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Legal representation in arbitration

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Arbitration analysis: Gary Born, partner at WilmerHale and Chair of the International Arbitration Practice Group, advises that choosing to forego legal representation is a serious decision with tangible consequences in any setting, including international arbitration.

Generally, parties to an arbitration do not have to have legal representation--does this create inequality between represented and unrepresented parties?

Under most national arbitration statutes and institutional arbitration rules, parties are given the right to choose whether they wish to be represented by external counsel or would rather represent themselves (pro se parties). Sometimes parties opt to represent themselves in arbitration proceedings rather than retaining external counsel--that is especially likely in disputes involving primarily technical issues (such as commodities disputes, smaller construction matters, and some financial matters). Nonetheless, in the vast majority of substantial international commercial and investment arbitrations, parties retain external legal counsel, usually counsel with expertise in arbitration as representatives.

Whether the parties are pro se or represented by lawyers, the equality of arms may be affected due to different degrees of expertise, willingness or ability to commit resources. A pro se party may not fully understand the arbitration process or the substantive legal issues which are in dispute, putting that party in a less advantageous position when it comes to effective presentation of its case. The same result may follow where a party retains external counsel, but limits the resources available for case presentation, either through budgetary, staffing or other limitations, or selects less-experienced, but less-expensive, counsel. In virtually all international commercial disputes, these choices, whether wise or not, will be made by businessmen and women, or governmental authorities, after consideration of the relevant advantages and disadvantages of different courses of action. For the most part, whatever inequality of arms exists is the product of deliberate choices made by the parties.

What are the advantages and disadvantages to having or not having legal representation?

Choosing to forego legal representation is a serious decision with tangible consequences in any setting, including international arbitration. Choosing to appear as a pro se party, or to be represented by in-house counsel, are very likely to reduce the costs of the arbitration proceedings, at least in the short-term. Proceeding without external counsel also may give a party greater control over preparation and presentation of 'its' case. In interstate and investment arbitration, state parties not infrequently choose to proceed without external counsel, or with limited involvement of external counsel, often for exactly these reasons.

On the other hand, external counsel provides the benefits of experienced, specialist representation. That experience and expertise is beneficial in any setting, but especially in international disputes--where complex procedural and judicial issues may arise and where appellate remedies may not exist.

If only one party has representation, does that make it more difficult for the represented party?

Where one party proceeds without counsel, lower quality submissions and procedural missteps frequently make the counter-party and the arbitral tribunal's tasks more difficult. Lay parties also often lack presentation, procedural and related skills, which can result in confusion or misunderstanding of a parties' case or evidence. In these circumstances, tribunals may look to counsel, for the represented party, to provide particularly objective presentations or to take less robust procedural or other positions. Even more likely, a tribunal may, consciously or unconsciously, itself take a role in clarifying the position on the unrepresented party.

Counsel's tasks in these circumstances are especially challenging. Counsel must zealously and robustly present his or her client's position, and make full use of all procedural opportunities, without appearing to take advantage of the pro se party. This demands a high degree of advocacy ability and clarity.

With the draft London Court of International Arbitration (LCIA) Rules 2014 specifically providing for parties to have 'authorised' representatives, do parties need to pay greater consideration to who is acting on the 'other side' and whether they are entitled to do so?

Article 18.2 of the draft 2014 LCIA Rules does not mark any radical innovation and is instead similar to some other institutional rules, such as the 2012 International Chamber of Commerce (ICC) Rules, art 26(4) ('The parties may appear in person or through *duly authorized representatives*...'), the 2012 China International Economic and Trade Arbitration Commisison (CIETAC) Rules, art 20 ('A Power of Attorney shall be forwarded to the Secretariat of the CIETAC by the party or its *authorized representative(s)*.'), the 2013 Hong Kong International Arbitration Centre (HKIAC) Rules, art 13(6) ('The arbitral tribunal or HKIAC may require *proof of authority of any party representatives*').

In practice, parties often provide the proof of counsel's authority voluntarily, in the form of a power of attorney or otherwise. Good practice calls for the arbitral tribunal to request evidence that counsel are duly authorised, by requiring communication of written evidence.

Can the issue of representation have an effect on enforcement or the validity of the award?

Issues of representation can affect the enforceability of an award, in a variety of ways. In principle, a party's lack of legal representation, like a party's default, is not grounds for annulment or non-recognition of an award. Nonetheless, in exceptional circumstances, a party's lack of representation in a highly complex case, where its chosen representative is wholly incapable of presenting the party's case, may raise issues of enforceability.

More likely, the denial of a party's choice of legal representative or counsel may provide grounds for annulment or non-recognition of an award. Many institutional arbitration rules guarantee parties the freedom of choice of legal representatives and violation of this right may provide grounds for non-recognition of an award under the New York Convention, art V(1)(d) (or comparable grounds for annulment).

Are there certain jurisdictions that require representatives to be registered in order to act?

Freedom of choice of representation has historically been recognised as an important aspect of the arbitral process, allowing the parties to effectively present their case in a fashion they expect when agreeing to arbitration. That freedom is recognised in most national arbitration laws, and by most institutional arbitration rules. Despite this, laws in a few jurisdictions require that counsel in locally-seated arbitration be locally-qualified. That is reportedly true in Turkey and Thailand, and was formerly true in Singapore, Japan and a few other jurisdictions.

Nonetheless, most jurisdictions have concluded it is inappropriate and unwise to impose parochial restrictions on the choice of counsel in international arbitrations. This is not surprising, given that imposing such limitations on the parties' choice of legal representatives would contradict the basic concept of arbitration as a flexible and self-tailored dispute resolution system and, as noted above, provide possible grounds for annulment or non-recognition of an award.

Do you have any best practice tips?

The best practice for counsel in international arbitration is hard work and experience. There is no substitute for either. Equally important, counsel must listen to the arbitrators, taking his or her lead from the tribunal's concerns and interest. Also highly relevant in arbitration are the applicable procedural rules--including any applicable institutional arbitration rules and the tribunal's procedural directions. Of course, counsel must be familiar with his or her own ethnical and professional responsibility obligations, imposed by his or her local bar. In rare cases, the law of the arbitral seat may also purport to impose ethical obligations on counsel in a locally-seated arbitration.

Less useful, at least in their current form, are the International Bar Association (IBA) Guidelines on Party Presentation in International Arbitration. Those Guidelines provide little clear guidance for counsel, in contrast to the IBA Guidelines on the Taking of Evidence in International Arbitration, and are unlikely to be of enduring value.

Gary Born is widely regarded as the world's preeminent authority on international commercial arbitration and international litigation. He has been ranked for the past 20 years as one of the world's leading international arbitration practitioners and the leading arbitration practitioner in London. Mr Born has participated in more than 550 international arbitrations, including four of the largest ICC arbitrations and several of the most significant ad hoc arbitrations in recent history. He heads WilmerHale's international arbitration group, which is based in London and integrated with related practices in the firm's New York, Washington, Berlin and Brussels offices.

Interviewed by Kate Beaumont.