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Paris Arbitration Week

Expert Evidence in International Arbitration: Does the Current Market Practice Serve the Purpose of Sound Arbitral Justice?

22 September 2021, Paris/online

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At the occasion of the Paris Arbitration Week, White & Case, Advant Altana, King & Spalding, Clyde & Co and Reed Smith, in cooperation with ICC France, jointly organized an roundtable discussing expert evidence in international arbitration, and in particular whether the predominance of party-appointed experts and the complexity of facts to be assessed by the arbitrator(s) affect the fair outcome of the case.

Speakers: **Nicolas Bouchardie** (Partner, White & Case LLP, France), **Diana Bowman** (Legal Manager, Vinci Energies International & Systems), **David Brown** (Partner, Clyde & Co., France), **Jean-Marc Coulon** (General Counsel, Bouygues Travaux Publics), **Arnaud Ingen-Housz** (former General Counsel, Havas; Sole practitioner, France), **Laurent Jaeger** (Partner, King & Spalding International; President of the Arbitration and ADR Commission, ICC France), **Christophe Lapp** (Partner, Advant Altana, France), **Peter Rosher** (Partner, Reed Smith LLP, France), **Franck Tassan** (former Group General Counsel, Carrefour; Arbitrator, Mediator, Consultant), **François Vermeille** (Arbitrator, Expert, Mediator, FV-Consulting, Switzerland; Honorary President of the Swiss Chamber of Technical and Scientific Forensic Experts).

Considering the ever-growing number of construction industry arbitration cases involving technical complexity, parties have a legitimate expectation that arbitral decisions will be based on a proper understanding of technical issues, which requires a strong reliance on experts' technical skills and knowledge. Over the past 20 years, arbitration practice in relation to expert evidence has interestingly evolved: the use of tribunal-appointed experts has drastically declined, while party-appointed experts have become the norm. Among other reasons, this change can be explained by the central role of Anglo-American practitioners who have imported their common law practices.

By essence, party-appointed experts endorse an adversarial approach to the administration of evidence and, as a result, parties themselves are to determine the factual and technical issues of the case to be adjudicated by the tribunal. As a result, cross-examinations of party-appointed experts have become the main technique available to arbitral tribunals in order to assess the parties' technical arguments. Ultimately, this may create concerns as to the credibility and accuracy of the evidence submitted to the tribunal, and whether this new norm of party-appointed experts has proven to serve the purpose of sound arbitral justice and is satisfactory to parties and arbitrators.

In this context, a Working Group created in 2019 and composed of recognized construction practitioners (in-house counsels, experts, lawyers, and arbitrators)[1] initiated debates about ways to improve the administration and management of expert evidence. The Working Group's findings were discussed at the event and are set out below.

1 In addition to the individuals mentionned above as speakers, the Working Group comprises the following persons: Juliette Barbarin (General Counsel, TotalEnergies); Carole Ditty (General Counsel, Bouygues UK); Benoît Dupuis (Executive Director, Marchés et Pilotage Contractuel, Société du Grand Paris); Paul A. Gélinas (Arbitrator, Chairman of the ICC Commission on Arbitration between 1996 and 2001); James Perry (Expert and Arbitrator, JP Consulting); Stéphanie Smatt Pinelli (General Counsel, Orano); and Pierre Tercier (Professor, Arbitrator, Honorary Chairman of the ICC International Court of Arbitration).

Difficulties encountered by arbitral tribunals in understanding and dealing with complex technical disputes

The Working Group first identified the shortcomings usually encountered by arbitral tribunals in dealing with complex technical matters. While legal and factual issues may be easily dealt with by lawyers and arbitrators, only knowledgeable construction experts are able to give informed opinions on specific case-based technical matters, such as niche industries' practicalities, causation issues, delay analysis or damages' evaluation, which are often at the heart of the parties' disputes.

Considering the length and the overwhelming complexity of parties-appointed experts' reports, arbitrators hence become at risk of giving up their jurisdiction over facts and evidence, and more generally of losing control over the decision-making process. Ultimately, parties, who expect the arbitrators to render awards based on facts and evidence, may feel insecure or even frustrated by the way technical issues are approached.

Arbitration users and arbitrators often denounce the inconsistencies of methodologies used and findings reached by parties-appointed experts in their reports, although being based on the same factual background. Few arbitration rules discuss how to resolve such discrepancies. The *ICC Commission on Arbitration and ADR* has recently published reports addressing the accuracy of witness testimony and the issues experts and arbitrators should consider in the course of the proceedings.[2] Overall, these shortcomings unfortunately impede the arbitrators' ability to adequately understand all technical aspects of a case and render a properly informed award.

Assessment of the existing methods in use to overcome shortcomings

The Working Group then examined the advantages and disadvantages of the existing methods which can be used to overcome those difficulties. These methods include: expert meetings before the hearing (in the presence of, or more often without, the lawyers); joint expert reports; expert conferencing or joint examinations ('hot-tubbing') during the hearings prior to or following cross-examinations.

The Working Group has reached the conclusion that these traditional methods are not always satisfactory to help arbitrators understanding the real technical points of contention and the arguments submitted by each party. Indeed, experts rarely accept to modify their vision or to reach a middle ground and tend to restate the positions already developed at length in their reports. Moreover, from the users' standpoint, these procedures are costly to implement and may lead to having a tribunal-appointed expert who is perceived by the parties as a fourth arbitrator. There is therefore a true need for a renewed approach to expert evidence in order to (i) improve the system of party-appointed experts and (ii) ensure a more efficient arbitral justice.

The need for of a 'technical assistant' in complex arbitration?

The Working Group also proposes an innovative and creative management tool aiming at helping arbitral tribunals making informed decisions in particularly complex cases, considering the imperative requirements of due process, speed, efficiency and cost control: the 'technical assistant'.

In 2008, Michael Schneider, Chair of *l'Association suisse de l'arbitrage*, submitted the idea of an expert acting as an *advisor* to the arbitral tribunal, who in light of his knowledge and skills would help clarify the relevant facts and reduce the discrepancies between the parties and their own experts' conclusions, without however delivering any opinion. Following discussion, the Working Group has reshaped Michael Schneider's idea and advocates for a new figure within the arbitral process: the *technical assistant*.

The *technical assistant* shall be in charge of providing, at all stages of the proceedings, knowledgeable information regarding questions submitted by the arbitrators. The explanations provided will not be considered as evidence per se, but as additional technical information to the tribunal. The goal here is not to obtain the technical assistant's own opinion, but to verify whether the tribunal's understanding is correct. Besides, the technical assistant is not entitled to contact the parties. If an information is required from the parties, the technical assistant must inform the arbitrator(s), who may liaise with the parties. The tribunal therefore keeps its sovereignty over the arbitral process.

2 The ICC Commission on Arbitration and ADR reports on *Accuracy of Fact Witness Memory in International Arbitration* (2020); *Issues for Arbitrators to Consider Regarding Experts* and *Issues for Experts Acting Under the ICC Expert Rules or the ICC Rules of Arbitration* (2021 updates) are available at www.iccwbo.org/commission-arbitration-ADR.

The recourse to a technical assistant appears as an efficient way to ensure that arbitral tribunals (i) solely own and properly carry out their jurisdictional function, and at the same time (ii) understand the complexity of technical issues raised by the parties. Consequently, one may expect that the recourse to such technical assistant will foster the appointment of more mindful and reasonable party-appointed experts, as the arbitral tribunal will benefit from additional technical insight over the case. As transparency of the process is key, the recourse to such technical assistant shall be provided for in the terms of reference, by the following draft clause:

> The arbitral tribunal is authorised at all times to have recourse to a Technical Assistant of its choice with a view to obtaining knowledge of technical matters that will enable it to acquire a proper understanding of the matter and, as a result, carry out its jurisdictional function.
>
> Points of view and explanations provided by the Technical Assistant at the request of the arbitral tribunal will not be considered to constitute evidence.
>
> A Technical Assistant will operate in accordance with one or other of the sets of provisions stipulated in the Rules.

As to cost efficiency, recourse to a technical assistant shall involve no additional cost to the parties, except in the event he/she is entrusted by the arbitral tribunal with tasks which go beyond the mere provision of technical information, with a view to accelerate the proceedings and/or minimizing the cost of the arbitration.

The Working Group is aware that the figure of *technical assistant* may raise critical issues that will need further consideration for fine-tuning. To name a few, the Working Group is mindful of the necessity to have safeguards against the risk of having a fourth arbitrator, i.e. especially in light of the controversies over tribunal's secretaries, and of the technical assistant becoming a *de facto* tribunal-appointed expert. Hence every effort must be made to avoid the perception that the dispute resolution process is still in the hands of the arbitrator(s).

Besides, supplementary mechanisms must be elaborated to ensure that technical assistants stay neutral in helping the arbitral tribunal making informed decisions and does not assent to one party's position or argumentation, nor comment or give its opinion, even unintentionally. The Working Group is currently discussing the above-cited draft clause, together with short rules on when and how to have recourse to a technical assistant and the practicalities as to its appointment and challenge's mechanisms.[3]

3 The Working Group' final works are expected in a few months. Additional inputs from arbitration practitioners from both common law and civil law backgrounds are most welcome and can be addressed to the Working Group at fvermeille@fv-consulting.ch.