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The Guide to Construction Arbitration - Sixth Edition

Expert evidence in construction disputes: arbitrator perspective

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Expert evidence in construction disputes: arbitrator perspective

Katherine Bell
Schellenberg Wittmer Ltd

Summary

INTRODUCTION

The primary methods of presenting factual evidence in international arbitration are contemporaneous documents, testimony of fact witnesses and testimony of expert witnesses. Whereas contemporaneous documents tend to have the highest probative value when it comes to facts in general, expert witness testimony is the predominant means of evidence when it comes to technical matters. International construction disputes frequently raise a variety of complex technical issues and other factual issues requiring technical expertise. The parties, therefore, will almost invariably have to adduce expert evidence in support of their case and to support the tribunal's decision-making process.

In practice, parties to large-scale international construction arbitrations often appoint not one but several experts to give testimony in a variety of technical fields. Expert evidence is typically required on the topics of delay, quantum, geotechnics, defects or forensic accounting.

Against this background, it is not surprising that experts have become a routine feature in international construction arbitration, with the role of the expert witness continuously evolving and being refined by arbitration practitioners.

Most arbitration rules, such as those of the International Chamber of Commerce or the United Nations Commission on International Trade Law, contain provisions dealing with expert evidence;[1] however, these institutional rules offer hardly any guidance as to how experts should be managed effectively.

The arbitration rules of the International Bar Association (IBA) generally reflect arbitral practice and expressly provide for the use of experts.[2] The most elaborate rules on the use of experts in arbitral proceedings are set forth in the Chartered Institute of Arbitrators Protocol, which aim at supplementing the IBA Rules.[3]

Construction experts and engineers are frequently members of professional associations. Many of these organisations have established codes of conduct that set out ethical rules for their members when serving as witnesses in dispute resolution proceedings.[4]

Expert evidence is generally a significant cost driver in international arbitration. This makes it all the more important that expert evidence is managed properly to ensure that it is of utmost benefit to a party's proof of its case and the arbitral tribunal's understanding of the technical issues in dispute. Determining the most efficient and successful methods for submitting and handling expert evidence is therefore essential.

This chapter is based on the author's experience and considers legal and practical aspects of managing expert evidence throughout the arbitration, focusing on expert evidence submitted by the parties.

PARTY-APPOINTED VERSUS TRIBUNAL-APPOINTED EXPERTS

Common law and civil law traditionally take different approaches when it comes to expert evidence. In the common law tradition of the adversarial system, expert evidence is introduced into the proceedings by the parties. In the civil law tradition, experts are appointed by the court and are considered independent 'assistants' to the judiciary.

Modern international arbitration has combined these two approaches: parties may appoint and present their own experts in support of their case, and the arbitral tribunal also has the

power to appoint an independent expert, whether at the request of a party or on its own initiative.

Article 5.1 of the IBA Rules expressly provides that parties may rely on party-appointed experts as a means of evidence on specific issues. The statements, opinions and conclusions put forward by a party-appointed expert are simply a means of evidence. The arbitral tribunal must still assess the admissibility of expert evidence and its probative value according to the same rules applicable to other forms of evidence.

With regard to technical issues in particular, it may be assumed that there is a scientific right or wrong; however, in practice, each side will almost inevitably appoint competing experts, who will present conflicting expert evidence. Even after the experts have been tested during cross-examination at the hearing, it is usually a challenging task for the arbitral tribunal to make a reasoned judgment between two diverging professional opinions.

Where the arbitral tribunal is confronted with conflicting expert evidence, or from the outset in the absence of reports by party-appointed experts, the tribunal may wish to appoint an additional expert of its choosing to obtain technical assistance based on a source of expertise untainted by party bias.

It is generally accepted that arbitral tribunals have the power to appoint experts, and most arbitration rules expressly grant the tribunal such authority.[5] Article 6.1 of the IBA Rules provides that the arbitral tribunal, after consulting with the parties, may appoint one or more independent experts to report on specific issues designated by the arbitral tribunal.-[6] The costs of the tribunal-appointed expert are not part of the general costs of the arbitration, and the requesting party is likely to have to pay an advance on such costs prior to commencement of the expert's work.[7] If the tribunal decides without a party request that it wishes to appoint an expert, the tribunal will usually request the parties to advance the expected costs in equal shares.

It is understood and crucial that the arbitral tribunal does not delegate the decision-making to its expert. Nevertheless, parties and counsel regularly have concerns when it comes to tribunal-appointed experts and sometimes fear that their dispute is essentially decided by the tribunal-appointed expert rather than the arbitral tribunal itself. Parties are also often afraid of a lack of control with regard to how the tribunal-appointed expert's evidence – potentially the element most critical to their case – will be presented.

Further, although the tribunal-appointed expert is subject to the same standards of impartiality and independence as the members of the tribunal, the expert is not the individual chosen by the parties to resolve their dispute.

Finally, another – and in the view of the author, justified – concern that is particularly relevant where cutting-edge technical issues are concerned is that a single tribunal-appointed expert may have a tendency to promote their own published theory without taking into account or presenting to the arbitral tribunal other valid opinions in the field, including those presented by the party-appointed experts. Tribunal-appointed experts, therefore, do not per se have more weight than party-appointed experts.[8]

Despite the appointment of an expert by the tribunal, parties will often retain their own expert or experts to assist with the preparation of the questions to the tribunal-appointed expert, the assessment of the tribunal-appointed expert's report, and to prepare for the questioning of the tribunal-appointed expert at the evidentiary hearing; therefore, the appointment of an

expert by the tribunal does not necessarily result in considerably fewer expenses for the parties.

From the point of view of the arbitral tribunal, the selection, instruction and administration of a tribunal-appointed expert is very time-consuming; therefore, arbitral tribunals will generally refrain from assuming this additional task unless the mandating of a tribunal-appointed expert seems essential to the resolution of the case. Further, as a rule, arbitral tribunals have sufficient experience when it comes to assessing technical issues and are capable of extracting the answers to the relevant technical questions from the expert reports, possibly also by relying on expert conferencing at the hearing.

In light of all the above, it is not surprising that, in practice, expert evidence in construction disputes is habitually submitted by the parties, and tribunal-appointed experts remain the exception. Generally, the arbitral tribunal will appoint an expert only if requested by one or both parties, or if the tribunal lacks the necessary expertise to decide around a certain technical issue relevant to its decision. A tribunal in an arbitration by the Stockholm Chamber of Commerce (SCC) refrained from appointing an expert on its own initiative following the claimant's objection and the respondent's lack of comment, on the grounds of its duty of impartiality under the SCC Arbitration Rules.[9]

Suffice to note that in the rare cases where a tribunal-appointed expert is appointed, the parties' procedural rights are safeguarded by means of their involvement in the selection process and in compiling the questions to be put to the expert.[10]

FINDING AND SELECTING THE RIGHT PARTY-APPOINTED EXPERT

Considering the significance of expert evidence, finding and choosing the right expert is one of the most important decisions to be made by the parties in the course of a construction arbitration.

In technical fields where there are few people sufficiently qualified to give an expert opinion, it may be wise to identify and appoint an expert as soon as possible. Moreover, an early involvement of the expert allows counsel to identify and understand the key technical issues in dispute, assess the client's chances of success and plead the client's case from the start in the knowledge that the expert's evidence will be fully supportive.

Counsel may pursue various avenues when searching for an expert. Most law firms practising international arbitration keep databases of their preferred experts in the prevalent fields of construction-related expertise. If expertise of a more obscure nature is required, the client will probably be able to suggest appropriate candidates. Another option is to contact international construction and engineering consultancy organisations that can draw from a large pool of experts in various fields and broker between counsel and expert candidates.[11] Counsel may also reach out to the leading arbitration institutions.[12]

Regardless of how an expert candidate is found, it is important to conduct an interview with the potential expert, typically via telephone or videoconference, before the decision is made on whether to retain them. The main purpose of the expert interview is to enable a detailed discussion about the content of the expert witness's curriculum vitae (CV), to provide the expert with more detail regarding the issues in dispute, to allow the expert to ask further questions to confirm their expertise and availability, and to allow counsel to assess the candidate's abilities as an expert witness and how they will fit into the team. There may also be some discussion regarding the expert's preliminary view on certain aspects of the case.

If the expert has concerns about their expertise in certain areas, they should be forthcoming about them.

A number of factors will influence the decision regarding the choice of an expert:

- The expert must have a solid reputation in the relevant field and, ideally, experience in acting as an expert witness, by having given both written and oral testimony. To come across as reliable and credible, the expert should have good communication skills and be able to communicate complicated technical issues in a comprehensible way that allows people without specialised knowledge – in particular, the members of the arbitral tribunal – to understand the salient technical points of the case.
- The expert's availability should also be discussed. Counsel should ensure that the expert has sufficient capacity to carry out the various steps of the mission, namely conducting fact-finding, compiling the report, assisting during the document production phase and attending the evidentiary hearing.

IMPARTIALITY AND INDEPENDENCE OF THE PARTY-APPOINTED EXPERT

Although appointed by the parties, experts are expected to perform an independent assessment of the case, with their ultimate duty being to the arbitral tribunal. The more objective and independent the expert appears, the more credible they are and the more weight the arbitral tribunal will give to the expert's evidence.

Article 5.2.c of the IBA Rules requires the expert to include in the report a statement of their independence from the parties, their legal advisers and the arbitral tribunal.[13] The main purpose of this provision is not to exclude experts with any connection to the participants or the subject-matter of the case but rather to emphasise the duty of the party-appointed expert to evaluate the case in an independent and neutral manner.[14] In particular, a person will not qualify as party-appointed expert if they have a financial interest in the outcome of the case or otherwise have relationships preventing them from providing an honest and frank opinion.[15] Accordingly, Article 5.2.a of the IBA Rules contains a duty of the expert to disclose any existing or past relationship with any of the parties, their legal advisers or the arbitral tribunal.

However, the value of this self-assessment by the expert might be criticised as limited, and party-appointed experts might be reproached for their apparent lack of independence, tailoring their evidence for the primary purpose of supporting the case of the appointing party.

Both counsel and the expert should seek, therefore, to ensure that the expert does not come across as biased. Experts are generally regarded as convincing if they can refrain from acting as advocates for the parties that retain them and show a willingness to concede points where appropriate to do so.[16]

If a party deems that the expert appointed by the other party lacks the required independence or impartiality, the question arises whether the expert may be formally challenged, or whether the expert's independence and impartiality is primarily a matter to be considered by the tribunal in its assessment of evidence. The issue generally appears to boil down to a matter of assessment of evidence by the arbitral tribunal. This solution is also supported by the fact that Article 5 of the IBA Rules – in contrast to Article 6, dealing with tribunal-appointed experts, – does not provide for the removal of a party-appointed expert. This differentiation

seems justified, given that a party-appointed expert can be challenged by the counterparty's expert, whereas there is no such counterpart in the case of a tribunal-appointed expert. Accordingly, excluding a party-appointed expert will only be considered in highly exceptional circumstances.[17]

INSTRUCTIONS TO THE PARTY-APPOINTED EXPERT

Following the appointment of the expert, the party, its counsel and the expert should work together to establish the expert's mission. The instructions to the expert should be executed in writing and clearly set out the scope of the expert's work. The instructions should further contain the details of the matter and the involved parties, the expert's contact details, a timetable for deliverables and the expert's remuneration and payment conditions.

The expert should be provided with all relevant documents, including (if they already exist) the relevant parts of the parties' legal submissions and fact witness statements. The expert has a duty to carry out a forensic investigation of the relevant facts and should be proactive in requesting any additional information or documents required to perform the task. Accordingly, the expert is likely to be closely involved in guiding and directing disclosure requests from the other party. The documents should be provided alongside instructions regarding their use. In particular, the instructions should contain a confidentiality clause.

Counsel might wonder whether their written communications with an expert, including drafts and markups of the expert's report, may be subject to document production. The production of these communications is rarely sought, and case law or guidelines on the discoverability of counsel–expert communications are rare.[18] Prevailing practice in international arbitration is a presumption of non-discoverability of counsel–expert communications.[19]

WRITTEN EXPERT EVIDENCE: THE EXPERT REPORT

Expert evidence is typically introduced into the arbitral proceedings in the form of a report. The expert report is often submitted with a party's first legal submission; there is an opportunity to submit a rebuttal expert report in the second round of submissions.[20] As a rule, rebuttal reports are limited to responses to matters contained in another party's witness statements, expert reports or other submissions that have not been previously presented in the arbitration.[21] The revised IBA Rules also permit rebuttal expert reports to respond to new developments that could not have been addressed in a previous expert report.[22]

The report's format and content depend on the particularities of the case and the instructions given to the expert. Article 5.2 of the IBA Rules sets out the constituent elements of the expert report, such as the instructions, the facts underlying the report, the expert's opinions and conclusions, including a description of the methodology, evidence and information used in arriving at the conclusions, and documents on which the expert relies that are not already on file. This information is required to enable the other party to appropriately evaluate the content of the expert report.[23] In addition, the expert report must contain an affirmation of the expert's genuine belief in the expressed opinions. This statement is intended to commit the expert to their report and emphasise that the expert should be prepared to take responsibility for the contents of the report during the course of the arbitration.[24] Finally, the report should include the expert's CV.

The report should follow a logical structure and contain a table of contents. Large volumes of information should be depicted in a comprehensible and digestible manner. It may be wise

to move bulky or voluminous documentation, calculations or methodologies to appendices rather than including them in the body of the report.

Building information modelling (BIM) is becoming a more common feature of construction projects. This means the data is available to enable the use of BIM as part of the dispute resolution process. BIM is, therefore, gaining traction as a tool to assist in the presentation of expert evidence in construction arbitration.[25] It can be used to demonstrate an engineering analysis or expert programming evidence. As a rule, BIM snapshots are included in the expert report, and the full version is provided electronically.[26]

Documents underlying the expert report are typically referenced in the body text and listed in a subsection of the report or in an appendix, and – if not already on file – annexed to the report. A recurring issue in this context is whether the expert must designate only the documents that they relied on in the report or all documents that were consulted when preparing the report. It is important to consider this at the outset when instructing the expert, as a party that provides the expert with full access to its digital data room may be severely disadvantaged if the expert is subsequently ordered to disclose that information. There appears to be no prevailing practice regarding whether the expert is obliged to disclose the entirety of the information and documents received or that were made accessible to the expert. As a rule, it should be sufficient to list only the documents that were used to prepare the report. This allows a level playing field between the parties. Furthermore, additional documents should only be handed over based on the principles applicable to document production requests in the arbitration.

EXPERT WITNESS MEETINGS AND JOINT REPORTS

To make the expert evidence more accessible and to gain a better understanding of the issues in dispute, an increasingly popular method of dealing with party-adduced expert evidence is for the arbitral tribunal to order expert conclaves or joint expert meetings.

During these meetings, which are expressly provided for in Article 5.4 of the IBA Rules, the experts – in the absence of the tribunal, the parties and their counsel – conduct discussions to narrow down the issues in dispute. Experts from the same discipline can relatively quickly identify the reasons for their diverging conclusions and work towards finding areas of agreement. The experts then prepare a joint report setting out the outcome of their meeting and the areas of agreement and disagreement. The joint expert report, therefore, significantly contributes to the arbitral tribunal's understanding of where the points of divergence lie. These reports often comprise a table setting out the issues in the left column and the respective experts' positions in adjacent columns.[27]

ORAL EXPERT EVIDENCE: EXPERT TESTIMONY AT THE EVIDENTIARY HEARING

The party-appointed expert is required to give testimony at an evidentiary hearing if requested by a party or the arbitral tribunal.[28] Expert witnesses in construction arbitrations are routinely required to testify. If an expert who is called to give evidence at a hearing fails to appear, the tribunal, as a rule, will disregard the expert's report unless there are exceptional circumstances.[29] If a party does not request an expert appointed by the opposing party to appear at the hearing, that party shall not be deemed to have accepted the content of the expert's report.[30] If, prior to the hearing, the experts attended a joint expert meeting and established a joint report, their oral evidence at the hearing may be limited to the identified areas of disagreement.[31]

At the hearing, the expert will not only be regularly present to give testimony but will usually attend the entire hearing, as it is important for the expert to hear the fact evidence as well as other experts' testimonies.

Traditionally, expert witnesses give their evidence separately and in turn, first during direct examination by counsel of the appointing party followed by a cross-examination by the opposing counsel.

The expert's report usually serves as their direct testimony; however, in recent years, it has become more and more customary for each expert to give a presentation summarising the main points of their report. The expert is then subjected to cross-examination, possibly followed by redirect examination limited to the scope of the cross-examination. Experts are questioned much like fact witnesses with the focus on their credentials, independence, the material reviewed, methodology and the basis for their opinions. In addition, the arbitral tribunal is likely to put questions to the experts during or after their examination.

An expedient and popular method of dealing with oral expert testimony is expert witness conferencing, known colloquially as 'hot-tubbing'. The expert witnesses give evidence concurrently rather than sequentially, with the arbitral tribunal leading the debate. The experts take questions first from the arbitral tribunal and thereafter from counsel at the same time. The arbitral tribunal may order expert witness conferencing at the request of a party or on its own motion.[32]

Expert witness conferencing is recognised as an effective technique for the arbitral tribunal to elicit clearer evidence on the relevant technical issues and shorten the procedure at the hearing. Placed next to their professional peers, experts may be compelled to present their opinions more independently and objectively.[33] Without being subjected to cross-examination, expert witnesses are more likely to take a constructive approach, to express their opinions with confidence and to make concessions where they feel it is right to do so.[34]

For conferencing to be successful, the arbitral tribunal must be well prepared, understand the technical issues at stake and properly manage the process. Counsel should agree to expert conferencing only if they are confident that their expert is sufficiently resilient and engaging to ensure that their opinions and findings will be suitably presented in the process.[35]

EXPERT EVIDENCE AND SETTING ASIDE THE AWARD: WHAT TO LOOK OUT FOR

An arbitral award may be challenged and potentially set aside on grounds related to expert evidence relied on by the arbitral tribunal when rendering its decision.

In light of the importance of an expert's independence and impartiality, an arbitral award may be challenged, for example, based on the argument that the arbitral tribunal relied on the findings of a biased expert. Depending on the seat of the arbitration, the challenge may be put forward on the grounds of incompatibility with public policy. In any case, the party in question must have promptly challenged the expert's lack of independence in the arbitral proceedings.[36]

Another potential ground for the setting aside of an award may be put forward based on the right to be heard, where the arbitral tribunal rejected a party's request for the appointment of a tribunal-appointed expert. The success of a challenge based on such an argument largely depends on whether the applicable arbitration law grants the parties a right to the appointment of an expert by the tribunal. Although many jurisdictions do not grant the parties

such right,[37] according to the Swiss Supreme Court's case law, the parties have a right to the appointment of an expert by the tribunal if certain rather restrictive conditions, such as an express request by a party and the relevancy of the requested expertise to the tribunal's decision, are met.[38]

Finally, it is paramount for the arbitral tribunal and counsel to ensure that expert reports are submitted in compliance with the agreed procedural rules, as non-compliance may serve as grounds for a challenge to the award. In a landmark decision of 2011, the Higher Regional Court of Frankfurt in Germany set aside an arbitral award because of the failure by a party and its expert to adhere to the agreed procedural rules. The arbitral tribunal had issued a procedural order containing detailed directions for the taking of expert evidence. The directions required the parties to disclose all information that the experts had reviewed in the process of drafting their respective expert reports. This provision had been subject to extensive prior negotiations between the parties and the tribunal and was referred to in the procedural order as an 'agreement by the parties'. One of the parties subsequently failed to disclose all the information its experts had reviewed when preparing their report. The Court confirmed the setting aside of the award and held that the parties' agreement on procedural issues takes priority over the tribunal's procedural discretion and could not be overridden by the tribunal's decision.[39]

ENDNOTES

[1] International Chamber of Commerce (ICC), Rules of Arbitration (entered into force 1 January 2021) (ICC Rules), Article 25, paragraphs 2 and 3; United Nations Commission on International Trade Law (UNCITRAL), Arbitration Rules, Articles 17(3), 27(2), 28(2), 29(1) and 29(5) (note that Article 29 mentions only tribunal-appointed experts).

[2] See International Bar Association (IBA), Rules on the Taking of Evidence in International Arbitration (2020 edn.) (IBA Rules), Article 5: Party-Appointed Experts and Article 6: Tribunal-Appointed Experts.

[3] See Chartered Institute of Arbitrators (CIArb), Protocol for the Use of Party-Appointed Expert Witnesses in International A
rbitration (2007 edn.) (CIArb Protocol).

[4] See Mark Kantor, 'A Code of Conduct for Party-Appointed Experts in International Arbitration
– Can One be Found?', 26(3) ***Arbitration International*** 323 (1 Sept 2010), pp. 343, 353 and 359, with references to organisations and codes of conduct in the United States (e.g., Code of Ethics of the American Society of Civil Engineers, last updated 26 October 2020), the United Kingdom (e.g., Code of Conduct Regulations of the Institution of Mechanical Engineers, revised 2021) and Australia (e.g., Code of Ethics and Guidelines on Professional Conduct of Engineers Australia, last updated August 2022); see Robert Horne and John Mullen, ***The Expert Witness in Construction*** (2013), p. 124 et seq. regarding professional institute rules in the United Kingdom (i.e., Code of Professional Conduct of the Institution of Civil Engineers, last updated 26 February 2025; practice statement and guidance note of the Royal Institution of Chartered Surveyors, 'Surveyors acting as expert witnesses' (4th edn.), amended February 2023). For Switzerland, see SIA 151 Code of Conduct of the Swiss Society of Engineers and Architects (2015 edn.), Articles 3 and 4.

[5] See, e.g., ICC Rules, Article 25(4); UNCITRAL Arbitration Rules, Article 29; London Court of International Arbitration (LCIA), Arbitration Rules, Article 21.

[6] See also ICC Rules, Article 25(3); UNCITRAL Arbitration Rules, Article 29(1); LCIA Arbitration Rules, Article 21(1); International Centre for Dispute Resolution, International Arbitration Rules, Article 25(1).

[7] See, e.g., ICC Rules, Appendix III, Article 1(12).

[8] See also Florian Haugeneder, 'The Arbitration Agreement and Arbitrability, Party-Appointed and Tribunal-Appointed Experts in International Arbitration' in Christian Klausegger, Peter Klein, et al. (eds), ***Austrian Yearbook on International Arbitration*** (2020), p. 180.

[9] Stockholm Chamber of Commerce (SCC) No. 2023-2, Seller (Xanadu) v. Purchaser (Utopia) (Final Award), SCC Case No. 2021/b, 2022, in Stephan W Schill (ed.), ICCA Awards Series (Kluwer Law International, 2023).

[10] See also IBA Rules, Article 6.

[11] See, e.g., The Academy of Experts (www.academyofexperts.org (accessed 2 June 2025)) or Expert Witness Institute (www.ewi.org.uk (accessed 2 June 2025)).

[12] Pursuant to the ICC Rules for the Proposal of Experts and Neutrals (in force as of 1 February 2015), Article 1(1), any person may submit a request to the ICC International Centre for alternative dispute resolution for the proposal of an expert in a particular field. The ICC currently charges a flat fee of US$5,000 per expert for this service (see ICC Rules for the Proposal of Experts and Neutrals, Appendix II, Article 1).

[13] Certain guidelines go further – see CIArb Protocol, Article 4.

[14] See 1999 IBA Working Party and 2010 IBA Rules of Evidence Review Subcommittee, '-Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration' (IBA Commentary), p. 19.

[15] ibid.

[16] See also Jane Jenkins, International Construction Arbitration Law (3rd edn., 2021), p. 250, with further references.

[17] Haugeneder (see footnote 8), p. 184; see also Mohamed S Abdel Wahab, 'Party-Appointed Experts in International Commercial Arbitration: A Necessity or a Nuisance?' in Franco Ferrari and Friedrich Jakob Rosenfeld (eds), Handbook of Evidence in International Commercial Arbitration: Key Concepts and Issues (Kluwer Law International, 2022), p. 197.

[18] See, e.g., CIArb Protocol, Article 5, which presumes that counsel–expert communications as a general matter are privileged and not subject to production.

[19] Paul Friedland and Kate Brown de Vejar, 'Discoverability of Communications between Counsel and Party-Appointed Experts in International Arbitration' in Albert Jan van den Berg (ed.), Arbitration Advocacy in Changing Times, ICCA Congress Series No. 15 (Kluwer Law International, 2011), pp. 162–64; Gary B Born, International Commercial Arbitration (Volume II, 3rd edition, 2021), p. 2451. As a notable exception, CIArb Protocol, Article 5(1) provides that instructions to an expert are not privileged.

[20] See IBA Rules, Article 5.3.

[21] id., Article 5.3(a).

[22] id., Article 5.3(b).

[23] IBA Commentary (see footnote 14), p. 19.

[24] ibid.

[25] See Jenkins (see footnote 16), p. 255.

[26] ibid.

[27] See also Howard Rosen, 'How Useful Are Party-Appointed Experts in International Arbitration?' in Albert Jan van der Berg (ed.), Legitimacy: Myths, Realities, Challenges, ICCA Congress Series No. 18 (Kluwer Law International, 2015), pp. 379–430, and Annex IV with practical tips and template regarding joint expert meeting and joint report.

[28] See IBA Rules, Article 8.1.

[29] See id., Article 5.5.

[30] See id., Article 5.6.

[31] See also IBA Commentary (see footnote 14), p. 20.

[32] See IBA Rules, Article 8.4(f).

[33] See Klaus Sachs and Nils Schmidt-Ahrens, 'Protocol on Expert Teaming: A New Approach to Expert Evidence' in Albert Jan van der Berg (ed.), Arbitration Advocacy in Changing Times, ICCA Congress Series No. 15, pp. 135–48.

[34] Horne and Mullen (see footnote 4), p. 303.

[35] Thomas Snider and Laura Adams, 'The Use of Experts in Construction Arbitration in the Middle East' in Nassib G Ziadé (ed.), BCDR International Arbitration Review, Vol. 4 (Kluwer Law International, 2017), pp. 11–42.

[36] See, e.g., for Switzerland, Swiss Private International Law Act, Article 190(2), and Bernhard Berger and Franz Kellerhals, International and Domestic Arbitration in Switzerland (4th edition, 2021), Section 1350; for the Netherlands, Dutch Code of Civil Procedure, Article 1065(1)(e), and V Lazić and G J Meijer, 'Netherlands' in F-B Weigand (ed.), Practitioner's Handbook on International Commercial Arbitration (3rd edition, 2019), Section 11.210; and for Austria, C Liebscher, The Austrian Arbitration Act 2006: Text and Notes (2006), annotated text to Austrian Code of Civil Procedure, Section 601(3).

[37] Born (see footnote 19), pp. 2448–49; E Gaillard and J Savage, Fouchard Gaillard Goldman on International Arbitration (1999), Section 1290. Regarding the arbitral tribunal's obligation to pursue requests for evidence in Germany, see Higher Regional Court (OLG), Frankfurt am Main decision of 17 February 2011, 26 Sch 13/10, at II. 3, with further references.

[38] See Swiss Supreme Court decision 4A_277/2017 of 28 August 2017. The Court did not consider, however, that the petitioning party's right to be heard had been violated, and did not set aside the award, as the further conditions had not been met. See also M E Schneider, 'Technical Experts in International Arbitration', 11(3) ASA Bull 446, Section 18; see also Swiss Supreme Court decision 4A_420/2022 of 30 March 2023, in which the applicant claimed a violation of the principle of equal treatment of the parties, the right to be heard and procedural

public policy, as the court had refused to hear his expert. The Supreme Court rejected the appeal.

[39] See OLG Frankfurt am Main decision of 17 February 2011, 26 Sch 13/10. The German Supreme Court, in its judgment of 2 October 2012, III ZB 8/11, dismissed the appeal against this decision.

Schellenberg Wittmer

Katherine Bell katherine.bell@swlegal.ch