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# **Eyeopeners – The Enlightening Effect of Site Visits in Construction Disputes**

Bernd Ehle and Courtney Furner\*

## **Introduction**

In some cases, particularly certain construction disputes, it is insufficient to rely on documents, witness and expert testimony in order for an arbitral tribunal to obtain a full picture of the disputed issues. In such cases, site visits add a further, necessary dimension to the arbitrators' understanding of the case of which parties should not lose sight: obtaining a first-hand visual impression of, and hence further insights into, the subject matter of the arbitration. This forensic advantage can hardly be substituted by demonstrative exhibits such as photos, 3D maps or drone videos.

In practice, however, site visits are infrequently used in construction disputes submitted to international arbitration.<sup>1</sup> After exploring the reasons for this underutilisation, this paper considers the current frameworks within which site visits are conducted; the challenges associated with undertaking site visits; and practical considerations for arbitral tribunals, parties and their counsel in this context. The authors conclude that site visits should be a tool of choice for arbitral tribunals and parties in appropriate circumstances, as they may add considerable value to the adjudication of construction disputes and thereby enhance the factual basis of arbitral awards.

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1 Michael J Altschuler, 'Seeing is Believing: The Importance of Site Visits in Arbitrating Construction Disputes' in *AAA Handbook on Construction Arbitration and ADR* (3rd edn, American Arbitration Association (AAA) 2016) 91.

## The underutilisation of site visits in international construction arbitration

Although site visits have been readily used in construction or energy-related arbitrations between investors and states,<sup>2</sup> as well as in inter-state arbitrations involving construction and maritime delimitation disputes,<sup>3</sup> there appears to be an inherent reluctance to use site visits in construction arbitration proceedings, even where conducting a site visit may be relevant to resolving the dispute. This reluctance can be attributed to two main factors.

First, site visits can be costly and may not be considered by the arbitral tribunal and the parties as a time and cost-efficient exercise in the resolution of a dispute.<sup>4</sup> This is particularly true in low-value arbitrations or where the site is at a distant location and would therefore involve significant travel expenses.<sup>5</sup>

Second, the parties' counsel are generally accustomed to conducting proceedings based on the preparation of documentary and oral evidence without attending sites. This habitude may cause lawyers to refrain from initiating a site visit, or to readily push back on proposals to conduct a site visit on the basis that it is an ineffective use of time and resources. This reaction is even more likely if a site visit is held on short notice. A more deeply rooted origin of this resistance is that, during a site visit, control of the evidence shifts to some degree from counsel and the arbitral tribunal to the party representatives, experts and workers on the site.<sup>6</sup>

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2 Eg, *Marion Unglaube v Republic of Costa Rica* (ICSID Case No. ARB/08/1), Award, 16 May 2012; *Elsamex, S.A. v Republic of Honduras* (ICSID Case No. ARB/09/4), Award, 16 November 2012; *Republic of Equatorial Guinea v CMS Energy Corporation & Ors* (ICSID Case No. CONC(AF)/12/2), Report, 12 May 2015; *Burlington Resources, Inc. v Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Reconsideration and Award, 7 February 2017. In relation to site visits conducted in investor-state arbitration, see Meg Kinnear and Randi Ayman, 'Site Visits in ICSID Arbitration' in Andrea Carlevaris, Laurent Lévy, Alexis Mourre and Eric A Schwartz (eds), *International Arbitration Under Review: Essays in Honour of John Beechey* (ICC, Publication No. 772E, 2015) 247.

3 For example, Beagle Channel Arbitration (*Argentina v Chile*), Report and Decision (Court of Arbitration, 18 February 1977) (1977) 52 ILR 93, 20 Reports of International Arbitral Awards (United Nations, 2006) 53; *Guyana v Suriname*, Award, (Permanent Court of Arbitration (PCA), 17 September 2007); Indus Waters Kishenganga Arbitration (*Pakistan v India*), Award (PCA, 20 December 2013); Bay of Bengal Maritime Boundary Arbitration (*Bangladesh v India*), Award (PCA, 7 July 2014).

4 Christopher Koch, 'ICC's New Dispute Board Rules' (2004) 15(2) ICC International Court of Arbitration Bulletin, 10, 24; Kinnear and Ayman (see above at n 2) 247.

5 Eric A Schwarz, 'The ICC Arbitral Process – Part IV: The Costs of ICC Arbitration' (1993) 4(1) ICC International Court of Arbitration Bulletin 8, 15.

6 Altschuler (see above at n 1) 92.

*Benefits of site visits*

The reasons for resisting site visits, although valid, should, however, be weighed against the obvious benefits in construction-related disputes.

First, and probably more than in other types of disputes, a site visit can help the arbitral tribunal in a construction case to obtain a first-hand impression, and thus a better understanding, of the issues before it.<sup>7</sup> This is because a site visit provides invaluable insight into the facility, working and equipment conditions, the size of the project and the general environment at hand.<sup>8</sup> Accordingly, a party may have an interest in proposing that the arbitral tribunal conduct a site visit where it believes that visual cues are likely to be helpful to its case. Subsidiarily, the arbitral tribunal is also given an opportunity at the site visit to meet the relevant players in the dispute and observe how they interact outside of the hearing room.

Second, a site visit offers the arbitral tribunal and the parties an additional, and arguably more precise, evidentiary basis upon which to adjudicate the dispute. Altschuler rightly notes that construction contracts, project designs and associated materials are the documentary means by which the structure is built; however, the structure itself is the ultimate reality.<sup>9</sup> Photographs, 3D maps or drone videos are effective ways of visually depicting the project at hand, but their forensic shortcoming is that they start with ‘an editorial point of view’ which may not readily discern what represents the rule or the exception to the actual physical state of the project.<sup>10</sup> By contrast, a site visit offers primary, unedited evidence of the project which cannot be emulated by party (or third-party) narration. Even if the accurate depiction of the project is not in issue, a site visit is of forensic value as it may allow the arbitrators to confirm or amend their preliminary views formed based

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7 International Bar Association, IBA Rules on the Taking of Evidence in International Arbitration (effective 29 May 2010) Article 7; see also Marc Blessing, ‘The Arbitral Process Part III: The Procedure Before the Arbitral Tribunal’ (1992) 3(2) ICC International Court of Arbitration Bulletin 18, 35; W Laurence Craig, William W Park and Jan Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, Oceana Publications, Inc/ICC Publishing, SA 2000) 458 (para 26.03); Richard H Kreindler: ‘Benefiting from Oral Testimony of Expert Witnesses: Traditional and Emerging Techniques’ in Dossier II of the *ICC Institute of World Business Law: Arbitration and Oral Evidence* (ICC, Publication No 689E, 2004) 87, 91; Julian D M Lew, ‘Document Disclosure, Evidentiary Value of Documents and Burden of Evidence’ in Dossier VI of the *ICC Institute of World Business Law: Written Evidence and Discovery in International Arbitration: New Issues and Tendencies* (ICC, Publication No. 698E, 2009) 11, 14; Matthias Scherer, Bernd Ehle and Sam Moss, ‘Construction Arbitration in Switzerland’ in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner’s Guide* (Kluwer Law International 2013) 1194 (para 66), 1195 (para 74); Kinnear and Ayman (see above at n 2) 247.

8 Blessing (see above at n 7) 35; Scherer, Ehle and Moss (see above at n 7) 1195 (para 74).

9 Altschuler (see above at n 1) 92.

10 *Ibid.*

on documents and witnesses. It may also provide the arbitral tribunal with a sufficient technical understanding to evaluate the evidence otherwise produced.<sup>11</sup> Moreover, a site visit may serve yet another forensic purpose, namely, to become evidence on the record and therefore relied upon by the arbitral tribunal in its arbitral award.<sup>12</sup> Using site visits as a tool to gather evidence is an existing feature of ICSID<sup>13</sup> and inter-state arbitration<sup>14</sup> and therefore, one to which construction arbitration tribunals should be open. However, as noted below, arbitral tribunals must be procedurally prudent in gathering evidence during a site visit.

Third, sometimes experts do not have access to all materials or to the on-site conditions to which they testify. If opposing counsel does not focus on these evidentiary gaps during cross-examination, the expert's testimony will go unchallenged.<sup>15</sup> A site visit would grant an arbitral tribunal and counsel an opportunity to overcome this issue by revealing conditions that are relevant, but unknown, to the expert's testimony.

Fourth, control over evidence during a site visit may realign in favour of counsel as they become more comfortable on site. In any event, counsel do not lose the forensic initiative during a site visit, at least not more than when arbitrators exercise evidence-gathering powers (eg, by issuing subpoenas to witnesses or requesting additional documents) to clarify issues.<sup>16</sup>

As regards costs concerns, a site visit, if conducted at an early stage of the proceedings, may allow an arbitral tribunal to better understand and triage certain issues in dispute and may therefore ultimately reduce the need for extended witness testimony to explain the claims. In certain cases, the cost of renting hearing facilities may be more than the cost of a site visit (although these savings may be offset by travel/accommodation costs associated with the site visit).<sup>17</sup> Ultimately, it is for the arbitral tribunal to weigh the cost of the site visit against its benefits before embarking upon it.<sup>18</sup>

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11 Kinnear and Ayman (see above at n 2) 254.

12 *Ibid.*

13 *Ibid.*

14 See below notes 77–78 regarding the Bay of Bengal Maritime Boundary Arbitration.

15 Altschuler (see above at n 1) 93.

16 Altschuler (see above at n 1) 92.

17 Altschuler (see above at n 1) 98. This is often the case with dispute boards, which will most likely seek to reduce costs and disruption to the established schedule by fitting a hearing into its regularly scheduled meetings or site visits, unless a party requests an urgent hearing or the Determination must be rendered within 90 days of the Date of Commencement: see Koch, 'ICC's New Dispute Board Rules' (see above at n 4) 27; Christopher Koch, 'The New Dispute Board Rules of the ICC' (2005) 23(1) ASA Bulletin 53, 87.

18 Kinnear and Ayman (see above at n 2) 247.

These benefits reflect how a site visit adds information that can substantially affect an arbitral tribunal's assessment of the evidence and even change the outcome of the case. By extension, site visits serve to enhance the evidentiary basis of arbitral awards rendered. Accordingly, parties and arbitral tribunals should seek to overcome any reluctance against conducting site visits in construction arbitrations so that they may profit from the forensic benefits that such visits can bring.

Independent of the benefits of conducting site visits, there are certain circumstances in which site visits are, or at least, should be, necessary for an appropriate resolution of the dispute.

*Where site visits are (or should be) necessary*

Naturally, not every construction-related dispute warrants the temporal and monetary investment of a site visit. In particular, where purely legal issues are at stake, a site visit probably adds little or no value. However, where the parties' experts have adduced equally convincing contradictory testimony, backed up by supporting photographic or other documentary evidence, the arbitral tribunal may have difficulty making a fair decision without having inspected the conditions on site.<sup>19</sup> In this instance, a site visit is necessary and expedient. Where a dispute concerns the status of the subject matter of the contract – for example, claims of shoddy workmanship, construction defects, structural failure(s) and fault(s), unfinished work, installation of damaged materials, an unsafe work environment or the status of cargo<sup>20</sup> – a site visit may not be required, but is nevertheless recommended, for the arbitral tribunal to comprehend the factual issues in dispute before reaching a decision on the merits.

Irrespective of whether site visits are necessary in a particular dispute, arbitral tribunals may be inspired by, and parties may gain confidence from, the integral role that site visits play in the resolution of construction disputes by dispute boards.

*Source of inspiration: the use of site visits by dispute boards*

Whereas arbitral tribunals seek to better understand and ascertain the facts in an existing and ongoing dispute, dispute boards, whose mandate is more akin to that of an expert determination, are given full power to take the

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<sup>19</sup> Altschuler (see above at n 1) 93.

<sup>20</sup> Nigel Blackaby, Constantine Partasides, Martin Hunter and Alan Redfern, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) 315 (para 5.22); Altschuler (see above at n 1) 91.

initiative in ascertaining the facts and the law.<sup>21</sup> One such express power conferred on dispute boards is the power to conduct regular site visits which are relevant to the performance of the contract at hand.<sup>22</sup> The site visits conducted by dispute board members are unique in the resolution of construction disputes today.

Site visits are used as a forum to not only facilitate the ‘cure’ of the parties’ existing claims, but also to assist in the avoidance of the parties’ potential disagreements prior to dispute adjudication and outside the context of any formal proceedings.<sup>23</sup> For instance, under the Fédération Internationale des Ingénieurs-Conseils (International Federation of Consulting Engineers (FIDIC)) 2017 Conditions of Contract, the purpose of the Dispute Adjudication/Avoidance Board’s meetings with the Parties and its use of site visits is to enable it, inter alia, to ‘become aware of, and remain informed about, any actual or potential issue or disagreement between the Parties.’<sup>24</sup> Similarly, under the International Chamber of Commerce (ICC) Dispute Board Rules, the Parties and the Dispute Board are to attend the site visits, during which the Dispute Board will review the performance of the contract and may informally assist the Parties with existing, or encourage them to avoid potential, disagreements.<sup>25</sup>

Moreover, an ICC Dispute Board may engage in informal conversations with the Parties’ representatives during the site visit.<sup>26</sup> This allows a Dispute Board to typically become aware of nascent disagreements between the Parties which deserve attention.<sup>27</sup> If a Dispute Board is not kept fully informed of progress and allowed to make its own observations, it might not be able to deal rapidly and efficiently with a problem when it does occur,<sup>28</sup> thereby hindering the Dispute Board from performing its unique mandate.

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21 Jane Jenkins, *International Construction Arbitration Law* (2nd Revised edn, Kluwer Law International 2013) 100.

22 Eg, see AAA Dispute Review Boards Guide Specifications, effective from 1 December 2000, Specifications C, D(1), E; ICC 2015 Dispute Board Rules, effective from 1 October 2015, Articles 11(2), 12, 15(1); FIDIC’s Dispute Adjudication Board’s (DAAB’s) Procedural Rules (annexed to FIDIC’s *Conditions of Contract for Construction* (2nd edn, FIDIC 2017)), effective from 5 December 2017, Rule 3; see also CI Arb’s Dispute Board Rules, effective from August 2014, Article 10.

23 See FIDIC, *Conditions of Contract for Construction* (see above at n 22) Clause 21.3; 2015 ICC Dispute Board Rules, Articles 12(1), 12(2), 12(3), 16, 17.

24 DAAB Procedural Rules (see above at n 22) Rule 3.1.

25 2015 ICC Dispute Board Rules (see above at n 22) Articles 12(1), 12(3), see also Articles 16, 17.

26 *Ibid.*, Article 12(1).

27 Peter M Wolrich, Nael G Bunni and Pierre M Genton, ‘Drafters’ Insights into the 2015 ICC Dispute Board Rules’ (2016) 1 ICC Dispute Resolution Bulletin 43, 46. For case examples, see Pierre M Genton, ‘ICC Dispute Board Rules: Status and Perspectives of a Key Contribution to the Prevention of Disputes’ in Arnold Ingen-Housz (ed), *ADR in Business: Practice and Issues across Countries and Cultures II* (Kluwer Law International 2010) 399.

28 Koch, ‘ICC’s New Dispute Board Rules’ (see above at n 4) 25.

The inextricable link between a dispute board's site visits and its hands-on mission to 'cure' existing and 'prevent' possible disputes in an informal setting somewhat distinguishes the role that site visits play for dispute boards vis-à-vis those conducted by arbitral tribunals. Notwithstanding, arbitral tribunals and parties should embrace site visits, even if to a lesser degree as under dispute board procedures,<sup>29</sup> as they have been recognised as an effective and rewarding tool to aid the resolution of construction disputes.<sup>30</sup> Furthermore, there is great potential for arbitral tribunals and parties to use a hands-on approach during site visits, as is the case with dispute boards, to better understand the claims at hand, and to engage in a true dialogue that could lead to a narrowing of the issues in the dispute which, in turn, could very well lead to greater procedural and cost efficiency in the arbitration proceedings overall.

### **Current framework for conducting site visits in international commercial arbitration**

Arbitral tribunals have the express or implied power to order site visits in relation to international disputes. However, these powers remain subject to the mandatory statutory rules of the *lex arbitri*, which cannot be derogated from, and international procedural public policy.

#### *Arbitral tribunals' powers to grant site visits*

In international commercial arbitration, arbitral tribunals have broad powers to order site visits. As illustrated below, this power is largely unregulated and usually implied from the arbitral tribunals' powers to inform itself of the case at hand.

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29 Eg, arbitral tribunals would not engage in informal conversations with Parties' representatives: see above at n 26.

30 Genton observes that '[i]nformal assistance by the [Dispute Board] is the most rewarding return for the parties as well as for the [Dispute Board] Members themselves. Experience shows that a continuous commitment favouring the dialogue between the parties has an immense value and that this dialogue is often reinforced by the presence of the [Dispute Board] Members on site. Hence, monthly reports and regular site visits carried out by the [Dispute Board] Members are key elements in the resolution of disputes. The parties are invited to prepare such site visits, report on areas of concern, table the unresolved claims and initiate a true direct dialogue instead of having only a formalized exchange of correspondence in which either party tries to preserve its rights'. See above at n 27; at 414.

## INTERNATIONAL ARBITRATION RULES

Few international arbitration rules expressly confer on arbitral tribunals the power to conduct site visits.<sup>31</sup> Arbitral tribunals constituted under the London Court of International Arbitration (LCIA) Arbitration Rules 2014 have the express power, either upon the application of any party or ex officio, to order any party to make a 'site or thing under its control available for inspection by the Arbitral Tribunal, any other party, any expert to such party and any expert to the Tribunal'.<sup>32</sup> Site visits are also expressly contemplated by the Dubai International Arbitration Centre (DIAC),<sup>33</sup> the International Centre for Dispute Resolution (ICDR),<sup>34</sup> the China International Economic and Trade Arbitration Commission (CIETAC),<sup>35</sup> the Istanbul Arbitration Centre (ISTAC),<sup>36</sup> the Chartered Institute of Arbitrators (CIArb),<sup>37</sup> the Australian Centre for International Commercial Arbitration (ACICA),<sup>38</sup> the joint venture between the Dubai International Financial Centre and LCIA (DIFC-LCIA),<sup>39</sup> the Singapore International Arbitration Centre (SIAC)<sup>40</sup> and the Vienna International Arbitral Centre (VIAC)<sup>41</sup> Arbitration Rules.

Under the auspices of other international arbitration rules, an arbitral tribunal's power to conduct site visits is implied from its general powers to obtain evidence, regulate procedure and meet at different locations for deliberations. For instance, Article 25(1) of the ICC Arbitration Rules 2017<sup>42</sup> encompasses site visits as such evidence may help to establish the facts of the case and would reasonably be within the parties' expectations in a construction or engineering case, or in other situations where the venue

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31 For an example in the domestic arbitration context, see AAA, AAA Construction Industry Arbitration Rules and Mediation Procedures, effective from 1 July 2015, Rule 37; in the inter-state arbitration context, see PCA, PCA Arbitration Rules 2012, effective from 17 December 2012, Article 27(3); in the investor-state context, see ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the 'ICSID Convention'), effective from 18 March 1965, Article 43(b); ICSID, ICSID Arbitration Rules 1968, effective from 1 January 1968, Rules 34(2), 37(1).

32 LCIA Arbitration Rules 2014, effective from 1 October 2014, Article 22.1(iv), see also Article 21.3.

33 DIAC Arbitration Rules 2007, effective from 7 May 2007, Articles 27.4, 30.2.

34 ICDR International Arbitration Rules 2014, effective from 1 June 2014, Article 21.7.

35 CIETAC Arbitration Rules 2015, effective from 1 January 2015, Article 44(2).

36 ISTAC Arbitration Rules, effective from 26 October 2015, Article 29(4).

37 CIArb Arbitration Rules 2015, effective from 1 December 2015, Appendix 2, Article 20.

38 ACICA Arbitration Rules 2016, effective from 1 January 2016, Articles 23.3, 32.3.

39 DIFC-LCIA Arbitration Rules 2016, effective from 1 October 2016, Articles 21.3, 22.1(iv).

40 SIAC Arbitration Rules 2016, effective from 1 August 2016, Article 26.1.

41 Austrian Federal Economic Chamber, VIAC Arbitration and Mediation Rules 2018, effective from 1 January 2018, Part I, Article 43(1).

42 ICC Arbitration Rules 2017, effective 1 March 2017.

of performance is important.<sup>43</sup> Furthermore, site visits arguably fall within ‘additional evidence’ under Article 25(5).<sup>44</sup> Similarly, under the UNCITRAL Arbitration Rules 2010, site visits fall under ‘other evidence’ that an arbitral tribunal may require from the parties.<sup>45</sup> Furthermore, the power of site inspection is implied in the arbitral tribunal’s power under Article 18(2) to ‘meet at any location it considers appropriate for deliberations’ or ‘any other purpose, including hearings.’<sup>46</sup>

#### LEGES ARBITRI

Several national arbitration laws expressly contemplate site visits.<sup>47</sup> Where there is no such express provision, the arbitral tribunal’s broad evidentiary powers thereunder arguably encompass site visits. For example, in the authors’ jurisdiction, Switzerland, the *lex arbitri* merely provides that ‘[t]he arbitral tribunal shall itself take the evidence’<sup>48</sup> and, in the absence of an agreement between the parties directly or by reference to arbitration rules, the arbitral tribunal may determine the admissible evidentiary means and the manner in which the evidence is gathered.<sup>49</sup>

#### SOFT LAW

Article 16(b) of the UNCITRAL 2016 Notes on Organizing Arbitral Proceedings provide parties, arbitral tribunals, and arbitral institutions with general and universal guidance on how such site visits may be conducted, without seeking to promote such guidance as best practice.<sup>50</sup>

43 ICC Arbitration Rules 2017 (see above at n 42); Lew (see above at n 7) 15.

44 Lew (see above at n 7) 15.

45 UN Commission on International Trade Law (UNCITRAL) Model Law Arbitration Rules 2010, effective from 15 August 2010, Article 27(3); see also Lew (above at n 7) 15.

46 Lew (see above at n 7) 15; see also ACICA Arbitration Rules 2016 (n 38) Article 23.2; Swiss Chambers’ Arbitration Institution of the Swiss Chambers of Commerce Association for Arbitration and Mediation (SCAI) Swiss Rules of International Arbitration 2012, effective from 1 June 2012, Article 16(3); Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules 2013, effective from 1 November 2013, Article 14.2; ICDR International Arbitration Rules 2014 (see above at n 34) Article 17.2.

47 See English Arbitration Act 1996, effective from 31 January 1997, Article 38(4)(a); UNCITRAL Model Law on International Commercial Arbitration 2006, effective from 4 December 2006, Articles 24(2), 26(1)(b); Dutch Code of Civil Procedure, Book IV (Arbitration) of 1 December 1986, effective from 1 January 2015, Article 1022b.

48 Swiss Private International Law Act of 18 December 1987, effective from 1 January 2017, Article 184(1).

49 Gabrielle Kaufmann-Kohler and Antonio Rigozzi, *International Arbitration: Law and Practice in Switzerland* (Oxford University Press 2015) paras 6.14 – 6.15, citing Marc Veit, ‘Article 184 PILS’ in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner’s Guide* (see above at n 7) 127 (para 3), 129 (para 14).

50 UNCITRAL, 2016 Notes on Organizing Arbitral Proceedings, effective 7 July 2016, Preamble (vii – viii), Article 16(b) (paras 110 – 113).

If parties have agreed to supplement their arbitral procedure with the IBA Rules on the Taking of Evidence in International Arbitration,<sup>51</sup> the Arbitral Tribunal may, at the request of a Party or ex officio, inspect or require the inspection by a Tribunal-appointed or Party-appointed Expert of ‘any site, property, machinery or any other goods, samples, systems, processes or Documents’ as it deems appropriate.<sup>52</sup> The Parties and their representatives have the right to attend such inspection, and the Arbitral Tribunal is to determine the timing and arrangements for the inspection in consultation with the Parties. Furthermore, a Tribunal-appointed Expert may request a Party to provide access to a site for inspection ‘to the extent relevant to the case and material to its outcome’.<sup>53</sup> The Parties may respond to the Tribunal-appointed Expert’s report by way of responsive witness statement or expert report by a Party-appointed Expert.<sup>54</sup> If a Party fails to make available a site or a particular object for inspection, the Arbitral Tribunal may infer that the result of such inspection would be adverse to the interests of that Party.<sup>55</sup>

*Overarching duty to protect parties’ procedural rights*

Unlike dispute boards, whose procedures are not bound by natural justice, due process or procedural regularity for their determinations to be held to be valid and binding between parties,<sup>56</sup> an arbitral tribunal’s discretion to conduct site visits remains subject to the procedural protections guaranteed by the mandatory applicable national arbitration law.<sup>57</sup>

These mandatory procedural protections, which comprise the parties’ fundamental rights to equal treatment and to be heard,<sup>58</sup> pose certain challenges for arbitral tribunals and parties when conducting site visits.

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51 2010 IBA Rules on the Taking of Evidence in International Arbitration (see above at n 7) Preamble (para 1), Article 1.

52 *Ibid.*, Article 7.

53 *Ibid.*, Article 6(3).

54 *Ibid.*, Article 6(5).

55 *Ibid.*, Article 9(6).

56 Jenkins (see above at n 21) 101, referring to *Bernhard Schulte GmbH & Co KG & Ors v Nile Holdings Ltd* [2004] EWHC 977 (Comm) (Cook J).

57 Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 705–706 (para 1295); Gary B Born, *International Arbitration: Law and Practice* (2nd edn, Kluwer Law International 2016) 160, §8.04[A].

58 See UNCITRAL Model Law on International Commercial Arbitration, effective from 7 July 2006, Articles 18, 34(2)(a)(iv); 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted 10 June 1958 and entered into force 7 June 1959, 330 UNTS 38 (the ‘New York Convention’), Articles V(1)(b), V(1)(d), V(2)(b).

### Challenges in conducting site visits in international arbitrations

An arbitral tribunal and, by extension, the arbitral award ultimately rendered, can only profit from the forensic benefits of a site visit where the parties' procedural rights are fully protected, and the arbitral tribunal does not overstep its mandate. This poses a number of challenges in the way a site visit is to be conducted and in relation to the respective roles that the arbitral tribunal, the parties, their counsel and experts should play during the process.

#### *Who should attend?*

The parties and their representatives not only have the right, but should be strongly encouraged, to attend the site visit.<sup>59</sup> Site visits should always be organised in consultation with the parties and representatives of all parties and their counsel, as well as any relevant party-appointed or tribunal-appointed experts.

In light of the arbitral tribunal's power to order the site visit *ex officio*,<sup>60</sup> a site owner may not necessarily have an interest in giving, but should always ultimately give, its permission for the conduct of a site visit.<sup>61</sup> Where one party (eg, the site owner) does not wish the arbitral tribunal to inspect the site (or certain parts thereof), a procedural order regulating the site visit is essential.<sup>62</sup>

A site visit can still take place with or without active participation by the parties during the visit. However, in the case of lack of participation, no real oral examination can properly take place while preserving the requirements of due process.<sup>63</sup>

An exception exists where the construction project is freely accessible to the arbitral tribunal (eg, the project is a road, square, public building). In this situation, if the arbitral tribunal decides to inspect the site on its own without the parties attending, it must provide the parties with its observations of the site and an opportunity to comment thereon.<sup>64</sup>

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59 Craig, Park and Paulsson (see above at n 7) 458 (para 26.03); Scherer, Ehle and Moss (see above at n 7) 1195 (para 74), citing Bernhard Berger and Franz Kellerhals, *International and Domestic Arbitration in Switzerland* (2nd edn, Stämpfli Verlag AG 2010) 353 (para 1237); Blackaby, Partasides, Hunter and Redfern (see above at n 20) 312 (para 5.22).

60 Eg, see above at n 32.

61 Altschuler (see above at n 1) 96.

62 Kinnear and Ayman (see above at n 2) 256.

63 Kreindler (see above at n 7) 91.

64 Scherer, Ehle and Moss (see above at n 7) 1195 (para 74); Berger and Kellerhals (see above at n 59) 353 (para 1237).

*Can an arbitral tribunal reject a party's request for a site visit?*

The arbitral tribunal has the sole discretion to decide whether a site visit is appropriate.<sup>65</sup> A party's procedural rights will thus not necessarily be violated if an arbitral tribunal rejects its request for a site visit where the issues in dispute do not warrant a site visit.

For instance, in a 2012 decision, the Swiss Federal Supreme Court rejected a party's request for annulment of an arbitral award brought on the basis that the arbitral tribunal had breached its right to be heard by not accepting its request for an on-site visit which, it argued, would have assisted the arbitral tribunal in determining that the equipment delivered by the respondent was defective.<sup>66</sup> The Court noted that the dispute hinged on the interpretation of certain provisions of the contract and therefore, it was difficult to conceive what purpose a site visit would serve.<sup>67</sup> The Court also noted that, in disregarding the party's request for a site visit, the arbitral tribunal proceeded to an anticipated evaluation of the probative value of such a visit and concluded that the evidence was superfluous, which, in the Court's view, was permissible.<sup>68</sup>

This decision confirms that arbitral tribunals may, within their general power to assess the pertinence of evidence, reject a party's evidentiary requests, including to conduct site visits, if such requests are not relevant or necessary to the case at hand.<sup>69</sup> Furthermore, the ruling reinforces the position, at least for Swiss-seated arbitrations, that it is not for parties to dictate to arbitral tribunals the way in which they should conduct their procedures, and that as firm a stance on procedure as on the merits will not lead to a violation of parties' fundamental procedural rights.<sup>70</sup>

*May co-arbitrators delegate site visits to the president of the arbitral tribunal?*

Co-arbitrators may delegate evidentiary steps, for example, site visits, including in the company of experts, to the president of the arbitral

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65 Gaillard and Savage (eds) (see above at n 57) 706 (para 1295).

66 *X v Y*, Decision No. 4A\_150/2012 (Federal Supreme Court of Switzerland, First Civil Law Chamber, 12 July 2012) ('*X v Y*') paras 4.1–4.2, available in English in ASA Bulletin (2013) 31(1) 138 and at [www.swissarbitrationdecisions.com/sites/default/files/12%20juillet%202012%204A%20150%202012.pdf](http://www.swissarbitrationdecisions.com/sites/default/files/12%20juillet%202012%204A%20150%202012.pdf) accessed 2 August 2018; see also Scherer, Ehle and Moss (see above at n 7) 1195 (para 75, ft 96).

67 *X v Y* (see above at n 66), para. 4.2.

68 *Ibid.*

69 Philippe Pinsolle, 'The Need for Strong Arbitral Tribunals' in Andrea Menaker (ed), *International Arbitration and the Rule of Law: Contribution and Conformity* (ICCA Congress Series No 19, Kluwer Law International 2017) 855–856.

70 Pinsolle (see above at n 69) 861.

tribunal if the parties are aware of such delegation and consent to it at the relevant time.<sup>71</sup>

As there is limited jurisprudence on this point, the contours of such delegation are not well delineated. However, Lévy properly submits that co-arbitrators should be prudent in exercising their discretion to delegate evidentiary steps to the president considering the arbitral tribunal's mandatory requirement of deliberation.<sup>72</sup>

*What role should the arbitral tribunal play in a site visit?*

Unlike dispute boards,<sup>73</sup> whose conclusions are not enforceable in the same way as arbitral awards,<sup>74</sup> arbitral tribunals may be reluctant to take the initiative in ascertaining the facts and the law because of procedural paranoia (real or perceived).<sup>75</sup> However, this does not exclude the arbitral tribunal from using a site visit to obtain evidence upon which it may adjudicate the dispute.<sup>76</sup> How far the arbitral tribunal can (or, properly, should) extend its evidence-gathering mandate must, in the authors' opinion, be expressly agreed in a procedural order.

The parties should agree on whether to authorise the arbitral tribunal to gather evidence during the site visit. If the parties do mandate the arbitral tribunal to gather evidence, the arbitral tribunal, counsel and the parties should carefully agree on the way in which evidence should be gathered during the site visit, and subsequently admitted to the record. Although an example from the inter-state arbitration context, the way in which the Bay of Bengal Maritime Boundary Arbitration<sup>77</sup> tribunal handled evidence gathered at a site visit could be an inspiration to international commercial arbitration tribunals. In that arbitration, the parties requested the Permanent Court of Arbitration (PCA) Registry to take photographs and

71 *Société Aranella v Société Italo-Ecuadoriana* (Paris Court of Appeal, 26 April 1985) (1985) 1 *Revue de l'Arbitrage* 311, 316 *et seq.*; see also Gaillard and Savage (see above at n 57) 706 (para 1295, fn 252).

72 Laurent Lévy, 'The Chairman's Role in the Arbitral Tribunal's Dynamics' in Dossier IX of the *ICC Institute of World Business Law: Players' Interaction in International Arbitration* (ICC, Publication 737E, 2012) (fn 21).

73 See above notes 21–30.

74 2015 ICC Dispute Board Rules (see above at n 22), Article 1(2).

75 Eg, see Queen Mary University and White & Case, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration [www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015\\_0.pdf](http://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015_0.pdf) accessed 2 August 2018; Klaus Peter Berger and J Ole Jensen, 'Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbor for Procedural Management Decisions by International Arbitrators' (2016) 32(3) *Arbitration International* 415.

76 Eg, see above, notes 12–14.

77 Bay of Bengal Maritime Boundary Arbitration (see above at n 3).

videos during the site visit. After the site visit, the arbitral tribunal issued a procedural order inviting the parties to agree on which photographs and video segments from the site visit should be admitted into evidence, with any party's objection to the introduction of a photograph or video segment being resolved by the arbitral tribunal prior to the commencement of the hearing.<sup>78</sup> Subsequently, no objection was raised by either party and the evidence obtained during the site visit ultimately formed part of the arbitral tribunal's factual findings.<sup>79</sup>

Even if the site visit is not 'on the record' and its purpose is to obtain an overview of the issues in dispute, the arbitral tribunal and parties should agree on a protocol for the collection of its observations. For example, if the arbitral tribunal anticipates the need to take photographs for its deliberation, it should obtain prior agreement from both parties. These photographs should be treated as confidential.<sup>80</sup> Similarly, all information obtained from site personnel during a site visit cannot be considered to constitute direct evidence unless the opposing party has had an opportunity to discuss such statements and to cross-examine their authors.<sup>81</sup>

Furthermore, an arbitral tribunal should resist the temptation to raise issues based on its observations of the site beyond the ambit of the claims submitted to it as at the time of the site visit. An arbitral tribunal may breach neutrality if it comes upon new visual evidence during a site visit and indirectly brings that evidence to the attention of the parties in respect of potential breaches not alleged in the dispute.<sup>82</sup> If the arbitral tribunal relies on such visual evidence to make findings beyond the matters submitted to it, then its arbitral award may be vulnerable to annulment or non-enforcement on the basis of *ultra petita*.<sup>83</sup>

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78 *Ibid.*, Final Award, 8 July 2014, paras 24 – 26, referring to Procedural Order No. 3 (Concerning the Record of the Site Visit) dated 20 November 2013.

79 *Ibid.*, paras 263–267.

80 Altschuler (see above at n 1) 96.

81 Blessing (see above at n 7) 35; Craig, Park and Paulsson (see above at n 7) 458 (para 26.03).

82 See the case example in Altschuler (see above at n 1) 94.

83 New York Convention (see above at n 58), Article V(1)(c) provides that recognition and enforcement may be refused if the 'award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced'.

*What role should the expert play during a site visit?*

The most difficult question regarding an expert's mandate in a construction dispute is whether the expert, in carrying out his/her fact finding, should be given a 'green light' to conduct his/her own investigations, or whether the expert should only do so in the presence of parties, or in the presence of the arbitral tribunal.<sup>84</sup> These issues must be discussed by the parties and the arbitral tribunal and preferably recorded in a procedural order.

**Practical considerations for arbitral tribunals and parties conducting site visits**

The parties should anticipate, at the case management conference, whether a site visit is necessary by the arbitral tribunal or a tribunal-appointed expert and, if so, when and how the inspection should be conducted.<sup>85</sup>

*Timing of the site visit*

To maximise its evidentiary value, the site visit should take place with the following considerations in mind.

First, where a site visit is intended to provide an overall framework for the assessment of evidence, it should be conducted as early as possible in order to clarify the issues in dispute and before any other evidence is taken.<sup>86</sup> Conversely, where a site visit is to be used to prove or disprove a fact in contention, the site visit may be more appropriate after the other relevant evidence has been adduced so that the visit may inform the outstanding issues in dispute.<sup>87</sup> Where parties are conscious of time and cost, but the hearing will involve multiple hearing days and the site is close by, a site visit could take place on the first day of the first hearing (eg, with opening statements on site, enabling the parties to point to areas in dispute), followed by a second site visit before the last hearing to allow the arbitral tribunal to revisit items of importance that could not have been anticipated prior to hearing key witness testimony.<sup>88</sup>

Second, the site visit should take place before remedial works. Similarly, site visits are most efficacious when conditions on site are the same as they were on the day the contractor left the project. Any natural or other

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84 Blessing (see above at n 7) 36–37.

85 See CI Arb Arbitration Rules 2015 (see above at n 37) Appendix 2, Article 20; DAAB Procedural Rules (see above at n 22) Rule 3.7; see also AAA Construction Industry Arbitration Rules and Mediation Procedures (see above at n 31) P-2(a)(xx).

86 Blessing (see above at n 7) 36; Kinnear and Ayman (see above at n 2) 255.

87 Kinnear and Ayman (see above at n 2) 255–256.

88 Altschuler (see above at n 1) 95.

conditions of the site which could fluctuate, for example, weather or security-related concerns, must also be kept in mind when considering when to schedule a site visit.<sup>89</sup>

Third, where the contractor has been demobilised from or has voluntarily left the site, it should be granted access to the site to document conditions relevant to its claims or counterclaims before the arbitral tribunal's site visit.

#### *Conduct of the site visit*

How precisely site visits are to be carried out is to be determined by the arbitral tribunal in consultation with the parties as part of its broad powers to regulate the procedure for collecting evidence. The arbitral tribunal and the parties should always be mindful of their own roles, interests and ethical duties during the conduct of the site visit.

The arbitral tribunal must ensure that it gains the most out of the site visit while respecting due process at all times. Conversely, the parties should not underestimate the potential impact that the site visit may have on the arbitral tribunal. Indeed, the actions and statements of the parties' representatives attending the site visit may affect the arbitrators' impressions. Parties should be proactive in making sure that the arbitral tribunal gains insight into the issues in dispute and observes the conditions on site. To this end, the arbitral tribunal and the parties should record a detailed protocol for the purpose, attendance, scope and conduct of the site visit in a procedural order, considering the following issues:<sup>90</sup>

#### PURPOSE OF THE SITE VISIT

The arbitral tribunal should, in consultation with the parties, define the objective of the site visit and determine, for example, whether its purpose is: to educate the arbitral tribunal about issues in dispute; to provide sufficient technical understanding to evaluate the evidence on the record or to be adduced; or to gather facts and create on-record evidence which the arbitral tribunal may rely upon in its arbitral award. During the site visit, the arbitral tribunal should hold an opening briefing and debriefing at the end to reinforce the purpose of the visit.<sup>91</sup>

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89 Kinnear and Ayman (see above at n 2) 255–256.

90 For an illustration of procedural order regarding a site visit in the investor-state context, see Bay of Bengal Maritime Boundary Arbitration (see above at n 3) Procedural Order No 1 (Concerning the Site Visit of October 2013) dated 28 August 2013 (revised 11 October 2013), available at [www.pcacases.com/web/sendAttach/376](http://www.pcacases.com/web/sendAttach/376) accessed 2 August 2018.

91 Eg, see DAAB Procedural Rules (see above at n 22) Rule 3.9.

#### ATTENDANCE

All parties and respective representatives who wish to be present are, and do, participate in the site visit. The arbitral tribunal and parties may wish to invite experts but should determine the role of the experts during the site visit from the outset.

#### ACCESS

As a party's failure to make available a site without satisfactory explanation may cause an arbitral tribunal to draw adverse inferences against that party,<sup>92</sup> parties should ensure, prior to the site visit, that the site owner is prepared to open all areas, including those areas which may conceal issues in dispute. Parties may also be minded to conduct a pre-visit to the site to consider what the arbitral tribunal should see during the visit.<sup>93</sup>

#### SCOPE OF THE SITE VISIT

To ensure the parties' procedural rights are protected, the arbitral tribunal must establish what areas of the site will be visited ahead of the inspection.<sup>94</sup>

#### COMMUNICATION DURING THE SITE VISIT

The arbitral tribunal should determine the language used during the site visit (often the same as the language of proceedings) and ensure any necessary translation is available.<sup>95</sup> It should also determine who will narrate the visit and the extent to which each party may ask questions or object to information volunteered by the opposing party.<sup>96</sup> During the site visit, the arbitral tribunal must avoid *ex parte* communications;<sup>97</sup> it must also refrain from posing questions to persons on site unless the parties and their counsel agree to this and have the opportunity to ask follow-up questions.<sup>98</sup> Parties should speak through their representatives. Counsel, who are neither fact witnesses nor under oath, should 'act as guides without editorializing'.<sup>99</sup> Parties should point out conditions on the site, leaving the arbitral tribunal time alone to view each area. The arbitral tribunal should also attempt to gauge the dynamics between the parties' representatives.

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92 See above at n 55.

93 Kinnear and Ayman (see above at n 2) 256.

94 *Ibid.*, 257.

95 *Ibid.*, 256.

96 *Ibid.*, 256.

97 Craig, Park and Paulsson (see above at n 7) 458 (para 26.03).

98 See above at n 81.

99 Altschuler (see above at n 1) 97.

## EVIDENCE

The arbitral tribunal must have a clear vision as to what will become sworn evidence compared to what is to be considered explanatory and therefore akin to submissions by counsel.<sup>100</sup> The procedural order should clarify whether parties may make post-visit submissions on what was observed and how such observations support their respective submissions.<sup>101</sup> Where the site visit is used to gather evidence, the protocol should determine how it is recorded (eg, through video, photographs, minutes of the visit, transcript) and whether there will be cross-examination and the right to tender rebuttal evidence during or after the site visit.<sup>102</sup> The parties should also be given the opportunity to comment on the evidence before it is entered on the record.<sup>103</sup>

## CONFIDENTIALITY

Site visits are usually confidential; however; the arbitral tribunal should consult the parties on the extent to which the visit is confidential as any evidence gathered will be likely be subsumed within the confidentiality regime applicable to the overall case.<sup>104</sup>

## TRAVEL AND LOGISTICS

The protocol should include an itinerary setting out transportation, accommodation, security and meals.<sup>105</sup> To ensure neutrality, the arbitral tribunal should travel to and from the site together, or accompany both parties, but not accept transport from only one party. Any lunch or dinner break should not be furnished by the host as it will place the other party at a disadvantage.<sup>106</sup>

## RECORD OF THE SITE VISIT

Ideally, the arbitral tribunal's and parties' observations should be recorded on site.<sup>107</sup> If the parties consent, the arbitral tribunal should take photos and

100 Kinnear and Ayman (see above at n 2) 256.

101 *Ibid.*, 257.

102 *Ibid.*, 256.

103 Kinnear and Ayman (see above at n 2) 256; eg, see the example of the protocol in the Bay of Bengal Maritime Boundary Arbitration set out above at n 78.

104 Kinnear and Ayman (see above at n 2) 257.

105 *Ibid.*

106 Eg, in the Bay of Bengal Maritime Boundary Arbitration (see above at n 3), the arbitral tribunal recorded in a procedural order the parties' (proper) agreement that '[t]here shall be no formal receptions held for the Tribunal', and that '[s]ocial events shall be strictly limited to simple dinner events that the Parties may wish to prepare, if that dinner includes and is restricted to all members of both delegations participating in the site visit, and no other persons': Procedural Order No. 1 (see above at n 90).

107 Scherer, Ehle and Moss (see above at n 7) 1195 (para 75).

share them with the parties (eg, by appending the photos to the minutes of the site visit).<sup>108</sup> The arbitral tribunal may also consider videoing the site visit for its deliberations without intending for the video to form part of the record; if so, it should obtain the parties' prior consent and circulate the video with the site visit minutes. Following the site visit, counsel should carefully review and comment on the arbitral tribunal's minutes of the site visit; these minutes could be later relied upon in the arbitral award.<sup>109</sup>

#### COST OF THE SITE VISIT

The procedural order should address which party is to bear the costs of the site visit or whether it will form part of the costs order at the end of the arbitration.<sup>110</sup>

### Conclusion

The future will show whether modern technology will allow for real-time 'virtual' site visits, and whether such virtual visits may grant arbitral tribunals the same first-hand impression as being physically on site. Until then, site visits should be a tool of choice in the resolution of construction disputes.

Indeed, in the authors' own experience, site visits can, in the right circumstances, be 'eye-opening' for arbitrators in construction disputes as they provide a useful opportunity to understand the technical or even legal issues at stake and possibly ascertain facts and create on-record evidence. As such, site visits add forensic value to the adjudication of construction disputes and thereby strengthen the integrity of the awards rendered. Arbitral tribunals and parties to construction arbitrations should be conscious of these benefits and open to using this underutilised tool more often unless there are significant financial, geographical, security or other reasons for not doing so. When deciding to conduct a '*descente sur les lieux*' (site visit), there are several legal and logistical aspects to be considered to make the process worthwhile and compliant with the parties' fundamental procedural rights.

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<sup>108</sup>See above at n 80.

<sup>109</sup>Eg, as is the practice of Dispute Adjudication/Avoidance Boards: see DAAB Procedural Rules (see above at n 22) Rule 3.10.

<sup>110</sup>Kinnear and Ayman (see above at n 2) 258.

