The Arbitral Tribunal-appointed Expert: A Swiss Approach[1]

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Construction disputes; International arbitration; Switzerland

Abstract

The Swiss perspective on the role of experts in arbitration states that the arbitral tribunal , after consulting the parties, may appoint one or more experts to provide a technical and economic assistance to the arbitrator during his decision- making process. The rules do not prevent the parties from submitting their own experts opinion as evidence, but make it significantly clear that the opinion of the tribunal -appointed expert will be given preeminent consideration.

The role and relevance of experts in international arbitration practice

Experts have a predominant role to perform when settling disputes between the parties to a conflict. Whether the dispute is submitted to the ordinary courts or to arbitration, it is unquestionable that the expert's opinion has great relevance at the time the judge rules on the disputed issues.

In the specific case of construction arbitration, the role of the expert becomes evident. The matters that are submitted to the arbitrator's decision are often highly complex and technical, and impose on the arbitrator the obligation to resolve the dispute through assessment of information that is often beyond the arbitrator's expertise. As a general rule, disputes arising during the execution of infrastructure and engineering construction projects are submitted for determination to an arbitrator or arbitral tribunal, so it is important for the arbitrators to have specialised advice that allows them to base the decision on objective technical elements.

The complexity of construction arbitrations necessarily requires the intervention of an expert, who from his experience and expertise must inform the arbitral tribunal on the matters in controversy. A key element regarding the role played by experts in the proceedings is who is in charge of appointing them. In this regard, in

[1] This article was first presented at the Eight Annual Conference of the International Academy of Construction Lawyers, San Diego, California, April 2022.

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international arbitration practice, there are different ways of appointing the expert and the option chosen has important consequences in the development of the arbitral proceedings. Who appoints the expert is a most crucial element, which raises the first question to be answered: is it the parties or the tribunal?

The answer to this question has important repercussions during the development of the arbitral proceedings. It is not insignificant whether the expert is appointed by the parties or by the arbitral tribunal. The role played by the expert in arbitration differs whether the expert is appointed by the tribunal to report directly to it (the tribunal-appointed expert), whether the expert is appointed by the parties to present his report as evidence in the arbitral proceedings (the party-appointed expert) or whether the expert is appointed by mutual agreement of the parties to decide on the matter in dispute as an expert (the expert decision-maker).[2]

Regarding the latter (the expert decision-maker), although it does reduce the time required to resolve the dispute, we believe that the quality of the procedure and the decision is likely to be less good than if the decision is to be taken by an arbitrator(s). This is because an expert decision-maker will limit him or herself exclusively to reviewing and weighing the technical elements of the particular dispute and on that basis issue a decision, which has the effects of an award. Other means of proof that may be relevant for the resolution of the conflict are left aside and procedural aspects that are necessary for an adequate proceeding are omitted. As will be discussed below, this role of the expert as a judge where he is granted the powers of an arbitrator to resolve a dispute is contemplated in a new procedure in the Standard 150:2018 rules of the Swiss Society of Engineers and Architects (SIA).

In international arbitration practice, the expert's role as a decision maker is not the most common. Generally, their function is limited to presenting their expert opinion on a particular issue within their sphere of competence, and it is in this context that we find party-appointed experts and tribunal-appointed experts. Choosing one alternative or the other depends on the rules of procedure to which the arbitration is subject, and there are differences in their approach between the civil and common law systems. The former prefers tribunal-appointed experts, while the latter prefers party-appointed experts.

Party-appointed experts are the usual practice in arbitrations that are influenced by the common law system. There is an understanding that the confrontation of party-appointed experts is the most useful way for the arbitrator to gain insight into the technical elements of the case that he or she has to have in consideration when rendering his decision. Often the parties prefer it because they consider that their interests are better represented and that their position can be better supported and argued.

We consider that the party-appointed expert has disadvantages compared to the tribunal-appointed expert, particularly in relation to their independence. As Jones notes, one of the most significant challenges regarding the use of party-appointed experts is their tendency to act as "hired-guns", tailoring their evidence to support the interest of the party by whom they were appointed.[3] It is common for the role

[2] Bernardo Cremades and David Cairns, *The Overall Context of Expertise and its Role in International Arbitration*, p.94.

[3] Doug Jones, "Let's get together: Quo Vadis International Construction Arbitration", GAR Live Construction Disputes, Conference, Conference held on 9 July 2020, p.11.

of the party-appointed expert to be misrepresented, and it is a particular challenge for experts to recognise that their duty is to assist the tribunal, not the party for whom they were appointed.[4]

The usual practice in civil or continental law jurisdictions is for the tribunal to appoint their own experts, who will investigate and report back to the tribunal independently of any party's submissions.[5] The main role of the tribunal-appointed expert is to provide technical and economic assistance to the arbitrator during his decision-making process, answering questions raised by the parties and providing a thorough analysis of highly complex and sophisticated issues related to the matter in dispute.[6] Usually, the opinion of the tribunal-appointed expert is issued on a written report that, according to Nardin, will be used by the tribunal to understand the issues in dispute, assess the positions of each party in a thorough and independent manner and get clear answers to questions raised by the parties and the tribunal, with the purpose of rendering an adequate and well-founded decision.[7]

One of the advantages of appointing an expert by the tribunal is the independence from the parties to the proceeding. Whether or not the expert is appointed by the tribunal with the agreement of the parties, his or her appointment is made on the basis of his or her expertise, neutrality and independence and works as an assistant of the tribunal and under its control. According to Nardin, another positive aspect of the designation of a tribunal-appointed expert is that the expert's report is a strong and efficient supporting document that is also submitted to the parties to allow them to express contradictory views; it represents a clear basis for opening constructive debate on the merit of the dispute and also that the tribunal has valuable assistance to make a decision based on expert analysis and in full knowledge of the facts while the issues in dispute are presented in a professional manner without biased interpretation.[8]

The great challenge of this mechanism for the appointment of experts is to avoid the loss of the decision-making power that essentially lies with the arbitral tribunal, in the sense of implicitly handing over jurisdictional functions to the expert. In this sense, given that many times the technical matters that are part of the facts of the case and that are analysed by the experts appointed by the arbitral tribunal are highly complex, sophisticated and beyond the knowledge of the arbitrators, in complex cases, the expert's opinions and determinations will have a significant impact on the assessment of the disputed issues by the tribunal. There may be some loss of power by the tribunal in the sense that the expert's conclusions already include de facto or suggest the essence of the decision of the tribunal.[9] In this regard, it is necessary that the arbitral tribunal assumes a proactive role in the delimitation of the expert's functions, clearly establishing the tasks and limits of

[4] Doug Jones, "Let's get together: Quo Vadis International Construction Arbitration", GAR Live Construction Disputes, Conference, Conference held on 9 July 2020, p.11.

[5] Doug Jones, "Innovating evidence procedure in international construction arbitration" (2020) 55 *Derecho & Sociedad* 247.

[6] Michel Nardin, "Is there a Future for Tribunal-Appointed Experts?", in Matthias Scherer (ed.) (2019) 37(1) *ASA Bulletin* 54.

[7] Michel Nardin, "Is there a Future for Tribunal-Appointed Experts?", in Matthias Scherer (ed.) (2019) 37(1) *ASA Bulletin* 54.

[8] Michel Nardin, "Is there a Future for Tribunal-Appointed Experts?", in Matthias Scherer (ed.) (2019) 37(1) *ASA Bulletin* 55.

[9] Michel Nardin, "Is there a Future for Tribunal-Appointed Experts?", in Matthias Scherer (ed.) (2019) 37(1) *ASA Bulletin* 55.

his assignment, indicating clearly and precisely the scope within which the expert must issue his conclusions.[10] The expert's scope of services should be established with certainty only so that the arbitral tribunal can disregard any opinion outside his or her mandate.[11] In this regard, the Rules of Arbitration of the International Chamber of Commerce (ICC), establish that the arbitral tribunal, after consulting the parties, may appoint one or more experts and define their terms of reference.[12] It is the arbitral tribunal who must establish the guidelines and limits within which the experts must give their opinion, in order to avoid an extraordinary involvement of the expert in other areas of the proceedings where, with his opinion, he can influence other elements of the proceedings and which are beyond the scope of his mandate. The expert may be tempted to decide on the matter in dispute, influencing with his personal notion of justice, on the basis of an apparent technical impartiality.[13]

The expert's impartiality, neutrality and independence are essential elements that must be observed by the expert when performing his or her role in the arbitration. Although these are elements to which greater attention must be paid when experts are appointed by the parties, tribunal-appointed experts are not exempt from review. To this purpose, international practice has developed guidelines with recommendations that regulate the handling of experts by arbitral tribunals. They are considered soft-law instruments and provide recommendations that may be adopted in whole or in part by arbitral tribunals, which may even, in accordance with the principle of party autonomy, take elements from different guides and combine them, taking into account the particular circumstances of each case.

Within these best practice guidelines, we find the CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration (CIArb Protocol). The CIArb Protocol goes some way to enhancing the independence of expert witnesses.[14] It establishes principles on the independence that experts must necessarily have,[15] emphasising that the fact that the expert appointed by the parties is paid by the party that presents him, should not by that fact alone vitiate the impartiality that such expert must have. As noted by Jones, the CIArb Protocol (as well as the IBA Rules on the Taking of Evidence in International Arbitration), sets out the ethical principles of independence, duty and opinion which should guide the expert's evidence and outlines requirements of the expert to declare that evidence has not been influenced by the pressures of the dispute resolution process or by any party to the arbitration.[16] The above-mentioned protocol was developed

[10] Felipe Bulnes and Gonzalo Vial, "La prueba pericial y el riesgo de transferencia indebida de jurisdicción: medidas para una adecuada valoración de la pericia", p.16.

[11] Felipe Bulnes and Gonzalo Vial, "La prueba pericial y el riesgo de transferencia indebida de jurisdicción: medidas para una adecuada valoración de la pericia", p.16.

[12] ICC 2021 Arbitration Rules art.25(3).

[13] Felipe Bulnes and Gonzalo Vial, "La prueba pericial y el riesgo de transferencia indebida de jurisdicción: medidas para una adecuada valoración de la pericia", p.16.

[14] Doug Jones, "Party appointed expert witnesses in International Arbitration: A protocol at last" (2008) 24(1) *Arbitration International* 141.

[15] Article 4 of the CIArb Protocol establishes that: "(1) An expert's opinion shall be impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any Party. (2) Payment by the appointing Party of the expert's reasonable professional fees for the work done in giving such evidence shall not, of itself, vitiate the expert's impartiality. (3) An expert's duty, in giving evidence in the Arbitration, is to assist the Arbitral Tribunal to decide the issues in respect of which expert evidence is adduced."

[16] Doug Jones, "Innovating evidence procedure in international construction arbitration" (2020) 55 *Derecho & Sociedad* 247.

to be applied only to the party-appointed experts, as expressly stated in the foreword: "The CIArb Protocol applies only to party-appointed experts. It is not intended to cover tribunal-appointed experts or single-joint experts". Notwithstanding the foregoing, the CIArb has issued a guideline to "set out the current best practice in international commercial arbitration on the appointment and use of party-appointed and tribunal-appointed experts" which should be read in conjunction with the CIArb Protocol.[17] It states that prior to confirming the appointment of any tribunal-appointed expert, arbitrators should be satisfied that the expert is independent and impartial, and also prior to accepting their appointment, the expert should provide a declaration of independence and impartiality.[18]

Similar to the CIArb Protocol and with an approach influenced by civil law, we find the Code of Best Practices in Arbitration of the Spanish Arbitration Club. Like the CIArb Protocol, it is a guide that provides recommendations on the proper handling of experts in arbitration proceedings. Similar to the aforementioned protocol, it establishes principles on the correct objectivity and independence of experts, expressly stating that "the expert must be objective and independent".[19] This code of good practice was based on the CIArb Protocol at the time of drafting but, unlike that protocol, applies to both party-appointed experts and tribunal-appointed experts, reflecting the importance that civil law sytems gives to the latter. This guide provides three recommendations to ensure that experts act objectively and independently:

- Detailed breakdown of the brief, the information received, and the work methods employed in the expert report, which will facilitate the tribunal's discernment of any possible bias.
- Disclosure to the arbitrators and the parties of any circumstance that might compromise the expert's independence, impartiality or objectivity.
- Prohibition against the expert's fees being dependant on the outcome of the arbitration.[20]

These arbitral soft-law instruments were created to provide a solution to the modern challenges of international arbitration practice, such as the special concern for the objectivity and independence of experts and the excessive cost and time required to resolve arbitration proceedings. Regarding the latter point, it is worth mentioning the report developed by Lord Woolf in 1996, called *Access to Justice Report*. In this report, Lord Woolf states that one of the factors for the excessive cost of litigation is the proliferation of expert evidence: "It was a basic contention

[17] Chartered Institute of Arbitrators, *International Arbitration Practice Guide: Party-appointed and Tribunal-appointed Experts*.

[18] Chartered Institute of Arbitrators, *International Arbitration Practice Guide: Party-appointed and Tribunal-appointed Experts* art.4.

[19] Code of Best Practices in Arbitration of the Spanish Arbitration Club (2019): "133. Experts must be objective and independent. 134. The qualities of objectivity and independence require that experts possess the willingness and capability to perform their role, are guided by the truth and report, not only aspects that are favourable to the party that has appointed them, but also those adverse to it, and maintain an objective distance from the appointing party, the dispute, and other persons involved in the arbitration. 135. The duty of objectivity and independence requires that experts have no financial interest in the outcome of the arbitration. 136. The duty of disclosure is ongoing from the time the expert's appointment is proposed until the conclusion of the arbitration proceedings."

[20] Code of Best Practices in Arbitration of the Spanish Arbitration Club (2019), p.15.

of my interim report that two of the major generators of unnecessary cost in civil litigation were uncontrolled discovery and expert evidence."[21] As stated by Jones, Lord Woolf also identified inefficiency and wasted cost in circumstances where parties call multiple experts unnecessarily, in the hope of strengthening a weak case.[22] That is why we believe that soft-law guides such as the CIArb Protocol and the Code of Best Practices in Arbitration of the Spanish Arbitration Club attempt to respond to the concerns raised by Lord Woolf and are a direct response to the aforementioned problems. It is necessary for the arbitrator to adopt a proactive approach in the management of the procedure, in accordance with civil law practice, clearly outlining the matters to be proved, the type of evidence to be admitted, regulating the role and appointment of experts in the arbitration, and focusing the evidence to be submitted.

In line with the above, we believe that Jones' recommendations go in the right direction, in order to limit the effect of an expert's impartiality or predilection, if it exists, on his or her evidence and to maximise the efficiency of the evidentiary hearing, reducing the amount and scope of evidence at the hearing.[23] Jones suggests strategies that arbitral tribunals should implement which have as their root a proactive approach to handling expert evidence during the arbitration through continuing case management. He points out that the arbitral tribunal must manage expert evidence early on, identifying the experts and their disciplines at an early stage, so that the parties and the arbitral tribunal may be alerted and can solve, at an early stage, expert issues that can be difficult to solve later. He also suggests that the parties should agree on a list of the experts' issues, identifying the principal issues upon which the expert in each discipline will opine. At the time of issuing their opinion, it is relevant that the different experts, especially those appointed by the opposing parties, give their opinion on the same factual assumptions, methodologies and datasets.[24] The arbitral tribunal should adopt a proactive strategy in the sense of requiring the different experts participating in the proceedings to clearly delimit the factual elements on the basis of which the experts have to give their opinion, ensuring that the different opinions they may have are based on their own interpretations of the analysis of the same objective elements.

Jones suggests the implementation of six steps in the arbitration procedure that are intended to limit the differences between the experts, and that help the parties to the procedure to identify the key elements of the dispute and that should be the object of the evidence. This reduces the amount and scope of evidence at the hearing, eliminating evidence that is unnecessary. As Jones states, the streamlining of the topics requiring expert evidence ensures that only the relevant issues are ventilated at the hearing and that each expert's report squarely engages with the issues raised by the other, which increases efficiency and reduces costs.[25] In this way, the objectives set out in the aforementioned soft-law guides are given real

[21] Lord Woolf, Access to Justice: Final Report, Ch.13(1).

[22] Doug Jones, "Let's get together: Quo Vadis International Construction Arbitration", GAR Live Construction Disputes, Conference, Conference held on 9 July 2020, p.11.

[23] Doug Jones, "Let's get together: Quo Vadis International Construction Arbitration", GAR Live Construction Disputes, Conference, Conference held on 9 July 2020, p.13.

[24] Doug Jones, "Innovating evidence procedure in international construction arbitration" (2020) 55 *Derecho & Sociedad* 248.

[25] Doug Jones, "Let's get together: Quo Vadis International Construction Arbitration", GAR Live Construction Disputes, Conference, Conference held on 9 July 2020, p.13.

substance, thus preventing their recommendations from being reduced to a declaration of good intentions that cannot be applied in practice. The procedure proposed by Jones is as follows:

- first, identify disciplines in need of expert evidence and experts proposed;
- second, establish within each discipline a common list of questions;
- third, defer the production of all expert reports until all factual evidence (documentary and witness) is available;
- fourth, require the experts within each discipline to produce a joint expert report identifying areas of agreement and disagreement;
- fifth, require the experts within each discipline to produce individual expert reports on areas on disagreement only; and
- sixth, require the experts to produce "reply" expert reports conducted on a "figures-as-figures" basis.[26]

In our opinion, the above recommendations are compatible with good practices in international arbitration. We believe that their application, always considering the particularities of each case and adapting them to the specific circumstances, can increase the efficiency of arbitrations, improving the administration of the proceedings, avoiding the presentation of unnecessary evidence, which translates into cost savings and time reduction. We believe it is important to emphasise that, in our opinion, the implementation of the procedure proposed by Jones must be analysed in terms of the merits of the each case. Its benefits in terms of increasing the efficiency of arbitration will only be a reality if the characteristics of the case allow its application, otherwise it may produce an undesirable effect, increasing the costs and time of arbitration. It is therefore important to adopt a flexible approach to its implementation and to consider the timing of its application, in the understanding that the tribunal must, in the preliminary stages of the proceedings and when the rules of evidence are established, decide whether its application will be beneficial to the arbitration or whether other alternatives should be applied. Additionally, various institutions involved in international arbitration provide recommendations on the handling of experts in the proceedings. In this regard, the International Chamber of Commerce (ICC), in its institutional rules of arbitration, the so-called ICC Rules of Arbitration, does not establish a preference for party-appointed or tribunal-appointed experts. As previously stated, it only indicates that: "The arbitral tribunal may decide to hear witnesses, experts appointed by the parties or any other person …"[27], and that: "The arbitral tribunal, after consulting the parties, may appoint one or more experts, define their terms of reference and receive their reports. At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert."[28] There is no regulation or specification of the expert's role in the tribunal. The ICC Rules of Arbitration merely recognise the existence of party-appointed and tribunal-appointed experts, but do not regulate their participation in the proceedings. It is up to the parties and the arbitral tribunal to define their scope of work and the way in which expert

[26] Doug Jones, "Let's get together: Quo Vadis International Construction Arbitration", GAR Live Construction Disputes, Conference, Conference held on 9 July 2020, p.13.
[27] ICC 2021 Arbitration Rules art.25(2).
[28] ICC 2021 Arbitration Rules art.25(3).

evidence is presented and weighed. Notwithstanding the aforementioned, recognising the importance of the role of experts in arbitration proceedings, especially in construction arbitration, the ICC has issued a report with recommendations for the effective management of construction industry arbitrations: the *ICC Commission Report: Construction Industry Arbitrations Recommended Tools and Techniques for Effective Management*. Following the modern trend of international arbitration, the recommendations suggested in the report try to accommodate the approaches of different national jurisdictions. In its remarks, it states that, although many of the members of the commission come from common law backgrounds, the report aims to adopt a balanced course, since many construction cases are governed by civil law and/or managed by persons from civil law backgrounds.[29] Regarding the role of experts in construction arbitration, the report recommends that the arbitral tribunal adopt a proactive role clarifying, at the outset of a case, whether or not expertise is required, why it is required, by whom it will be provided and when.[30] Therefore, the course of action to be assigned to the expert evidence in the proceeding is defined in the initial stages, being relevant to determine who will appoint the experts. The report notes that in some cases it will be cost-effective for the tribunal to appoint its own expert, for the opinion of that expert might render unnecessary any further expertise or may identify the points upon which evidence or reports from witnesses or other experts may be required, recognising that the appointment of a tribunal-appointed expert[31] may involve an increase in the effective management of evidence, reducing the proliferation of unnecessary evidence that could hinder the effective development of the procedure. In the event that different experts are appointed, it is recommended that they discuss their views with each other either ideally before or otherwise after preparing their reports, as most independent experts eventually see eye-to-eye on many things. This could be done at a meeting possibly chaired by the tribunal or a designated member, if the parties agree.[32] It also recommends to clearly establish whether or not the points of agreement that exist between the different experts are binding on the arbitral tribunal, insisting that the reports to be presented in the arbitration must address elements on which there is no agreement between the parties and their experts.

International arbitration practice has tended to eliminate the existing gap between common law and civil law. In relation to the designation of experts, modern international arbitration has combined these two approaches: parties may appoint and present their own experts in support of their case, and the tribunal also has the power to appoint an independent expert, whether at the request of a party or on its own initiative.[33] The prevailing tendency is to adopt flexible models for the appointment of experts and the handling of evidence, taking into consideration the particular variables of each case and not the jurisdiction in which the arbitration

[29] *ICC Commission Report: Construction Industry Arbitrations Recommended Tools and Techniques for Effective Management* (2019), p.2.

[30] *ICC Commission Report: Construction Industry Arbitrations Recommended Tools and Techniques for Effective Management* (2019), para.18.1.

[31] *ICC Commission Report: Construction Industry Arbitrations Recommended Tools and Techniques for Effective Management* (2019), para.18.5.

[32] *ICC Commission Report: Construction Industry Arbitrations Recommended Tools and Techniques for Effective Management* (2019), para.18.4.

[33] Nathalie Voser and Katherine Bell, "Expert Evidence in Construction Disputes", *The Guide to Construction Arbitration, Global Arbitration Review*, 2nd edn, p.169.

takes place. According to Nardin, rather than adopting a rigid approach, it is preferable to weigh the interests of all stakeholders. Arbitrators should decide whether or not to rely on their own expertise and understanding to make a decision based on the contradictory opinions of the party-appointed experts, or to make use of a tribunal-appointed expert to assist during the decision-making process.[34]

The Swiss perspective on the role of experts in arbitration

Switzerland is recognised as one of the most prestigious seats of arbitration in international practice. In Europe, it is customary for the parties to an international arbitration to agree that the seat of arbitration is Zurich or Geneva. Its main arbitration-related legal provisions are codified in the Swiss Private International Law Act (Swiss PILA), applicable to international arbitrations, and in the Federal Civil Procedure Code (CPC), applicable to domestic arbitrations. In both legal texts, the parties are granted a wide freedom and autonomy to decide on the procedural rules that will be applicable to the arbitration, whether the parties agree to apply rules created by them or to apply procedural rules of a chosen arbitral institution. Regarding the latter aspect, the most frequently applied institutional rules are the Swiss Rules of International Arbitration (Swiss Rules) of the Swiss Arbitration Center, ICC Arbitration Rules, and, in the specific case of construction arbitrations, the SIA Standard 150:2018 (SIA 150) of the Swiss Society of Engineers and Architects (SIA).

The Swiss Rules regulates in special chapters the appointment and role of tribunal-appointed experts. This demonstrates a predilection of these rules for this type of evidence over the party-appointed experts. We consider, according to a civil law approach, that the opinion of the tribunal-appointed experts constitutes the method of evidence par excellence in construction arbitration and therefore also agree with the need for it to be explicitly regulated in institutional arbitration rules. This practice is also evident in ordinary judicial proceedings in Switzerland, since the CPC also regulates in detail the role of the tribunal-appointed experts in the proceedings (Section 5 of the CPC), rules that are extensive to Swiss domestic arbitrations by application of the provisions of Part 3 of the same legal text.

Article 28 of the Swiss Rules provides that the arbitral tribunal, after consulting with the parties, may appoint one or more experts to report to it, in writing, on specific issues. It also provides that the same rules apply to the appointment of arbitrators as to independence, impartiality, disclosure and challenge of an expert.[35] The expert has to submit his report to the tribunal, which must submit it to the parties. The parties have the opportunity to submit their opinion in written form and also have the right to review any document on which the expert has relied on in the report.[36] Also, at the request of any party, the expert may be heard at a hearing during which the parties shall have the opportunity to be present and examine the expert, applying the same rules as those established for the hearing.[37]

[34] Michel Nardin, "Is there a Future for Tribunal-Appointed Experts?", in Matthias Scherer (ed.) (2019) 37(1) *ASA Bulletin* 50.
[35] Swiss Rules art.28(1).
[36] Swiss Rules art.28(3).
[37] Swiss Rules art.28(4).

The above rules do not prevent the parties from submitting their own expert's opinion as evidence at arbitral proceedings, but make it significantly clear that the opinion of the tribunal-appointed expert will be given preeminent consideration. In consideration of the aforementioned, we believe it is reasonable for the parties to abstain from using the opinion of their own expert as the main source of evidence (with the high cost in time and money that this implies) and to focus their efforts on the interaction with the expert appointed by the tribunal, making use of the instances and rights established by the procedures in order to support their position by counteracting or reinforcing the opinion of said expert.

SIA Standard 150 and the role of the technical expert

In Swiss construction arbitration we find special rules issued by the Swiss Society of Engineers and Architects (SIA) called SIA Standard 150:2018 (SIA 150), that are very interesting. The SIA issues a number of construction contract models that are normally used in Switzerland. In that context they have issued arbitration rules to settle disputes arising in the execution of construction contracts. These are the so-called SIA 150 and which, in their 2018 version, replace the rules previously issued by the SIA in 1977. This new version contemplates a modernisation of the old rules, aligning them with current Swiss law and with the institutional arbitration procedures most commonly used in that country. According to Ehle, the new SIA 150 increases the attractiveness of arbitration as a dispute resolution mechanism for Swiss construction projects. This is because domestic construction disputes are usually submitted to ordinary courts of justice.[38]

Construction arbitrations deal with technical elements that are often beyond the arbitrator's knowledge and practice. The experts appointed by the tribunal (and also the ones appointed by the parties) often give their opinion regarding the facts that originated the dispute and that justify the existence of the arbitration, but it happens in practice that after analysing and evaluating such evidence, other controversies of an eminently technical nature may come to light that require a new analysis and expert opinion. It is extremely costly and inefficient to require the opinion of an expert for each technical controversy, thus requiring a new procedure to designate the expert, with the time and cost that this involves. That is why we believe that the incorporation of a figure such as the technical expert goes in the right direction, since it allows the existence of an expert appointed at the beginning of the arbitration to assist the arbitral tribunal and to assess each and every one of the technical elements that arise during the whole development of the arbitration and not only of the disputed facts that originated the conflict. A technically qualified person is appointed and, when required by the tribunal, gives his opinion based on his technical knowledge and professional experience.

The parties actively participate in their appointment, and may challenge certain nominations, since the technical expert is subject to the same rules that the SIA 150 applies to arbitrators in terms of their duties (art.7) and challenges (arts 8ff).

The rules contemplate that the technical expert has an advisory vote.[39] We believe that this may also be considered an interesting innovation introduced by these

[38] Bernd Ehle, "SIA 150:2018—Modern Swiss arbitration rules for construction disputes" (2018) 36(4) *ASA Bulletin* 895.

[39] SIA 150:2018 art.12(2).

rules. It reinforces the idea that the technical expert is a consultant to the tribunal and that the conclusions reached after analysing the technical information of the case must be considered by the arbitrator at the time of issuing his award. The abovementioned does not imply a transfer of the jurisdictional function of the arbitrator, but it does impose the obligation to consider the expert's opinion at the time of deciding on the dispute. This establishes a transition of the expert's role from an evidence-based role to a consultative role.

In a 2015 decision,[40] the Swiss Federal Supreme Court recognised that arbitrators can be assisted by consultants (and also secretaries) as long as they do not delegate their core decision-making functions. The arbitrator appointed by the parties was an architect who had no legal expertise or experience in arbitration. The arbitrator, within the freedom granted by the procedure, decided to appoint a secretary and a legal consultant, who would support him in procedural matters. According to the Federal Supreme Court:

> "in complex arbitrations of a commercial or technical nature, the arbitral tribunal often calls upon external consultants to help it handle non-legal, delicate issues, which it would not be able to fully master without being backed by experts in the fields concerned, an approach which has obvious advantages but also some risks. … It is admitted moreover that when the parties did not set procedural rules, the arbitral tribunal, which sets the procedure itself pursuant to Art. 182(2) PILA, is entitled to appoint a consultant on its own initiative without requesting their prior consent …"[41]

When addressing the arbitrator consultant, the Swiss Federal Supreme Court relied exclusively on the article published by Bernhard Meyer and Jonatan Baier,[42] which describe arbitrator consultants as "purely auxiliary persons, acting under the auspices and responsibility of the member of the arbitral tribunal who assist arbitrators to translate their factual and legal decisions into the technical or commercial language of the contract, or vice versa"[43].

The decision of the Swiss Federal Supreme Court establishes that the appointment of consultants by the arbitral tribunal, which would be the role of technical experts under the SIA 150, is admissible under the Swiss *lex arbitri* even against the will of the parties, but with a clear limitation: the arbitral tribunal cannot delegate its decision-making function, which belongs solely and exclusively to the arbitrators. Two important conclusions can be drawn from this decision in relation to the role of experts in Swiss arbitration: first, there is an express recognition by the court of the existence and usefulness of the expert consultant, which provides legal certainty and security for the parties involved in the arbitration, especially for the arbitrators who appoint him or her. We do not know whether the authors of the SIA 150 Rules had this court decision in mind when creating the figure of the technical expert in the new version of the rules, but it certainly provides certainty about the validity and admissibility granted by the court, and therefore by the Swiss

[40] 4A_709/2014, Decision of the Swiss Supreme Court of 21 May 2015.

[41] 4A_709/2014, Decision of the Swiss Supreme Court of 21 May 2015, para.3.2.2.

[42] Michael Feit and Chloé Terrapon Chassot, "The Swiss Federal Supreme Court Provides Guidance on the Proper Use of Arbitral Secretaries and Arbitrator Consultant under the Swiss lex arbitri: Case Note on DFC 4A_709/2014 dated 21 May 2016" (2015) 33(4) *ASA Bulletin* 914.

[43] Bernhard F. Meyer and Jonatan Baier, "Arbitrator Consultants—Another Way to Deal with Technical or Commercial Challenges of Arbitrations" (2015) 1 *ASA Bulletin* 40.

lex arbitri, to this institution. Secondly, the fact that the Swiss Federal Supreme Court expressly ruled on this matter indicates that the Swiss legal system attributes special importance to consultants, evidencing that it is a key issue in arbitrations. The role played by consultants in evidentiary matters in arbitration is of such importance that a pronouncement by the Swiss court on their recognition and validity was required.

We believe that the appointment of an expert as a consultant to the tribunal on technical matters goes in the right direction. As Timlin states, according to Meyer and Baier, the consultant may increase the efficiency of arbitration. When an arbitrator can rely on a consultant to help answer technical questions that the arbitrator otherwise would have to spend a significant amount of time researching, the consultant may reduce the length of the proceeding. Also, the time savings could also potentially translate into cost saving for the parties.[44] Considering the relevance of the assessment of technical elements in construction arbitrations, the technical expert in its role as consultant allows the arbitral tribunal to issue better decisions, based on a correct analysis of the technical information of the case and supported by the expert opinion of a professional in the field.

Notwithstanding the foregoing, given the complexity of construction arbitrations, it may happen that the technical elements that have to be analysed during the course of the proceedings are beyond the expertise of the technical expert. The technical expert appointed by the arbitral tribunal at the beginning of the proceedings may not have the technical knowledge of all the elements and information to be examined during the arbitration. Although the nature of the technical elements to be analysed by the expert are known to the tribunal and the parties at the beginning of the arbitration, it may happen that, from the analysis of the data or as a result of other information provided by the parties or other facts that arise during the development of the project, specific knowledge may be required in a field that may be beyond the knowledge of the technical expert already appointed. The technical expert may not have all the knowledge and experience necessary to render an opinion on all the technical elements that will be involved in the arbitration. To overcome the above, the parties and the tribunal may, by application of the principle of autonomy of the parties and procedural flexibility, agree on more case-specific rules on this matter at an early stage of the arbitration such as at the introduction hearing. In this sense, the admissibility of other evidence may be agreed upon in the event that the technical elements of the case are beyond the specific knowledge of the technical expert, such as the submission of reports of experts appointed by the parties or by the arbitral tribunal itself to give their expert opinion on the particular case.

That is why the appointment of the technical expert does not prevent the parties from submitting reports developed by their own expert and even the tribunal may appoint an expert to rule on that specific matter that escapes the technical knowledge of the technical expert. But for the technical expert to be able to efficiently develop his role in the proceedings, we believe that beyond his technical knowledge (essential, by the way) he must be able and have the necessary experience to weigh the reports submitted by other experts and, based on his own analysis, issue an

[44] Tracey Timlin, "The Swiss Supreme Court on the Use of Secretaries and Consultants in the Arbitral Process", Arbitration Law Review (2016) 8 *Yearbook on Arbitration and Mediation* 271.

opinion on the matter in order to support the arbitral tribunal in its decision. We believe that the choice of the technical expert should not only take into consideration his technical knowledge of the subject matter of the arbitration, but also his professional experience and personal skills that allow him to analyse other evidence, mainly reports prepared by other experts, which, although they may be beyond his specific expertise, given his professional preparation, allow him to form an opinion on the matter that can serve as guidance to the arbitral tribunal.

The relevance of the technical expert on the mandatory instruction hearings under SIA 150 Rules

One of the objectives of the SIA 150 Rules is to promote an efficient dispute resolution procedure and the incorporation of the technical experts responds to that objective. A way to make the procedure efficient and for the parties to efficiently reach a solution to their dispute is precisely to avoid the entire arbitration proceedings, which is achieved by motivating the parties to reach an agreement on the dispute. There is a strong emphasis in the SIA 150 Rules to encourage agreement between the parties, even establishing economic incentives to do so, penalising the party who refuses reasonable settlement offers.[45] Several provisions aim at seizing any possible opportunity for the parties to resolve their dispute amicably.[46]Article 13 of the SIA 150 Rules expressly provides that "the arbitral tribunal may attempt at any time to bring parties to a settlement".

In this ideal of promoting efficiency in the resolution of conflicts through agreement between the parties, the technical expert also plays a relevant role. The SIA 150 Rules incorporate a rule of an mandatory instruction hearing[47] which provides that within 30 days of the receipt of the statement of defence or of any reply to the counterclaim, the arbitral tribunal shall summon the parties to oral argument. In the hearing the arbitral tribunal shall make a provisional assessment, based on an examination of the case file, of the chances and risks of the proceedings. The arbitrators provide the parties with a preliminary assessment of the case which includes the arbitrator's view as to the parties burden of proof and the likely outcome of the matter based on the case file. The arbitrator identifies the strengths and weaknesses of each party's case.[48]

In order to ensure that this mechanism effectively promotes agreement between the parties, it is necessary that the preliminary assessment made by the arbitral tribunal on the conflict, evaluating the strengths and weaknesses of the positions of both parties, is carried out in a rigorous manner, analysing in detail the information submitted by the parties. In this assessment made by the arbitral tribunal, it must necessarily analyse technical elements of the dispute, since the dispute between the parties is related to those elements, and the opinion of the technical expert is therefore extremely relevant. It is a major challenge for the arbitrators to be able to achieve a review and analysis of the case file within the 30-day period established in the rules, so it requires the necessary support of the

[45] SIA 150:2018 art.38(3).

[46] Bernd Ehle, "SIA 150:2018—Modern Swiss arbitration rules for construction disputes" (2018) 36(4) *ASA Bulletin* 898.

[47] SIA 150:2018 art.19.

[48] Bernd Ehle, "SIA 150:2018—Modern Swiss arbitration rules for construction disputes" (2018) 36(4) *ASA Bulletin* 899.

technical expert, who will report on the technical elements of the dispute, and in consideration of that opinion, and other provisions, is that the arbitral tribunal can issue a precise assessment of the case and thus invites the parties to reach an agreement.

Construction arbitrations impose the challenge of reviewing a substantial volume of documents and analysing complex elements of the construction projects, so the early appointment in the arbitral proceedings of the technical expert by the arbitral tribunal becomes relevant in order to complete its assignment in a timely manner. In the event that the parties fail to reach an agreement, the arbitration proceedings will have to continue, with the technical expert already appointed accompanying the tribunal during its development. This has implications for the efficiency with which the proceedings should be conducted, since the technical expert will already have preliminary knowledge of the relevant elements of the dispute, thus avoiding the delay involved in the internalisation process to be carried out by the new expert, once the evidence stage is reached. Notwithstanding the aforementioned, the SIA 150 Rules state that the arbitral tribunal's assessment is not recorded in the minutes and is not binding on the arbitral tribunal or the parties in any way.[49] However, the tribunal will have gained precious knowledge and advanced its thinking at an early stage as a result.

The role of the expert in the urgent determination procedure under SIA 150 Rules

As mentioned above, one of the major innovations incorporated in the SIA 150 Rules, which implies an innovation with respect to the most internationally used arbitration rules, is the figure of the urgent determination procedure. In this case, the expert transitions from the position of a consultant to the arbitral tribunal to the role of arbitrator, being empowered to resolve and decide on a matter in dispute (the expert decision maker).

During the execution of a construction project, it is common for discrepancies to arise between the parties in the management of the contract regarding its application. For example, it is usual that there are conflicts related to change of orders, change of the site conditions, breaches in the duty of collaboration, non-performance, among others that have repercussions on the correct execution of the project. The parties are often entrapped in trying to resolve the conflict by focusing their efforts on the dispute rather than on the development of the project. It is usual that these issues remain unresolved and build up until the completion of the project, making their resolution more difficult. In this context and as Ehle indicates, the new SIA 150 provides parties with the possibility of resorting to an urgent determination procedure in which an expert makes a finding on dispute questions within 30 days, thus allowing the parties to plan and act accordingly for the remainder of the project.[50]

It is important to note that only certain issues, specifically indicated in art.1 of the Annex to SIA 150 Rules, can be submitted to the decision of an expert through

[49] SIA 150:2018 art.19.

[50] Bernd Ehle, "SIA 150:2018—Modern Swiss arbitration rules for construction disputes" (2018) 36(4) *ASA Bulletin* 902.

this procedure. The aforementioned article provides that an urgent determination arbitrator render a determination on the following issues:

- whether, according to the relevant contract and in the specific case, there is a unilateral right to change the order on the part of the master and, if so, whether a concrete instruction from the master ordering a construction service (planning, direction of work, execution) can be considered as the exercise of this right;
- whether the exercise of a unilateral right to change the order by the client entails in the specific case a right to adjust the remuneration and, if so, according to which method the agreed firm prices (unit prices, lump sum prices, global prices) must be adjusted to the changed service;
- whether the exercise of a unilateral right to change the order by the principal in the specific case gives rise to a right to adjust the time available for the performance and, if so, how this adjustment is to be measured (including the question of when a contractual penalty agreed on the expiry of the period or term for performance is due);
- whether the principal has breached a duty to cooperate and, if so, whether the contractor is entitled to an extension of the time available for performance (including the question of when a contractual penalty agreed upon at the end of the period or term for performance is due);
- whether there is an event of default which entitles a party to suspend provisionally the supply of its performance to the defaulting party; and,
- whether the provision of a construction service (planning, construction management, execution) was in breach of the contract.

These issues relate to those that generally arise during the execution of construction projects and that require a quick resolution. It is also relevant to note that issues already subject to a pending ordinary arbitration under the SIA 150 cannot be submitted to this procedure. This procedure can only be used in case of urgency, which has to be demonstrated by the party requesting it. The rules establish a presumption of urgency: "Urgency is presumed if the construction activity has already started and cannot expected to be completed within the next six months."[51]

The procedure provides that a claimant may request a positive or a negative determination and the respondent may either object such determination (in part or in full) or itself request a positive or negative declaration.[52] The party which needs to obtain a decision under this procedure may submit a request to the SIA Bureau who shall appoint a construction expert as an arbitrator within five days.[53] As indicated, it is a construction expert who is called upon to know the issue in dispute, and ultimately decide on the dispute. The resolution of the dispute is subject to the decision of an expert, which differs from the typical figure of the arbitrators that make up the arbitral tribunal in ordinary proceedings. The idea of these proceedings is to be able to submit the resolution of a dispute arising from the

[51] SIA 150:2018 art.1(5) Annex.
[52] Bernd Ehle, "SIA 150:2018—Modern Swiss arbitration rules for construction disputes" (2018) 36(4) *ASA Bulletin* 904.
[53] SIA 150:2018 art.2 Annex.

execution of a construction contract to a construction expert, since it considers that these disputes are related to controversies of an eminently technical nature. The period of time that the expert has to resolve the dispute is quite limited (30 days) and therefore in order to issue his decision he only considers technical information submitted by the parties. The annex states that "the arbitrator shall decide on his or her own competence".[54]

Notwithstanding the foregoing, it is important that the resolution of the dispute, no matter how tight the deadlines may be, be subject to a procedure that guarantees a fair process for the parties. For this reason, in addition to the appointment of the expert to resolve the dispute, the appointment of a trained lawyer as the arbitrator's secretary is contemplated.[55] The lawyer accompanies the expert during the resolution of the conflict, contributing from his legal practice to ensure that the principle of equality between the parties is complied with. The expert may conduct the proceedings at his own discretion, but the rules impose the limitation of taking into consideration the urgency of the issue and the respect of the principle of equal treatment of the parties. It is in these matters that the lawyer, who performs administrative tasks during the proceeding, can make a contribution in this regard, allowing the expert to focus his efforts on the analysis and reasoning of the technical information presented by the parties. As in other emergency arbitration proceedings, both the urgent determination arbitrator and the administrative secretary may not act as arbitrators in the ensuing ordinary proceedings, unless otherwise agreed between the parties.[56]

The expert's decisions have the effects of a final award, as stated in the SIA 150 Rules, thus evidencing the role of judge that the expert acquires under this procedure. Without prejudice to the quality of the final award of his decision, the parties may request the review and correction of the expert's decision initiating an ordinary arbitral proceeding under SIA 150 Rules within 30 days of the written notification of the reasons for the urgent findings decision.[57] The binding nature of urgent finding decisions is limited to the scoop of issues submitted to his knowledge (that has to be one of the issues described in art.1 of the Annex). If the decision contains findings on other matters they shall not be binding.

The urgent determination procedure differs from emergency arbitration, which is contained in most institutional arbitration rules, in that the latter is eminently constituted to decide on interim or provisional measures requested by the parties. These provisional measures are intended to preserve the status quo until a final decision is made on the merits of the dispute, so as to ensure that the parties suffer as little damage as possible during the arbitration proceedings and until the final award is issued and enforced. The decisions issued by an emergency arbitrator are of a temporary nature, as they may later be reviewed by the final arbitral tribunal that will rule on the merits of the dispute.[58] Unlike emergency arbitration, the urgent determination procedure only addresses disputes established in the regulations and which arise during the execution of the projects, with the purpose of having them

[54] SIA 150:2018 art.2(2) Annex.
[55] SIA 150:2018 art.2(2) Annex.
[56] Bernd Ehle, "SIA 150:2018—Modern Swiss arbitration rules for construction disputes" (2018) 36(4) *ASA Bulletin* 904.
[57] SIA 150:2018 art.3(1) Annex.
[58] Juan Eduardo Figueroa, "El Arbitraje de Emergencia: Su utilidad y perspectivas futuras", Revista Argentina de Arbitraje, No.1, October 2017.

heard by a construction expert with the powers of an arbitrator, so that in an expeditious procedure he or she may decide on the matter. It does not seek to hear and decide on interim measures, but rather on specific conflicts of common occurrence in the projects, in order to solve them early and efficiently. In this regard, it avoids the parties submitting all disputes to arbitration, which would hinder the fluent development of the project. As stated in the Annex to SIA rules, the expert's decision has the effect of a final award, which is a substantial difference with emergency arbitration. Although there is the possibility that the expert's decision may be reviewed in an ordinary arbitration proceeding, it is intended that the expert's decision be considered as binding for the parties, allowing them to continue with the execution of the project having avoided a conflict that, if they had waited for the constitution of an ordinary arbitration proceeding, could have been more difficult and slow to solve, hindering and delaying development of the project.

As indicated above, the application of the urgent determination procedure redefines the role of the expert in arbitral proceedings. With the faculties granted by the SIA 150, he acquires the quality of an arbitrator to decide on a matter in conflict. He has the power to freely determine the procedure, decide on his own competence and will decide on the dispute by applying his own knowledge of the subject matter and his urgent determination has the effect of a final award (without prejudice to the right of the parties to request the review of such decision as indicated above).

It is in this procedure where the role of the expert in the resolution of a conflict reaches its highest expression. From an eminently evidence role through the preparation of a report requested by the parties (party-appointed expert) to the role of consultant to the tribunal for the evaluation of evidence and analysis of technical information presented during the arbitration (tribunal-appointed expert), the expert ends up deciding on a matter in dispute submitted to him by the parties so that, based on his criteria and experience, he can issue an opinion that has the merit of an award (the decision maker expert). In international practice it is not usual to find this role of arbitrator of the experts, who are rather relegated to an eminently evidentiary role, so it will be interesting to analyse whether the experience gained during the application of the urgent determination procedures introduced by the new SIA 150 Rules will be imitated in the future by the institutional rules of arbitration most used worldwide.

Application of the Swiss experience in international arbitration

The figure of the expert also has application in international arbitration. In this context, the IBA Rules on Taking of Evidence in International Arbitration (IBA Rules) and the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules) specifically regulate the role of experts in arbitration.

Both rules are best practice guidelines that set certain international standards for the production and presentation of evidence, including expert evidence. The IBA Rules follow the common law tradition, with a rather adversarial approach to the production of documents, witnesses and experts (adversarial system) and a

rather passive role for the arbitral tribunal in the administration of the arbitration. The Prague Rules, on the other hand, adopt the civil law approach, whereby the arbitral tribunal is granted inquisitorial powers, which means that the arbitral tribunal adopts a proactive role in the administration of the arbitration.

In relation to the production of expert evidence, the IBA Rules regulate it in greater detail than the Prague Rules, containing more provisions in this regard. In the IBA Rules, experts are considered expert witnesses, which implies that they express their opinions based on their own experience, in order to assist the arbitral tribunal in those matters referred to in their report, unlike an ordinary witness who will testify on the facts, but not from an objective perspective. That is why this guide assigns greater importance to the development of the evidentiary hearing that the expert has to attend. Unlike the Prague Rules, where such rules, influenced by the inquisitorial principle, the expert's performance can be limited to the delivery of his written report.

The main objective of the authors of both the Prague and IBA Rules is to contribute to the arbitration tribunals as well as to the parties, by granting faculties that allow a more efficient administration of evidence, in terms of time and cost. They are intended to provide an efficient, cost-effective and equitable procedure for the taking of evidence in international arbitration.[59] They see as a deficiency of certain litigation proceedings and institutional arbitration rules "the large number of documents submitted, the existence of abundant witnesses and experts, and the formulation of cross-examinations in lengthy hearings".[60] This objective is completely aligned with the ones of the authors of the SIA 150 Rules. Both the Prague Rules and the SIA 150 Rules intend to implement efficient and expeditious procedures in order to reach an effective solution to the parties' dispute, at the lowest possible time and cost.

One of the conclusions reached by the Prague Rules working group, aligned with the conclusions reached by the Woolf Report, was that one of the main factors preventing the reduction of time and costs in arbitration proceedings is the large number of documents submitted, the existence of abundant witnesses and experts, and the formulation of cross-examinations in lengthy hearings.[61] We consider that there are important similarities between the Prague Rules and the SIA 150 Rules, mainly influenced by the fact that both are conceived in civil law legal regimes, which is reflected in the role played by the arbitral tribunal in the development of the arbitration. In addition, there is an important similarity in the objectives set out by the working commissions of both rules: to increase the efficiency of the procedure in order to resolve disputes in the shortest possible time and at the lowest possible cost. Although the IBA Rules were also conceived with this objective in mind, we believe that they do not achieve it satisfactorily, mainly because they have a big influence from the common law practice.

However, in order to achieve an efficient procedure, we consider that the application of certain provisions of the SIA 150 Rules to arbitral proceedings where

[59] Juan Eduardo Figueroa, "La producción de la prueba arbitral: las Reglas de la IBA v/s las Reglas de Praga", Revista Ecuatoriana de Arbitraje, No.11, 2020, p.46.

[60] Guillermo Argerich, Sol Argerich, Francisco da Silva Esteves and Juan Jorge, "Reglas de Praga: nuevas normas de soft law para procedimientos en el arbitraje internacional", p.4.

[61] Guillermo Argerich, Sol Argerich, Francisco da Silva Esteves and Juan Jorge, "Reglas de Praga: nuevas normas de soft law para procedimientos en el arbitraje internacional", p.4.

the Prague Rules and the IBA Rules are applied may be particularly useful. We believe that the treatment given by the SIA 150 Rules to the role of the expert in the proceedings, which is considered a novelty compared to other rules, can be applied in the context of international construction arbitration in order to resolve disputes submitted to arbitration in an expeditious and efficient manner, as a complement rule.

We would argue that the incorporation of a technical expert can increase the efficiency of the process and decrease the associated costs. Both the IBA Rules and the Prague Rules give the expert a primary evidentiary role. As noted above, both provide the possibility for the parties to present their own expert or that the court, on its own motion or at the request of the parties, may appoint them, with the admissibility of both means of evidence jointly. The existence of a tribunal-appointed expert is contemplated, assuming an eminently probative role. It carried out a report in relation to a particular issue and with respect to which there is controversy between the parties. Its participation in the process is determined by the report it submits to the tribunal, analysing the technical information presented and issuing its professional opinion regarding the facts in dispute.

The technical expert, in his consultative role to the arbitral tribunal, can bring efficiency to the proceedings and its application as a complement of the IBA Rules and Prague Rules may be of particular interest. As mentioned above, this expert is appointed by the tribunal at the beginning of the proceedings and accompanies the arbitrators in his role as technical consultant throughout the proceedings. In this regard, the technical elements that arise during the arbitration are known preferably by the technical expert and, based on his weighing of the facts and analysis of the information provided, he issues his or her opinion to the arbitral tribunal. This does by no means eliminate the existence of the party-appointed expert, but it does mitigate his or her participation in the proceedings. The parties are not precluded from submitting reports developed by their own expert, but it is given the same evidentiary value as any other document submitted by the parties. This report submitted by the parties is also analysed by the technical expert and based on his or her experience, and by contrasting the report submitted by the opposing party, if any, and weighing other evidence, he can issue his technical and professional opinion.

We believe that this redefinition of the expert's role as considered under the SIA 150 Rules does bring efficiency to the procedure since it alters the way they are treated in the IBA and Prague Rules. It, in some cases, replaces the hearings and procedural instances where the expert presents his report, which is contrasted by the expert or lawyer of the other party, or even by another expert appointed by the tribunal, which implies the development of long hearings, complicated procedures for the appointment of experts and high costs associated with it. The increase in the efficiency of the proceedings is reflected in the fact that the report submitted by the expert of the parties is considered to be a documentary exhibit submitted by the parties and it is the technical expert who is acquainted with its content and analyses its technical merits, and on the basis of his knowledge informs the tribunal so that it is the latter who decides on the dispute. Only one expert is appointed by the tribunal during and at the beginning of the proceedings, and only

this expert is responsible for knowing the technical elements of the case that are presented during the arbitration. We believe that in this way part of the objectives proposed by the Prague Rules working group is achieved, in the sense of eliminating "the existence of abundant witnesses and experts" and "the formulation of cross-examinations in lengthy hearings".

If this recommendation is followed, the IBA and Prague Rules should be complemented with the Swiss approach of the tribunal-appointed expert, granting him a consultative role throughout the whole proceedings.

The application of one set of rules or another will depend on each particular case, on the legal traditions of the parties involved, as well as on the more or less active role to be given to the arbitral tribunal. As noted above, both the Prague Rules and the IBA Rules can be applied perfectly well in a complementary manner which is expressly recognised by both rules. The preamble to the Prague Rules states that "[t]he Prague Rules are not intended to replace the arbitration rules provided by various institutions and are designed to supplement the procedure to be agreed by parties or otherwise applied by arbitral tribunals in a particular dispute",[62] in turn, the IBA Rules, indicate in the preamble that "[t]hey are designed to supplement the legal provisions and the institutional, ad hoc or other rules that apply to the conduct of the arbitration".[63] In the same way they can also be applied harmoniously with the SIA 150 Rules. There is no incompatibility between the rules, rather there is an alignment between the objectives pursued by all of them: better administration of arbitration, which translates into an efficient procedure, saving costs and time. As they are soft-law rules, and considering that they are guidelines or directives, it is best to adapt them to each case, taking into account the particularities that they may have, taking aspects of common law or other elements familiar with civil law, so that the production of evidence, especially expert evidence, is adjusted to the specific circumstances of each dispute.[64]

Conclusions

Experts have a relevant role in arbitrations, especially in construction arbitrations, where technical elements are part of the facts of the case. These technical elements are highly complex and sophisticated and the arbitral tribunal necessarily requires the assistance of experts in the field in order to analyse all the evidence submitted and issue their award. The dilemma of who appoints the expert (the parties or the arbitral tribunal), what role they will play in the proceedings and which alternative they will prefer to the other, is present in the modern discussion on international arbitral practice.

In this regard, we believe that the figure of the technical expert, incorporated by the new SIA 150 Rules, is an efficient response to this dilemma. This Swiss innovation, which considers redefining the role of the expert as a consultant to the arbitral tribunal on technical matters, can bring efficiency in the handling of evidence in international arbitrations, since it can dispense with the presentation of repeated reports of various experts, avoiding the proliferation of such experts

[62] Prague Rules p.3.
[63] IBA Rules p.7.
[64] Juan Eduardo Figueroa, "La producción de la prueba arbitral: las Reglas de la IBA v/s las Reglas de Praga", Revista Ecuatoriana de Arbitraje, No.11, 2020, p.60.

in the proceedings. The analysis of the technical elements of the case are known by this expert, with respect to whom the parties participate in his appointment, who advises the arbitral tribunal throughout the proceedings and with his advisory vote, serves as a guide to the arbitrators to issue a decision based on technical matters and objective analysis of the data submitted by the parties. Its application cannot be limited only to construction arbitrations, being perfectly compatible with other types of arbitration, especially with commercial arbitration.

The urgent determination procedure contemplated in the SIA 150 Rules is a novelty in arbitration. In this regard, the expert redefines his role in procedural matters in that he is given the authority to resolve a dispute submitted to his knowledge. This is the expression of the expert decision-maker. As an expert in construction matters, he is called upon to resolve practical problems that commonly arise during the execution of construction projects. It is an efficient and fast method to solve eminently practical conflicts and that its early solution avoids a hindrance in the development of the project. We believe that the incorporation of a procedure of these characteristics, which as we noted above differs from the emergency arbitration commonly used in international arbitration practice, can be a tool that helps to increase efficiency in the development of construction and engineering projects, avoiding conflicts that usually occur during the execution of projects, and which can be easily and quickly resolved, to escalate to arbitration itself, with the economic cost and time lost that this entails and consequently hindering the execution of the project.

Finally, we believe that the redefinition of the role of the expert introduced by the SIA 150 Rules are perfectly compatible with the aforementioned soft-law guides, such as the IBA Rules and the Prague Rules. The parties are free to incorporate the elements of each instrument they deem necessary, in order to adapt each rule to the particular circumstances of each case. In addition, the urgent determination procedure may be adopted by the parties to the proceeding as part of the dispute resolution mechanisms, without this being incompatible with the implementation of institutional arbitration rules. The complementarity that can be produced between all the instruments can imply an efficient resolution for the particular conflicts that arise between the parties, adapting them to each particular case.

Both the technical expert and the urgent determination procedure are perfectly compatible with modern international practice and their use in international construction arbitrations can directly benefit the parties involved. We believe that their implementation responds directly and efficiently to the objectives pursued by both the institutional rules of international arbitration and the aforementioned best practice guidelines: an increase in the efficient management of arbitrations which translates into cost savings and time reduction.