Kluwer Arbitration Blog

A Teaching Session for the Efficient Management of Technical Evidence in International Arbitration

Klaus Peter Berger (University of Cologne, Center for Transnational Law (CENTRAL)), John Gilbert (Bracewell LLP), Julian Lew (20 Essex Street and Queen Mary University of London), Michael McIlwrath (MDisputes), and David Perkins (JAMS International) · Friday, January 18th, 2019

Experts play a pivotal role in many international arbitrations. Usually, they are there to testify what went wrong. However, their know-how of the subject matter of the arbitration and their technical expertise may also be used to explain what went right. One approach to giving an arbitral tribunal the benefit of such an explanation, when confronted with complex technical questions that extend beyond the members of the tribunal's own training, is for them to appoint their own expert. This is, of course, permitted by the IBA Rules on the Taking of Evidence and most arbitration rules. Another approach is for the experts retained by the parties to provide that explanation and training directly to the tribunal, so that they do not feel the need for their own expert and are, as a consequence, more capable decision-makers.

The co-authors of this post were the arbitral tribunal and counsel in an LCIA international arbitration that took the latter approach, and which ended in an award issued over three years ago. We write to describe our experience with a so called "**teaching session**" in that case, and to recommend it for consideration in all cases involving a high quantity of technical evidence.

This was not the first time that some of the co-authors had used or participated in an arbitration where some form of teaching session was adopted. While one of the co-authors first saw it used approximately 20 years ago, we do not know its origin, and are surprised the technique is not employed more frequently, especially in disputes over technology. We are not aware of any formal or published guidelines for it, and therefore offer our own at the conclusion of this post, with apologies if we tread on ground that someone else has already covered.

Our arbitration

The arbitration in which we all participated had arisen under an agreement to jointly develop cutting-edge technology in subsea oil and gas extraction. The dispute was over claims of ownership of key design elements, and a patent obtained by one of the parties Almost all of the evidence was technical, consisting of expert reports submitted by each side and ample engineering materials generated by the parties in the course of their contractual relationship.

While relations among counsel were cordial, we cannot understate the importance of the

technology and the relevance of the dispute to the businesses represented in the arbitration. This was a bitterly contested dispute that was seen by the clients as critical to their future business. The parties had specifically appointed arbitrators known for their experience in cases involving technology.

In our arbitration, the arbitral tribunal, with the consent of the parties' counsel, reserved the morning of the first day of the hearing for a "teaching session" with language similar to the following in its procedural order:

> *With the consent of the Parties, the Arbitral Tribunal may reserve all or a portion of the first day of the hearing or some other convenient time during the proceedings for an off-the-record (non-transcribed) session with the Parties' experts and key technical witnesses to understand [_____] that is the subject matter of the dispute. This "teaching session" shall not be used to advance or defend any of the requests in the arbitration, but merely to aid the Arbitral Tribunal in its ability to grasp the [technical issues] in dispute. Neither the Parties nor the Tribunal shall refer on the record to the teaching session or statements made therein, whether during the hearing or in subsequent submissions.*

Should the teaching session be recorded?

Knowledge of the technical issues was distributed across the parties' external experts and their internal engineers, and it appeared sensible that both groups should be included in a teaching session if it was to cover all aspects of the technology.

From the perspective of the parties' counsel*:* we shared with each other our initial trepidation about the arbitrators engaging in open discussion with our experts and witnesses without having a record of it.

From the perspective of the tribunal*:* we initially expressed a desire to have the session recorded for our subsequent reference, even if off the record.

In the end, the parties and tribunal agreed simply that none of the session would be transcribed or recorded, and nothing in the session could be quoted or referred to when on the record. While a complete off-the-record rule was reached as a compromise, we believe it was a main contributor to success.

Free of the constraints and adversarial nature of the subsequent hearing, the atmosphere of our teaching session was collaborative and interactive, more conference room than a hearing room with participants all on the same ground and engaged in a fact-based educational co-presentation rather than one side physically or metaphorically raised above the others. Since the discussion was not on the record, counsel did not interfere except to offer helpful clarifications, for example by identifying where pertinent documents could be found in the hearing exhibits.

In our case, the parties had provided 3D models and a computer simulation of the technology as exhibits, and the tribunal and experts interacted together with the models. From the view of all

concerned, the presence of 3D models at the teaching session was highly useful, facilitating the tribunal's appreciation of what the design features of the equipment were intended to accomplish, what the equipment looked like, and how it would fit together with other parts of the system.

Each party was given advance notice of the model/simulation to be put forward by the other party to ensure that they were not controversial, and an opportunity to inspect them at the hearing location before the teaching session commenced.

From a practical point of view, a teaching session would have posed a significant challenge for the stenographer if it had been conducted on-the-record. The free-flowing conversation of several people pointing at different parts of 3D objects either would have required a markedly slower pace with formal designations of each speaker or would have resulted in a muddled transcript that failed to capture the discussion.

Perspectives on the teaching session

In the eyes of all members of the tribunal and counsel, the first day of the actual hearing was conducted with the proficiency typically seen only at the last day of a hearing, if at all. Not only did the arbitrators all have a shared, high-level understanding of the disputed technology from day one, but counsel (and experts and witnesses) did not feel obliged to over-explain technical matters. Little time was needed, and none was lost, in getting to the key technical points in dispute.

***From the perspective of the counsel**:* the hearing that followed was conducted by a hot bench that centered quickly on the most salient technical issues, moved the proceedings quickly, and saved our clients' money by ending earlier than anticipated. For example, it had originally been suggested that a "hot tubbing" session should be carried out with the two expert witnesses – this was unnecessary because the tribunal had had the opportunity to present their questions that they wanted to be asked to the expert witnesses during their testimony as a result of their improved understanding of the technical issues following the teaching session. We also felt their award could have been written by engineers with a competent grounding in the underlying technical dispute. While counsel could take issue with some of the conclusions reached in the award, there would not be issues relating to a failure to appreciate the disputed technology.

***From the perspective of the arbitrators**:* the teaching session provided the perfect start into the hearing as it allowed us to develop a profound understanding of the complex technology of the subject matter of the dispute and to clarify questions that had arisen during their study of the parties' briefs early on. For example, the parties had used a particular term in their briefs to describe the way in which the technology was applied. As a result of the dialogue with the experts the arbitrators' doubts as to the meaning of that term were quickly removed and we understood that behind the use of the term was a fascinating technological concept for the relatively easy maintenance of complex machines.

At the same time, that dialogue at the outset of the hearing and the collaborative atmosphere in which it took place allowed the tribunal members to establish good rapport with the experts and engineers from both sides. That clearly improved the atmosphere during the subsequent, more formal parts of the hearing. The members of the tribunal sensed that the collaboration from the teaching session also further improved the work atmosphere between the experts who had presented a joint expert report at the request of the tribunal.

Suggested guidelines for conducting a teaching session

From the authors' perspective, the types of cases that may benefit from a teaching session are principally technology cases or other cases where there is a large volume of technical evidence, on which the case turns. A teaching session is likely to be particularly helpful where the technology/technical issue is addressed by factual and expert witnesses.

Based on our experience, we suggest the following guidelines below can help ensure the success of a teaching session.

– ***Who should propose the session?*** Either the tribunal or parties can propose a teaching session at any time before the hearing, and may be planned as early as the first procedural order. We have provided a suggested text at the beginning of this post. We do believe, however, that consent of all parties should be a necessary requirement, as we are skeptical that a teaching session will be successful if one side is an unwilling participant, as it relies on a considerable degree of co-operation and a desire on both side to make it work.

– ***When should it be conducted?*** We believe the best time is the outset of the hearing, but do not rule out the possibility of it taking place at any time the tribunal and parties feel it would be most appropriate.

– ***Who should "teach"?*** We suggest that cases may differ, and tribunals should ask the parties to propose those they believe are best able to explain the technology to lead the teaching session. These may be engineering witnesses who have considerable experience with the disputed technology, employees with technical backgrounds who are not witnesses, or the parties' external experts. In our arbitration, the parties' engineers, who were later witnesses in the case, participated in the teaching session, and all concerned felt this was enhanced the process and the tribunal's understanding of the technology. It will often be the case that the parties' own engineers are the "real experts, with the deepest understanding of a particular technology and ability to explain it.

– *"Off the record," i.e., no transcript.* We recommend parties and tribunals consider the impact that recording or memorializing the teaching session may have on the open collaboration between experts and tribunal (and the willingness of counsel to accede to this) and also the logistical challenges this can present. The teaching session is effective because it is conversational, and in conversation people often speak with imprecision as they try to best communicate their ideas. The purpose of the teaching session, after all, is to help the tribunal get up to speed on the disputed technical issues, not to win the case. Being off the record also allows the parties' counsel to relax, and not rigorously supervise the experts and witnesses. In our case, the counsel may well have not consented to the teaching session taking place as it did, had the tribunal insisted on it being recorded. Further, because the teaching session is a collaborative process, obtaining a clean transcript may pose significant challenges, especially where the tribunal and experts interact together around exhibits.[1)]

– *Staying off the record.* What is said in the teaching session, should stay in the teaching session. Because the teaching session is so effective in providing a common understanding of the technology, counsel and the members of the tribunal may be tempted to refer back to what was explained informally. Thus, both counsel and tribunal should be alert to any reference to what was

"illustrated during the teaching session".

– ***No pleading.*** The tribunal should emphasize that no party may use the session to plead its case. The purpose of the session should be purely for purposes of the arbitrators on the technology in dispute, and counsel's involvement should be mainly hands-off.

To conclude, we believe that teaching sessions, when conducted with the consent and active involvement of the parties, can be a very effective means of making an arbitral hearing more efficient and lead to higher-quality awards by tribunals that have a better understanding of the disputed technical issues.

References

?1 The authors are not unanimous in their view that, on balance, it is generally better not to record the teaching session. One of the arbitrators has found recording the tribunal's interaction with the experts to be helpful later in the case.

This entry was posted on Friday, January 18th, 2019 at 5:00 am and is filed under Evidence, Hearings, Teaching Session
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.