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Aims & Scope
Switzerland is generally regarded as one of the World’s leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world’s best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

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Books related to the topics discussed in the Bulletin may be sent for review to the Editor (Matthias SCHERER, LALIVE, P.O.Box 6569, 1211 Geneva 6, Switzerland).
Arbitrator Consultants – Another Way to Deal with Technical or Commercial Challenges of Arbitrations

BERNHARD F. MEYER*, JONATAN BAIER**

I. Starting Point

Contemporary international arbitration often deals with cases involving complex issues of a specialized and technical nature. As a result, in order for the arbitral tribunal to reach an accurate understanding of the relevant technical or commercial aspects, it is often necessary for the parties to appoint technical or commercial specialists as arbitrators, or to educate the arbitration panel on the technical or commercial aspects of their dispute.

The first option, the appointment of one or several technically or commercially qualified arbitrators (specialist arbitrators), is used relatively rarely. The second option, the appointment of independent experts by the parties (party experts) or by the arbitral tribunal (tribunal experts) is by far the preferred method, at least in international commercial arbitration. The reason for this preference of experts over specialist arbitrators is unclear, but one may guess that the parties prefer procedural specialists (often lawyers) over technical or commercial specialists as arbitrators, because a commercial case rarely turns on a single technical or commercial issue. Modern cases typically involve a mix of factual, procedural, technical, commercial, contractual and even cultural issues. There may be a concern that specialist arbitrators tend to be too focused on the purely technical or commercial aspect of a case, thus losing sight of the “full picture”. In addition, it is often easier for the parties to adduce technical or commercial know-how in the form of expert opinions to an arbitration panel that is composed of procedurally trained lawyers, than the other way around.

Be that as it may, specialist arbitrators may be a good way to bring technical expertise into an arbitration panel when the technical or commercial

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1 The authors wish to thank Mr. Alexander Gordon, Zurich, for his critical review, particularly with regard to the English language. Mr. Gordon has no responsibility for the content of this article.
issues are clearly predominant or when the arbitral tribunal has to deal with specific trade-related questions (e.g. specialist insurance or banking practices).

As to experts, the appointment of independent party experts is predominant in today’s arbitration world. This is because technical or commercial experts are often already needed by counsel for the preparation of their case and the same experts may then provide further service as party appointed experts.

For arbitral tribunals, the downside is that party appointed experts – more often than not – come to different conclusions concerning the subject matter of the dispute. This is mainly because party appointed experts are typically provided different factual and legal scenarios ("assumptions") by counsel for their expert opinions. The arbitral tribunal then has the problem of basically having to choose between the two solutions offered by the party appointed experts, and only those solutions. Thus, things get very difficult for the arbitral tribunal if it comes to the conclusion that neither the assumptions of Claimant’s expert nor those of Respondent’s expert adequately reflect the facts and legal issues that the arbitral tribunal deems relevant at the end of the evidentiary hearing. The arbitral tribunal is then challenged by the need to deduce from the parties’ experts’ opinions the correct technical or commercial understanding and apply such understanding to the fact pattern that the arbitrators deem relevant and proven. This is the point – basically right before and during the deliberation stage – where the role of a consultant to the arbitral tribunal (“Arbitrator Consultant”) becomes important.

He may now be used by the arbitral tribunal to assist it in calculating its own solution, based on the tribunal’s own assessment of the case. At such point, the arbitral tribunal normally has a thorough understanding of the technical or commercial issues that are at stake in the case. However, a panel composed of lawyers normally lacks the technical or commercial expertise to

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5 In order to enhance the reader-friendliness of this article, the authors have decided to refer to an Arbitrator Consultant only by using the masculine pronouns (he, his) although it is well understood that there can be both male and female Arbitrator Consultants. When a masculine pronoun is used this shall equally refer to female and male Arbitrator Consultants.
calculate and convert into figures, or reflect in a technically or commercially suitable formula, the solution considered to be correct.

What can or should be done under such circumstances?

Several techniques have been developed by arbitral tribunals to overcome the aforementioned impasse:

a) One is that the arbitral tribunal appoints its own independent expert (tribunal expert) who critically examines the party experts’ positions, and comes up with what he considers to be the correct result. In essence, such approach bypasses the arbitral tribunal completely and delegates the decision-making power to the tribunal’s expert. Also, because the findings of a tribunal appointed expert are his and not the arbitral tribunal’s, such expert must defend his report in cross-examination at a (further) hearing. Needless to say that such procedure is time consuming and costly. Apart from that, it is often again the arbitral tribunal that must determine why and to what extent it wishes to follow the different expert’s (contradictory) conclusions, which may be another technical or commercial challenge by itself.

b) Another way is that, instead of appointing its own expert, the arbitral tribunal uses the party appointed experts to prepare new calculations, or convert into a technical or commercial formula, facts deemed relevant and proven by the arbitral tribunal. In simple cases, this can be accomplished by way of witness conferencing with the two party appointed experts. In more complex cases, the party experts have to submit, either individually or as a team, their new findings, based on the arbitral tribunal’s assumptions, to the arbitral tribunal and to the parties following the hearing.

c) Some hybrid-forms have also been developed in practice, known as “expert teaming”. At an early stage of the proceedings, the arbitral tribunal invites both parties to provide a short list of candidates from which the arbitral tribunal then chooses two (one from each list). The two candidates are appointed as a team by the

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The downside of all the techniques described under a. - c. above is that party appointed or party nominated experts sometimes wish to remain loyal to their instructing parties or previously expressed opinions. This makes it difficult for them to reach consensus on new assumptions that are submitted to them by the arbitral tribunal. Nevertheless, these methods have proven to be successful in a number of cases known to the authors, and particularly when party experts or party nominated experts are forced to act as a team, they often are able to agree on important technical conclusions or the commercial impact that the arbitral tribunal’s assumptions have on the end result. However, by openly providing new assumptions to the parties’ or the tribunal’s experts, and asking them to report thereon individually or as a team, the arbitral tribunal prematurely reveals its thinking or key decisions on certain factual or commercial issues, which may not be desirable at that stage.

Thus, another way is advocated here. The Arbitrator Consultant acts as an assistant to the arbitral tribunal, but “behind the scenes” and without the arbitral tribunal prematurely disclosing its thinking to the parties. In this article we undertake to describe the appointment and functioning of one or more Arbitrator Consultants to the arbitral tribunal. A major advantage of this system is that the costs associated with Arbitrator Consultants are normally quite minimal as compared to the appointment of tribunal experts or re-using party experts to issue and defend new reports based on the tribunal’s new assumptions.

Sometimes, particularly in very large and very complex arbitrations, Arbitrator Consultants may be appointed, in addition to party experts and/or tribunal experts, right from the start. In such cases, some of the cost advantages mentioned herein may, of course, not become effective.

II. Tasks of Arbitrator Consultants

An Arbitrator Consultant is a person with the necessary know-how to support the arbitral tribunal internally on its path towards issuing a technically or commercially sound award.

The Arbitrator Consultant is not appointed or acting as an expert. He does not produce a report and does not exercise any decision-making power

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7 See ANDREA MEIER, Assistance to the Tribunal: an Overview, ASA Special Series No. 42, Inside the Black Box: How Arbitral Tribunals Operate and Reach Their Decisions, p. 79 et seqq.
within the arbitral tribunal. Rather, Arbitrator Consultants are purely auxiliary persons, acting under the auspices and responsibility of the members of the arbitral tribunal. Arbitrator Consultants assist arbitrators to “translate” their factual and legal decisions into the technical or commercial language of the contract, or vice versa. Like an administrative secretary who is responsible for providing administrative and logistical support to the arbitral tribunal, Arbitrator Consultants work “within” the arbitral tribunal. Contrary to an administrative secretary, however, Arbitrator Consultants do not belong to the arbitral tribunal.

The tasks of an Arbitrator Consultant may be manifold, including inter alia:8

- Assisting arbitral tribunals in their preparations for hearings;
- Coordinating the use of party experts;
- Participating at hearings and assisting the arbitral tribunal’s questioning process with respect to party-appointed expert witnesses;
- Assisting with the drafting of the terms of reference for a tribunal appointed-expert, if any;
- Assisting in the critical assessment of any kind of expert reports;
- Answering technical or commercial questions from the arbitral tribunal;
- Participating at deliberations of the arbitral tribunal to the extent needed to fulfil their functions;
- Assisting in the drafting of certain parts of the award to avoid technical or commercial errors.

III. Typical areas for Arbitrator Consultants

While Arbitrator Consultants may be an appropriate tool in any arbitration of a technical or commercial nature, the following areas have — in our experience — proven to be highly suitable for the use of Arbitrator Consultants:

- Long-term energy cases (for example regarding price revisions);

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- Intellectual property cases (for example regarding patent infringements);
- Construction cases (for example regarding critical path issues, damage calculations, etc.);
- Research and development cases (for example regarding ownership in know-how, chemical and technical formulas, and the like).

IV. Advantages and risks of Arbitrator Consultants

The appointment of an Arbitrator Consultant may have the following advantages:

- Saves time and money, compared to tribunal-appointed experts;
- A flexible information tool for the arbitral tribunal;
- No premature disclosure of the arbitral tribunal’s thinking or findings to the parties (as possibly would be the case by the need of drawing up terms of reference for a tribunal-appointed expert or for forming expert teams);
- Assures the technical or commercial soundness of the final award;
- Avoids lengthy proceedings regarding the correction of an award due to technical or commercial misunderstandings or errors;
- Avoids the risk of the arbitral tribunal seeking assistance from unofficial “shadow” sources regarding technical or commercial aspects.

On the other hand, the appointment of an Arbitrator Consultant may also entail certain risks, particularly for the parties:

- Lack of transparency of what he actually does within the arbitral tribunal;
- Lack of control over his findings;
- Additional costs for unknown services.
V. Legal framework

A. Legal framework for the appointment of an Arbitrator Consultant

1. Preliminary remarks

As a starting point, it is important to define the legal limits within which an Arbitrator Consultant is to assist the arbitral tribunal. We shall examine the arbitration law of the *lex arbitri* and the Rules of Arbitration of the International Chamber of Commerce (“ICC Rules”), the Swiss Rules of International Arbitration (“Swiss Rules”) and the IBA Rules on the Taking of Evidence in International Arbitration (“IBA Rules of Evidence”).

While it is undisputed that the parties may always agree to the appointment of an Arbitrator Consultant, the relevant question at hand is to what extent legal frameworks allow the arbitral tribunal to appoint an Arbitrator Consultant on its own, i.e. *without* party approval. In this connection, a closer look is taken at the Swiss and English regulations because, interestingly, they are different on the pertinent point.

2. Lex arbitri

2.1 Switzerland

If an arbitration tribunal is seated in Switzerland, the Swiss legal system provides the parties with the fullest possible degree of freedom with regard to the applicable procedural rules.

Article 182(1) of the Swiss Private International Law Act ("PILA") provides that parties may, either directly or by reference to rules of arbitration, determine the arbitral procedure. If the parties have not defined the procedure, the arbitral tribunal shall determine it, either directly or by reference to a statute or to rules of arbitration (Article 182(2) PILA). The only requirement is that the arbitral tribunal ensures – as core procedural guarantees – equal treatment of the parties and their right to be heard in adversarial proceedings (Article 182(3) PILA).

There are no specific provisions in the Swiss arbitration law regarding the appointment of Arbitrator Consultants.
From this, we may draw the following conclusions regarding the right of an arbitral tribunal to appoint an Arbitrator Consultant on its own initiative:  

1. If the parties have determined the procedure of the arbitration directly, by establishing the rules themselves (Article 182(1) PILA), and these rules do not contain any right for the arbitral tribunal to appoint an Arbitrator Consultant (or any other type of consultant), then the arbitral tribunal shall first obtain the parties’ consent to do so.

2. If the parties determined the rules of the arbitral procedure indirectly, by referring to established rules of arbitration (Article 182(1) PILA), and the applicable rules do not contain any right for the arbitral tribunal to appoint an Arbitrator Consultant (or any other type of consultant), then the arbitral tribunal shall again first obtain the parties’ consent to do so.

3. If the parties have not determined the procedure, the arbitral tribunal is authorized to determine it on its own (Article 182(2) PILA), either directly or by reference to a statute or established rules of arbitration. Here, since the power to make or designate the rules is fully vested in the arbitral tribunal, it may appoint an Arbitrator Consultant (or any other type of consultant) at its own initiative. In this scenario, the parties’ prior consent is not required.

2.2 United Kingdom

On the other hand, if an arbitration tribunal is seated in the United Kingdom, the UK Arbitration Act of 1996 contains explicit regulations on Arbitrator Consultants or “assessors” as they are there called.

Section 37(1) UK Arbitration Act states the following:

“(1) Unless otherwise agreed by the parties –

(a) the tribunal may –

(i) appoint experts or legal advisers to report to it and the parties, or

(ii) appoint assessors to assist it on technical matters, and may allow any such expert, legal adviser or assessor to attend the proceedings [emphasis added]; and

(b) the parties shall be given a reasonable opportunity to comment on any information, opinion or advice offered by any such person.”

Thus, English law draws a distinction between tribunal-appointed experts and assessors assisting on technical matters and vests the arbitral tribunal with the basic right to appoint such auxiliary persons. In this connection, the Chartered Institute of Arbitrators (CIArb) issued its practice Guideline 10 (“Guideline”) inter alia on the use of assessors.\textsuperscript{10} While the function of an assessor is described to be in many respects similar to that of an expert, namely to give impartial information or advice to the tribunal on technical matters within his or her expertise, it lists the following differences: i) no drafting of a written report; ii) sitting with the tribunal during the hearing; iii) not giving evidence and not being questioned by the parties, and iv) not being part of the arbitral tribunal which must make up its own mind on the advice.\textsuperscript{11}

While the UK Arbitration Act of 1996 gives the arbitral tribunal the power to appoint an assessor on its own, it notes at the same time that the parties shall be given a reasonable opportunity to comment on any information, opinion or advice offered by the assessor. As there is a danger that the arbitral tribunal could decide a case based on private advice given by an assessor, the Guidelines recommend using assessors only in cases where the technical issues are exceptionally complex or difficult. In addition, the Guidelines recommend that the role of the assessor and the procedure to be followed should be agreed and laid down in advance between the arbitral tribunal and the parties.\textsuperscript{12}

3. Arbitration Rules

3.1 ICC Rules

According to Article 25(4) of the current ICC Rules:

“[t]he arbitral tribunal, after having consulted 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.”

\textsuperscript{10} Chartered Institute of Arbitrators (CIArb), Practice Guideline 10: Guidelines on the use of Tribunal-Appointed Experts, Legal Advisers and Assessors. See also PHILLIP CAPPER, Assessors in Arbitration and equivalent roles, conference binder for ASA conference of 1 February 2013.

\textsuperscript{11} Guidelines, N 5.1.

\textsuperscript{12} Guidelines, N 5.2 et seq.
This provision clearly addresses the appointment of an expert by the arbitral tribunal. The ICC Rules are, however, silent as to the possibility of the tribunal appointing an Arbitrator Consultant. On the other hand, the ICC Rules do not exclude such appointment either.

One may argue that the rules as set forth regarding tribunal-appointed experts should also apply for a tribunal-appointed Arbitrator Consultant. This would mean that an arbitral tribunal, after having consulted with the parties, could appoint an Arbitrator Consultant on its own. We think that such interpretation would be too broad because the safety net with regard to tribunal-appointed experts – the filing of a written report to be scrutinized by the parties and the parties’ right to question such expert at a hearing – does not come into play for Arbitrator Consultants.

Accordingly, if the parties have chosen the application of the ICC Rules, we are of the opinion that the arbitral tribunal may only appoint an Arbitrator Consultant with both parties’ consent.

3.2 Swiss Rules

As regards tribunal-appointed experts, the Swiss Rules state the following in Article 27(1):

“The arbitral tribunal, after consulting with the parties, may appoint one or more experts to report to it, in writing, on specific issues to be determined by the arbitral tribunal.”

There is no specific regulation on Arbitrator Consultants in the Swiss Rules.

Thus, while being similar to the respective provision in the ICC-Rules, the Swiss Rules require any tribunal-appointed expert to report in writing on specific issues determined beforehand. On this basis, some authors have concluded that the appointment of an Arbitrator Consultant to the arbitral tribunal would be prohibited by the Swiss Rules as a “general assisting” expert – a role similar to an Arbitrator Consultant – was not allowed. Nevertheless, it is the prevailing view that – based on explicit party agreements – the arbitral tribunal may appoint experts and consultants respectively under the Swiss Rules.13

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Accordingly, if the parties have chosen the application of the Swiss Rules, the arbitral tribunal may appoint an Arbitrator Consultant only with the agreement of both parties.

3.3 IBA Rules of Evidence

The IBA Rules of Evidence deal with tribunal-appointed experts in Article 6 in a similar manner as both the ICC Rules and the Swiss Rules. By contrast, they do not contain any provision on Arbitrator Consultants.\(^{14}\)

Thus, in case the parties agreed to the application of the IBA Rules of Evidence, the arbitral tribunal may appoint an Arbitrator Consultant only if both parties consent to such course of action.

4. Conclusions

From the foregoing analysis of the legal framework, we may conclude that:

- Most of the arbitration laws and most institutional arbitration rules examined do not stipulate a right of the arbitral tribunal to appoint an Arbitrator Consultant without party consent. The arbitral tribunal may only appoint an Arbitrator Consultant after the parties have agreed to such course of action (the exception being the UK Arbitration Act and some UK rules);\(^{15}\)
- The same also applies if the parties have determined the rules of the arbitral procedure directly and if these agreed rules do not provide for a right of the arbitral tribunal to appoint an Arbitrator Consultant;
- Only if the parties have left the setting of the rules of the arbitral procedure entirely to the arbitral tribunal – i.e. the parties have neither directly nor indirectly determined such rules – may the arbitral tribunal appoint an Arbitrator Consultant on its own.

Even if it is possible for an arbitral tribunal to appoint an Arbitrator Consultant on its own initiative, such right is of a rather theoretical nature. It is always recommended to have the parties’ consent and agreement on the procedure as will be shown below. This is particularly true because the appointment of an Arbitrator Consultant regularly entails additional costs that the arbitral tribunal may subsequently wish to recover from the parties.

\(^{14}\) Tobias Zuberbühler/Dieter Hofmann/Christian Oetiker/Thomas Rohner, IBA Rules of Evidence, Article 6 N 1 et seqq.

\(^{15}\) See for example the construction industry model arbitration rules of 1998 (for use with arbitration agreements under the UK Arbitration Act of 1996), Article 4.2.
B. Relevant principles regarding appointments

The use of Arbitrator Consultants requires the parties to place considerable trust in the integrity of the arbitral tribunal, because the parties cannot genuinely control the manner in which the arbitral tribunal and the Arbitrator Consultant cooperate with each other. The parties accept a certain lack of transparency and control.

Thus, with regard to the appointment of an Arbitrator Consultant, it is important that certain key principles are clearly stated and adhered to by the various players:

1. The duty to decide must remain solely with the arbitrators

One of the key duties of each appointed arbitrator is to adjudicate the dispute between the parties himself. The arbitrators cannot hand over such duty to any auxiliary person or third party. Thus, it is for the arbitral tribunal to ensure that no decision is transferred – either explicitly or impliedly – to the Arbitrator Consultant. Rather, the latter may only be used as a “translator” or “converter” of the arbitral tribunal’s decisions to the specific technical or commercial language of the contract in dispute.

2. Impartiality and independence

An Arbitrator Consultant must remain impartial and independent from the parties, their legal advisors and the arbitral tribunal at all times. Similar to the requirements for tribunal-appointed experts, it is recommended that an Arbitrator Consultant signs a statement of independence and impartiality prior to his appointment. In that statement the Arbitrator Consultant should disclose any facts or circumstances that may raise doubts as to his impartiality and independence in the eyes of a party.

3. Confidentiality

Arbitrator Consultants will often need access to certain relevant documents in order to fulfil their tasks. The Arbitrator Consultant should undertake to keep all information and documents to which he is given access as confidential. Accordingly, the Arbitrator Consultants should also sign a confidentiality clause prior to an appointment.

16 See e.g. Article 6(2) IBA Rules of Evidence.
4. **Remuneration**

The form of remuneration should also be discussed and disclosed in advance. Usually, an hourly fee will be arranged, but other remuneration plans are certainly possible.

VI. **The Arbitrator Consultant in practice**

A. **Preliminary remarks**

In the following, we shall outline how the tool of an Arbitrator Consultant may properly be implemented in complex arbitration cases.

Such implementation was recently field-tested *inter alia* in a major international energy price review case where the appointment of two Arbitrator Consultants (each nominated by one party) ensured that the arbitral tribunal’s decisions – that were made on solid grounds and on the arbitral tribunal’s own findings only – were properly “translated” into a very complex and mathematical price formula, which is typical for long term energy contracts. This became relevant after the arbitral tribunal found – based on an interpretation of the contract between the parties – that it was competent to make the required changes to contract price formula. The Arbitrator Consultants in that case were helpful to the arbitral tribunal as “sparring partners” in the deliberation process, but the arbitral tribunal’s decisions were in no way influenced by them. The Arbitrator Consultants were invited to join a deliberation session of the arbitral tribunal only after the latter had already made up its mind. Nevertheless, due to the technical nature of the price review clause, and the arbitral tribunal’s unwillingness to choose only between the two options offered by the parties’ experts, the Arbitrator Consultants were the perfect tool to assist the arbitral tribunal in

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17 An alternative solution, particularly applied in price review arbitrations, is that the arbitral tribunal describes the changes that need to be made to the formula in a partial final award and leaves it to the parties to prepare a revised formula which carries the tribunal’s solution into effect. However, if the parties cannot agree on a revised formula, the arbitral tribunal may nevertheless need to take recourse to an Arbitrator Consultant. See DAVID MILDON, The adjustment phase, in: Gas Price Arbitrations: A Practical Handbook, London 2014, p. 136 et seq.

drafting the adjusted price formula, and to re-calculate and translate the arbitral tribunal’s “third option” into the technical language of the contract.

In this particular case, the use of the Arbitrator Consultants avoided the need: (i) to appoint a court expert; (ii) to prematurely disclose the arbitral tribunal’s thinking to the parties; (iii) to wait for another written expert report; (iv) to organize a hearing concerning the new expert report; (v) to conduct another round of closing submissions, and – overall – it shortened the proceeding by several months or even a year. In addition, substantial costs were saved by the use of the Arbitrator Consultants.

B. **Addressing the issue as early as possible / detailed discussions with the parties**

It is advisable to discuss with the parties – as early as possible – the option of appointing an Arbitrator Consultant. If a need is already apparent at the outset of a proceeding, it may be brought up at the management conference and – if the parties agree – basic provisions regarding Arbitrator Consultants can be set out in the supplemental procedural rules. However, it is often only at a later stage – for example at the end of the evidentiary hearing – that the necessity for appointing an Arbitrator Consultant becomes obvious. Only then is the arbitral tribunal able to assess the technical or commercial support that it needs to formulate the final award.

Once the need for an Arbitrator Consultant is realized, we consider it essential that the arbitral tribunal describes its concerns and discusses all relevant issues regarding the possible appointment with the parties in great detail. At minimum, the following topics should be addressed and discussed at this stage:

− The technical or commercial difficulties that the arbitral tribunal is faced with (for instance, that the two options offered by the party experts may be unsatisfactory to the arbitral tribunal and a third option may require professional help on the level of calculation);
− It should also be shown that an Arbitrator Consultant may help to overcome these difficulties, without taking the role of an expert;
− The alternatives to working with an Arbitrator Consultant (e.g. appointing a tribunal appointed expert to make the new calculations; possibility of deciding the case based on a strict interpretation regarding the burden of proof; etc.);
− The precise tasks of the Arbitrator Consultant and how he shall be dealing with the arbitral tribunal;
The appointment procedure (targeting, instruction, etc.);
– The costs involved and how such additional costs are to be handled (advances, partition of costs, etc.);
– The timing questions.

Only if the above questions are openly discussed, to the extent that the parties become confident that the arbitration tribunal is not simply delegating its decision power to the Arbitrator Consultant, will the parties agree to such an appointment. Thus, the key to success is transparency.

C. Appointment procedure

Finding a suitable person with the necessary know-how in the respective field is often another challenge. Typically, there are only a few specialists in the respective area and they or their firms may have ties to one or both parties.

Pragmatically, the first step is normally to see if the parties can agree on a particular person or firm to act as Arbitrator Consultant. If this is not possible, the parties may be willing to agree on an institution to make the nomination. If this also does not work, techniques may be applied that are often successful for chairman searches (e.g. both parties file lists with 5 names, hoping that there is a match. If there is no match, the parties may challenge the proposals of the other side and the non-challenged persons are then ranked by both sides, etc.).

If none of these techniques are successful, an alternative may be that a team of Arbitrator Consultants is formed, composed of delegates from both sides (as in the described case). Although this may double the costs, such a joint team has the advantage that both parties feel represented. This may reduce the parties’ skepticism towards the Arbitrator Consultant who is not under their “control”.

Once the parties have agreed to either a single person or team of Arbitrator Consultants, the arbitral tribunal should establish contact. It is advisable that the parties have no direct contact with the Arbitrator Consultants and, preferably, the Arbitrator Consultants are not even told which party suggested them. Arbitrator Consultants shall be instructed by the arbitral tribunal and not by the parties, which ensures that they see themselves as neutral assistants and do not think in terms of having a commitment to one of the parties (or to both).
D. Engagement letter / order

The specific terms of the Arbitrator Consultant’s agreement should be retained in an engagement letter to be signed by the arbitral tribunal and each Arbitrator Consultant.

At a minimum, the engagement letter should specifically address the following points:

- Definition of the tasks to be fulfilled;
- Statement of independence or disclosure of critical facts by the Arbitrator Consultants;
- Time of engagement;
- Form and size of remuneration;
- Communication with the arbitral tribunal only;
- Confidentiality.

In addition, we have also experienced situations where parties requested that the Arbitrator Consultant undertake not to work for either party for a certain period of time (due to the fact that he was provided with sensitive data about the parties’ businesses).

Once the engagement letter is established, it may become part of an order issued by the arbitral tribunal, which sets forth the terms and conditions of appointment.

E. Costs and deposits

The use of Arbitrator Consultants regularly entails additional costs. As a consequence, advance payments by the parties may be requested and need to be administered.

Under the ICC Rules (Article 36), the advances on the costs of arbitration are fixed and administered by the ICC (either the Secretary General or the Court). Nevertheless, in the authors’ experience, the ICC allows arbitration tribunals to implement and administer separate cost advances for Arbitrator Consultants with the consent of the parties. After all, an Arbitrator Consultant – realistically seen – assures the parties that the arbitral tribunal can deal with the specific technical or commercial complexities of their case. His engagement is thus primarily an interest of the parties and the expenses should be attributed to them. These expenses should not be considered as expenses of the arbitrators like air-fares, travel costs, hotel accommodations, etc. Thus, the ICC, in our view, correctly tolerates the
implementation and administration of separate cost advances for Arbitrator Consultants by the arbitral tribunal itself.

Under the Swiss Rules (Article 41), and in contrast to the ICC Rules, the authority to request the parties to pay deposits and to administer deposits is vested in the arbitral tribunal and not in the institution. However, under the 2012 version of the Swiss Rules, the arbitral tribunal shall consult with the Arbitration Court (“Arbitration Court”) before requesting a deposit to be paid, and this may also apply to supplementary deposits requested for Arbitrator Consultants based on Article 41(3) Swiss Rules. Accordingly, if the Swiss Rules are applicable, the arbitral tribunal should consult with the Arbitration Court before requesting an additional cost advance for an Arbitrator Consultant.

As regards the ultimate bearing of the respective costs, the ICC Rules (Article 37(4) ICC Rules) provide the arbitral tribunal with discretion as to which party shall bear the costs and to what extent. Article 37(5) of the ICC Rules provides some guidance as it urges the tribunal to take into account the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner. On the other hand, Article 40(1) Swiss Rules embodies the basic principle that costs follow the event. The arbitral tribunal may, however, depart from these principles if adherence is inequitable based on the circumstances of the case. Notwithstanding these rules, the parties and the arbitral tribunal may always agree on the distribution of costs, which may be particularly appropriate for the costs of one or more Arbitrator Consultants who perform a technical function to both parties’ benefit. Therefore, it may often be appropriate to agree already in the engagement letter and to set up in an order by the arbitral tribunal respectively that costs for an Arbitrator Consultant shall be split half-by-half between the parties.

Again, it is advisable for the arbitral tribunal to discuss with the parties and agree with them on the system of remuneration of Arbitrator Consultants and the administration of the respective cost advances.

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19 Tobias Zuberbühler/Christoph Müller/Philipp Habegger, Swiss Rules of International Arbitration Commentary, 2nd edition, Article 41 N 2.
20 Please note that under Article 40(4) of the Swiss Rules the Arbitration Court must approve or adjust the determinations on costs made by the arbitral tribunal according to Articles 38(a) to (c) and (f) and Article 39 Swiss Rules. Under the ICC Rules Article 33 any draft award must be scrutinized by the Court.
F. Working with Arbitrator Consultants

The manner of working with Arbitrator Consultants is another area that should be discussed with the parties in an open and transparent way.

In the authors’ experience, the best way to work with Arbitrator Consultants is by face-to-face meetings. If necessary, limited documents should be provided to them in preparation for the meetings. However, Arbitrator Consultants should not be asked to establish written analyses or reports on what they consider to be the correct outcome of the case and they should not assess the correctness of the party appointed experts. These typical functions of a court-appointed expert should never be delegated to, or assumed by, the Arbitrator Consultant. He is – as mentioned before – not an advisor on the outcome of the case, but a “translator” of the arbitral tribunal’s own decisions into a technical language or a commercial calculation.

It is easiest to perform these functions at personal meetings. Thus, it is suggested that the arbitral tribunal invites an Arbitrator Consultant to those parts of the deliberations that are relevant to the performance of his limited technical or commercial functions. While the arbitral tribunal (in camera) decides to what extent it wishes to follow or not follow the solutions offered by the parties’ experts, the Arbitrator Consultant may advise the arbitral tribunal on the extent to which its decisions affect the technical language or the commercial numbers of the case. Ideally, the Arbitrator Consultant assists in the preparation of the technical or commercial language that is needed to reflect the arbitral tribunal’s decisions in the final award.

Again, in order to preserve the integrity of the deliberation process, it is recommended that the arbitral tribunal’s deliberations are held separately from the consulting sessions with the Arbitrator Consultant. Ideally, the arbitrators would meet in one room for deliberations while the Arbitrator Consultant waits in another room for whenever he is needed. In this way, the arbitral tribunal may, at any point of its (internal) discussions, call upon the Arbitrator Consultant, for instance to assess the impact of a technical or commercial decision on the overall outcome of the case. Separating the deliberation and consulting sessions from each other guarantees that the decision making process will be controlled by the arbitral tribunal and not the Arbitrator Consultant. Should the latter happen, then something would have gone fundamentally wrong with the process and the use of an Arbitrator Consultant would have failed.

21 In order to enhance transparency such limited documents provided to the Arbitrator Consultants may be listed in the final award.
In the example case discussed above, this system worked perfectly. While the arbitral tribunal, on the basis of its in-depth knowledge of the case at the end of the evidentiary hearing, was able to make the necessary legal and commercial decisions, the stand-by assistance of the two Arbitrator Consultants was a significant help. While the arbitral tribunal made the necessary decisions, the Arbitrator Consultants were able to redraft, on the basis of the tribunal’s decisions, a new long-term energy price formula and to assess the commercial value of the price change for the period under review. Without the background assistance of the Arbitrator Consultants, there would have been a real risk that the arbitral tribunal, being composed solely of lawyers, could have failed to correctly convert its decisions into the mathematical formula of a new contractual price clause. Since the parties in that case, understood the arbitrators’ needs and trusted in the integrity of the deliberation process, which was described to them by the arbitral tribunal in advance, they allowed the arbitral tribunal to use the two Arbitrator Consultants and everyone greatly benefitted from this approach.

As long as the arbitral tribunal and the Arbitrator Consultants adhere to the division of tasks as agreed upon with the parties, there is no need to inform the parties about the content of the consultation process. In fact, it would be a clear violation of the deliberation process if the parties were informed about the details of the communications between the arbitral tribunal and the Arbitrator Consultants. The element of trust, which is the basis of the Arbitrator Consultant arrangement in general, replaces the parties’ control in this instance.

However, if an Arbitrator Consultant should go beyond his remit – e.g. if he should make statements or come to conclusions on technical or commercial points that have not been addressed by the parties and their experts in the submissions or hearings, then – of course – such new statements or conclusions, should they be deemed relevant by the arbitral tribunal, would have to be recorded in minutes by the arbitral tribunal and sent to the parties for comments. The downside of such a development is that the parties or their experts must be allowed to make new submissions and – if the matter is important – another hearing must be set up to address the new points. Otherwise, the parties’ right to be heard would be severely violated.

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VII. Conclusions

The use of an Arbitrator Consultant to the arbitral tribunal is a relatively rarely used, but nevertheless highly efficient and effective, tool to ensure a technically or commercially sound, and therefore enforceable, award in complex arbitration cases. The use of such consultants is to the benefit of the parties and the arbitral tribunal alike and may help avoid more complex solutions such as the appointment of court experts, new reports or new hearings.

Agreeing to the appointment of an Arbitrator Consultant may, however, entail a certain risk for the parties, due to the lack of transparency and a lack of control over the Arbitrator Consultant’s work and his dealings with the arbitral tribunal. However, if the parties trust in the integrity of the arbitral tribunal, and if the modus operandi between the arbitral tribunal and the Arbitrator Consultant is openly discussed and transparently established, then the risk for the parties may be greatly reduced. Further, the use of such consultants may often be the fastest and most economical way to overcome difficulties in cases where party experts offer certain solutions that may, for various reasons, not be accepted by the arbitral tribunal. With the assistance of an Arbitrator Consultant, the arbitral tribunal may be in a position to correctly recalculate and define the outcome of the case without having to resort to appointing another expert.
Summary

International commercial arbitrations are often complex and of a technical nature. Ensuring that arbitral tribunals have, or acquire, the necessary technical or commercial know-how is a challenge – for the parties as well as for the arbitrators. The standard solutions (party- and/or court-appointed experts) are time-consuming, costly and often carry the risk of delegating decision-making powers to the experts.

Another way to ensure a technically or commercially sound and enforceable award is through the use of a consultant to the arbitral tribunal (“Arbitrator Consultant”). This tool was recently field-tested and successfully implemented in a major international energy price review arbitration in which the authors were involved. An Arbitrator Consultant is neither an expert, nor an arbitrator. Rather, he is a special assistant providing technical or commercial expertise to the arbitral tribunal “upon demand”. He advises the arbitrators on limited technical or commercial language and/or calculation questions. However, he does not prepare an expert report, nor is he subject to cross-examination by counsel. The Arbitrator Consultant is, with the approval of the parties, an assistant in the sense that he helps to “translate” the arbitrator’s decision into the particular technical or commercial language of a contract, or *vice versa*.
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Manuscripts and related correspondence should be sent to the Editor. At the time the manuscript is submitted, written assurance must be given that the article has not been published, submitted, or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within eight to twelve weeks. Manuscripts may be drafted in German, French, Italian or English. They should be submitted by e-mail to the Editor (mscherer@lalive.ch) and may range from 3,000 to 8,000 words, together with a summary of the contents in English language (max. 1/2 page). The author should submit biographical data, including his or her current affiliation.

Aims & Scope
Switzerland is generally regarded as one of the World’s leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world’s best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

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