

Insights

THE IBA SITE VISIT PROTOCOL: A FRAMEWORK FOR AVOIDING DISPUTES WITHIN DISPUTES

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Site visits can play an important part in construction arbitration, allowing the tribunal to gain a clearer understanding of the works in dispute. However, agreeing the terms of a site visit can be a contentious process giving rise to additional points of dispute between the parties. In an attempt to address this, the IBA has published the 'IBA Site Visit Model Protocol for International Arbitration' (the **Protocol**). The Protocol is designed to assist parties in discussing and organising site visits. It contains a series of draft provisions that parties can use as a starting point when agreeing and conducting site visits.

SITE VISITS

As the Protocol recognises, site visits are generally used in two scenarios:

- as an evidence gathering exercise, often re-balancing access to the relevant evidence (e.g. where an employer has discovered defects, but the contractor is no longer on site and wishes to undertake an inspection); and
- to provide a tribunal with greater insight into the relevant project, either generally or on a specific issue, helping to put the evidence into context and allowing a better understanding of the issues.

Site visits, and the terms governing them, can be contentious for a number of reasons. Parties may disagree over who should attend the site visit (particularly whether legal representatives should be present) and what interaction there should be between the participants. Agreeing the purpose and scope of the visit is another potentially contentious issue, as is the evidentiary weight that should be accorded to the visit.

THE PROTOCOL

The Protocol seeks to address these difficulties by providing a comprehensive, but flexible, framework that addresses these issues by reference to best international practice. The Protocol is designed to inform and structure discussions, providing a set of default clauses addressing the key

issues that are likely to arise. Each Article is accompanied by drafting notes, which provide the parties with more information and suggestions on procedural matters that should be considered.

The Protocol addresses the following matters:

Article 1: Form of the protocol as a party agreement at the pre-arbitration stage or a procedural order issued by the tribunal.

Article 2: Participants in the site visit, including whether the tribunal should be present and any limitation on the number of participants permitted. The drafting notes address multiple possible options, highlighting the importance of addressing what communication, if any, should be allowed between the arbitral tribunal and the other participants during the site visit. It also suggests that, where participants are expressly named, provision is made for the nomination of a replacement if the proposed party becomes unavailable, so the visit is not needlessly delayed.

Article 3: Mode of participation, whether in-person, remote, or hybrid. The Protocol notes that whilst remote inspections have their disadvantages they may offer a pragmatic solution in circumstances where the nature of the site does not justify an in person inspection or where a hybrid inspection allows wider access.

Article 4: Time and place of the site visit.

Article 5: Purpose of the site visit, scope, and itinerary, including any expected expert activities. Parties are encouraged to address all of these issues in advance to avoid disputes during the site visit and to provide clarity as to the exact parameters of the visit. This is a sensible approach designed to avoid disputes within the dispute. The notes also suggest that the parties agree a comprehensive list of tasks that will be undertaken during the site visit. The notes include points specific to construction and engineering proceedings or energy arbitrations including the proposed method for testing or verifying the compliance, functionality or suitability of equipment or fuel sources, and the need to consult specific technical personnel during the visit.

Article 6: Sampling, inspection and testing. This article includes provision for the possibility of additional testing after the site visit. The drafting notes encourage parties to consider joint testing from a costs perspective. They also recognise that laboratories close to the site might have a close relationship with one of the parties in certain instances, necessitating the need for additional testing.

Article 7: Preparatory work that should be carried out prior to, or during, the site visit, such as removing coverings or trial pits.

Article 8: Logistics, including transport and security.

Article 9: General guiding principles to decide any site visit-related disputes, including confidentiality and the impact of the site visit on the operations at the site. At the heart of the Protocol lie the

principles of good faith and party cooperation. Article 9(1) provides:

“To ensure fair, efficient, and productive conduct of the Site Visit, the Parties shall: (1) confer with each other in good faith; (2) cooperate with each other fully and transparently; (3) act in a timely and cost-efficient manner; and (4) use best efforts to induce third parties’ cooperation to achieve the purpose of this Site Visit Protocol in the context of the Arbitration.”

Article 10: Rules governing the taking of evidence, including the admissibility of accessed evidence. This article focuses on the evidentiary weight given to the site visit, bearing in mind that, unlike a formal hearing, a site visit may involve informal discussions between the parties and impromptu explanations being provided to the tribunal. The drafting notes encourage the parties to address these issues in advance, having in mind the purpose of the visit and the importance of ensuring that discussions between participants and their legal counsel remain covered by any applicable privilege.

Article 11: Compliance with the Protocol. The drafting notes suggest that the tribunal be empowered to rule on any objections or issues raised as a matter of urgency, so that any site visits can be conducted in line with the agreed protocol as soon as possible. The guidance also invites the parties to consider whether they wish to define sanctions and consequences for non-compliance, or whether they prefer to leave such discretion entirely with the tribunal.

Article 12: Costs of the site visit. The Protocol assumes that the majority of the costs of the site visit will be shared, with allowance for some party specific costs (such as flights or food and drink during the visit).

Article 13: Post-site visit steps such as site visit reports.

KEY TAKEAWAYS

Where either party considers that a site visit would be useful, this should be raised at an early stage of the arbitration proceedings so that the terms of the visit can be discussed and agreed. The Protocol provides a valuable framework for those discussions. It provides a comprehensive but flexible framework that covers most scenarios and at the same time encourages parties to cooperate to reach agreement on what might otherwise be contentious issues. As such it is a very valuable addition to the IBA’s catalogue of soft law guidelines for the conduct of International Arbitration.

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