

Inspecting The New Int'l Arbitration Site Visits Protocol

By **Roberta Downey, Angus Rankin and Ciaran Williams** (October 28, 2024)

This September saw the publication of the International Bar Association Site Visit Model Protocol for International Arbitration, offering a framework of rules for conducting site visits in international arbitration. While site visits can provide much-needed context to the issues in dispute and may form an essential part of the evidentiary record, they are also prone to generating new disputes as the parties look for ways to expand or restrict the scope of the visit and also grapple with the logistics of staging the visit.

The protocol is a welcome addition; while it cannot legislate for every contentious aspect of arranging a site visit, it is helpful in offering a standardized, sensible approach across a range of typical issues. It seems likely to save parties from reinventing the wheel on more generic issues, perhaps allowing them to focus on more case-specific issues that the protocol does not cover.

The protocol was prepared by a working group of the IBA Arbitration Committee. Accordingly, while it caters to construction and engineering-related cases, it is not solely aimed at those sectors and is offered for use in general commercial disputes where a site visit may be in prospect.

The Protocol

Although site visits are far from being obsolete, in the experience of the authors, they are generally less commonly used for construction disputes than in the past. If there is a decline in their use, it may be due to a number of factors including the increased availability of technology such as drone footage, and ever more sophisticated computer graphic models that can show an evolving situation in 4D and/or linked to project records such as a building information model.

Those tools may be better than real life as far as showing evidence at a particular window of time in the past, or showing things unavailable to the naked eye, e.g., a computer-generated fly-through of a process plant system or showing geotechnical conditions in cross-section.

The improved alternatives to a physical site visit affect the cost-benefit analysis of whether the significant time and financial investment in a site visit is worth it. Furthermore, a site visit may often be perceived as benefitting one party's case more than the other, which may be a barrier to a visit taking place at all. But despite these factors militating against site visits, they continue to be an important feature and necessary for particular types of case. We foresee plenty of work for the new protocol to do, well into the future.

The protocol is not intended to be comprehensive or prescriptive, but rather to serve as a starting point for the parties' agreement regarding the arrangements for a site visit, with a view to reducing the risk of disputes within disputes.



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Contents of the Protocol

The protocol contains 13 articles and supplementary drafting notes, which provide further explanations and suggestions for the parties and the tribunal.

A summary of the articles is as follows:

1. Site Visit Protocol

This article records the overarching agreement that the parties will agree to conduct the site visit in accordance with the articles in the protocol. This can either be by agreement between the parties pursuant to an order from a tribunal, or a combination of agreements and an order.

2. Participants

This deals with who shall attend the site visit, including on behalf of the tribunal, claimant, respondent, experts, legal counsel or other representatives. The participants often depend on the purpose of the site visit, for example, if samples are being collected, then experts will probably need to be present.

3. Remote Participants

This provides for remote participation of any party via audio or video link, and sets some guidelines for enabling this to happen.

4. Time and Place

This goes into more detail than Article 1 on the logistics of the site visit, specifying the time and specific place in which the site visit will be carried out.

5. Purpose, Scope and Itinerary

This enables the parties to set an itinerary for the site visit and establish a list of tasks to be carried out to enable both sides to go in with a clear and defined purpose.

6. Sampling, Inspection and Testing

This article provides a detailed framework for the parties to decide whether, and, if so, how, samples can be collected from the site.

7. Preparatory Work

This covers any preparatory work that needs to be carried out in advance of the site visit. The purpose of this article is to encourage parties to engage on issues such as the equipment or documentation that should be available during the site visit so that the site visit is as efficient as possible.

8. Transport, Security and Logistics

This sets out which parties are responsible for transport, security and logistical plans in relation to the site visit, and what, if any, safety, security and environmental measures are to be considered.

9. Guiding Principles

This article covers the guiding principles, such as good faith, transparency, time and cost efficiency.

10. Evidence

This covers communication between the participants at the site visit and whether records from the site visit will be admitted into evidence.

11. Compliance With the Protocol

This article reinforces compliance with the protocol and states that any concerns in relation to the site visit must be raised as soon as possible with the tribunal. It also invites parties to consider defining consequences for noncompliance with the protocol.

12. Costs of the Site Visit

This provides for an apportionment of the cost of the site visit between the parties.

13. Post-Site Visit Matters

This article covers matters after the site visit has taken place, including the sharing of information between parties and the possibility of a written site visit report.

As mentioned above, the protocol is broadly relevant to a wide spectrum of industries and not only construction projects. However, the protocol deals specifically with construction and engineering arbitrations in relation to inspections and testing, and sets out what the parties may need to consider, ranging from the documenting of defects to measuring the physical condition of the site.

Conclusion

Many site visits have taken place without the need for such detailed rules or the need to capture site visit arrangements in a formal agreement. However, in an increasingly regulated world, some parties have a tendency to prefer more rules — which can overcomplicate matters.

The protocol may be particularly helpful to a party pushing for a site visit because it provides a framework that could provide clarity and remove objections, thereby reducing the risk of disputes within disputes, which can plague site visits.

In due course, the protocol may become a widely accepted framework for parties to choose or tribunals to order, similarly to how the IBA Rules on the Taking of Evidence in International Arbitration have become widely adopted.

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