A little learning is certainly a dangerous thing. However, for advocates and arbitrators in international technology arbitrations, is a lot of technical expertise necessarily a benefit, or can it be a burden?

The thesis of this essay is that pre-existing technical expertise can be a benefit, but it can also be a burden, for both advocates and arbitrators, and that high quality international technology arbitrations can be conducted whether or not the advocates and arbitrators have such technical expertise.

That thesis relies on several premises: 1) that almost any fact issue can be understood by intelligent, diligent advocates and arbitrators; 2) that every dispute being arbitrated has a limited number of factual issues that need to be decided; and 3) that a high quality international technology arbitration is, among other things, both transparent and efficient.2

1 The author thanks those who reviewed and commented upon drafts of this paper: international arbitrator David R. Haigh, Q.C, of Burnet, Duckworth & Palmer LLP, Alberta, Canada; senior lecturer Joshua Compton, Ph.D. of the Dartmouth College Institute of Writing and Rhetoric, Hanover, NH, USA; Ron Moscona, of Dorsey & Whitney (Europe) LLP, London, England; and Nicole Oelrich, of Dorsey & Whitney LLP, Minneapolis, Minnesota USA. Their thoughtful comments immensely improved this paper; however, the views expressed are the author’s own.

2 Terms used in this essay are not assigned any unique or too-specific meanings. As used here, “technical expertise,” for example, is pre-existing knowledge, skill, experience, training, or education as to the fact issues material to the dispute being arbitrated. Compare Rule 702 of the US Federal Rules of Evidence (such pre-existing knowledge can qualify a witness as an expert). An arbitration and award are “transparent” when the material evidence is visible to the parties, and the reasoning that led to the award is explained. An arbitration is “efficient” when the decision is reached without wasting time or money. A “high quality arbitration” has many features, of course: the three features emphasized here are transparency, efficiency, and a just award arrived at rationally. Finally, the term “arbitral tribunal,” as used here, includes both sole arbitrators and panels composed of several arbitrators.
Understanding an issue is a prerequisite to deciding it rationally. If a technical factual issue simply cannot be understood by the intelligent, diligent laity, a high quality international technology arbitration could only be conducted among technically-expert arbitrators and advocates. Moreover, even if the technical fact issues could be understood eventually by the laity, but there are legions of such issues, advocates and arbitrators without technical expertise may not have time to “catch up” to those with pre-existing expertise, or “catching up” may be prohibitively expensive.

However, in the author’s experience and (anecdotally) in the experience of other arbitrators and advocates active in international technology arbitrations, there are no legions of incomprehensible, material technical issues encamped in international technology arbitrations. Sometimes, there are unskilled explanations of technical issues, and, many times, there are failures to winnow and discard the chaff. But, these are matters of advocacy, not technology, which do not require that international technology arbitrations be consigned or conceded to a technically-expert priesthood.

In international technology arbitrations—indeed, in all arbitrations—the desirable characteristics of transparency and efficiency must be balanced, for they tend to vary inversely. That is, a highly transparent proceeding (e.g., “no stone unturned” common law litigation) is not likely to be efficient, and a highly efficient proceeding (e.g., ruling by edict) is not likely to be transparent. In high technology arbitrations, it is argued here, the ability to balance transparency and efficiency is not enhanced by the absolute level of technical expertise among the advocates and arbitrators. Rather, that balance is most easily achieved when the technical expertise among the advocates and arbitrators matches.

Even if matching levels of technical expertise is desirable, it can only be a target. There are so many decisions being made, by so many different people, as to whom the advocates and arbitrators will be, that matching will be difficult to achieve. The parties and their advocates, in addition to being different people, also have different, perhaps contradictory, perceptions as to whether a technically-expert arbitrator is desirable or undesirable, further reducing the likelihood that a consistent level of technical expertise among the advocates and arbitrators will be achieved. It is, nonetheless, useful to have a target.