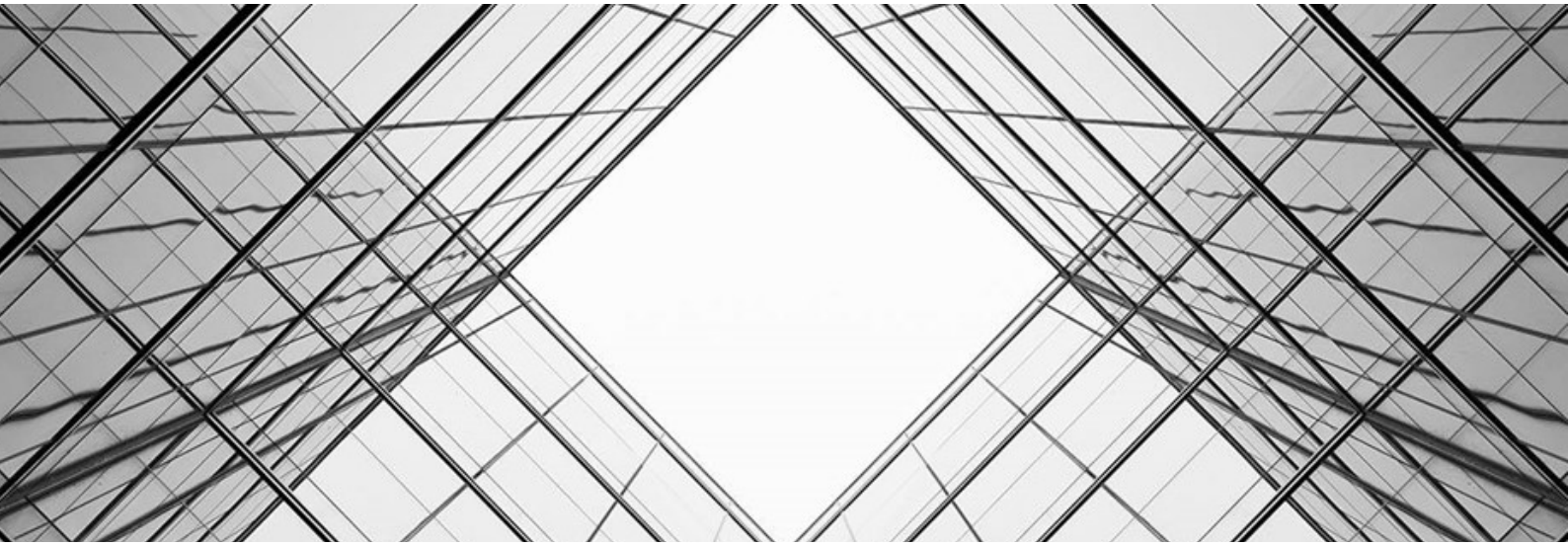

Procedural considerations of being an Expert Witness – Part 2

Part 2 – The use by tribunals of party-appointed expert witnesses, post-closing submissions – what happens and why?

It is becoming increasingly common in large construction international arbitrations for the tribunal to directly engage, post-closing submissions, with the party-appointed expert witnesses to assist with the calculations[1] required for their final award and to ensure the correctness of those aspects (and consequently the whole) of the final award.[2]

The authors of this paper (Michael Tonkin[3] and Igor Corelj[4]) are both experienced expert witnesses with a combined experience in excess of 50 years in the international construction industry and have been appointed directly by tribunals on a number of matters. Together they have shared their experiences and thoughts on this important topic.

The purpose of this paper is to explore the challenges for the parties, tribunal, and expert witnesses involved, and to propose some practical strategies and solutions to reduce or remove the associated risks.

How can the tribunal directly engage with the party-appointed expert witnesses?

Direct engagement by the tribunal of party-appointed expert witnesses post-closing submissions is normally done by way of a tripartite agreement executed between the tribunal, the expert witnesses, and the parties.[5]

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[1] Although potentially with any other relevant expert input, depending on the expertise
[2] In our experience this is becoming more common than tribunals appointing their own expert witnesses. Discussion on what approach is better is beyond the scope of this article but see *The MENA Leading Arbitrators' Guide to International Arbitration, 2023,* p230-233
[3] Michael Tonkin is a Partner and Quantum Expert based in HKA's Dubai office. Michael has acted as a lead expert witness on around 65 occasions and has been appointed arbitrator on over 65 matters. Michael is recognized as a Global Elite Thought Leader in WWL directories.
[4] Igor Corelj is a Principal and Quantum Expert based in HKA's Dubai office. Igor has acted as a lead expert witness on 14 occasions and in more than 25 complex engineering and construction arbitrations. Igor has been recognized as a Future Leader in WWL directories since 2021.
[5] Although the authors have also experienced less 'formal' type of arrangements; i.e. without the written agreement whereby the broad terms of engagement would be agreed typically during the evidentiary hearing.

Whilst the parties will be "a party" to the tripartite agreement, they will not have sight of any of the communications between the tribunal or the expert witnesses during the term of the agreement. Indeed the tripartite agreement will normally contain (and we suggest should contain) a confidentiality provision which prevents the expert witnesses from communicating with their respective instructing lawyers or the parties on any discussions/communications with the tribunal, and will also prevent the sharing of any work which the expert witnesses undertake in assisting the tribunal.

Notwithstanding the above, the parties will remain responsible for the consequential fees of the expert witnesses they have engaged. The authors have experience of the parties requiring confirmation from the tribunal of the volume of work undertaken by the expert witnesses i.e. the number of hours, prior to paying the expert witnesses for their work. However, any timesheets and/or invoices submitted by the expert witnesses to their respective clients should contain nothing more than annotation such as "work for the tribunal", so that what work the expert witnesses were doing (including which claims were being worked on) is not known to the parties during that time.

Some tribunals may require detailed timesheets to be submitted to them to review/test the reasonableness of the time spent – which may also be used by the tribunal in subsequent cost allocations – however, these detailed timesheets are not to be shared with the parties until such time as the tribunal decides it would be appropriate (or perhaps necessary) to do so.[6]

Why might a tribunal need to engage directly with party-appointed expert witnesses post-closing submissions?

Based on the authors' experiences, there are three main reasons why a tribunal might need to directly engage with the party-appointed expert witnesses post-closing submissions, these being:

First – assistance with non-readily available factual/liability/valuation options

Once the tribunal decides on matters of fact and/or liability and/or further matters of engineering/delay/quantum (such as valuation), which can result in an answer not currently set out by the parties or expert witnesses (because of the number of potential permutations), then the tribunal may require the expert witnesses to assist it with producing such answers. In large and complex construction cases, the parties frequently dispute both the facts and how the law should be applied to those facts so as to produce a commercial outcome of the arbitration. This logically results in multiple factual/ liability/valuation options, and the outcome the tribunal finally decides may not yet be available.

Second – assistance with overlapping and/or duplicated facets of claims/counterclaims

Most construction disputes relate to or naturally form part of a "final account", which can involve numerous claims and counterclaims. These final accounts are often advanced on several alternative bases which may lead, under certain factual/ liability/valuation options, to impermissible duplication, for example when the same claimed resource (or item, etc.) is considered during the same period of time under two separate heads of claim. During the expert witness process, it is good practice for the expert witnesses to indicate potential duplication (possibly by way of a potential duplication matrix) so that tribunals might consider engaging with the expert witnesses to understand and assist with identifying and calculating the precise extent[7] of any resulting duplication based on its final decisions.

[6] Release of communications between the tribunal and the experts, which therefore also includes detailed time sheets describing the works done, is discussed further below
[7] Subject to available information

Third – assistance with final checks on the calculations

Once the tribunal has finalised its decisions on all matters in dispute, it may require checks on its calculations. This is self-evident in that the tribunal might require expert witnesses to ensure that it has considered all relevant claims and counterclaims, and assigned intended figures against them, together with undertaking mathematical verification.

Summary

These three reasons may arise from the complexities of the calculations which require expertise that may not be available amongst the tribunal members or alternatively the tribunal (or the parties) may suggest a 'quality check' of the calculations by the expert witnesses.

The question that logically follows is "whether or not such direct engagement is necessary?"

Before addressing that question, we suggest that it is first appropriate to consider any issues arising from such direct engagement, which we now do.

Issues arising from this direct engagement?

At the 10th International Society of Construction Law Conference,[8] our colleague – Dr. Franco Mastrandrea – helpfully set out 4 issues/challenges likely to arise with the direct engagement of party-appointed expert witnesses. We have chosen to explore those 4 issues/challenges as well as add a fifth of our own, all as follows:

(a) Natural Justice – how will the parties be satisfied?;

(b) Inadequate disclosure by the tribunal to the expert witnesses/misinterpretation by the expert witnesses;

(c) 'Submissions' by the expert witnesses – matters that had not previously been raised;

(d) 'Clarifications' by the expert witnesses; and

(e) Additional fees of the expert witnesses.

We address each in turn below.

Natural Justice – how will the parties be satisfied?

One of the main concerns with party-appointed expert witnesses being directly engaged by the tribunal is ensuring natural justice. Without the parties or their legal representatives having any knowledge of what is being said/done/discussed and without the parties or their legal representatives being present, it should be immediately obvious that the parties may have concerns. The main question that arises is: "How can a party be satisfied with a process from which they have been excluded?" The logical subsequent question is: if due process during the direct engagement has not been followed or "errors" of some form are made (such as those we discuss further below), how will the parties know? And even if the parties were to find out, what recourse do they have?

A further challenge is what are the duties of the party-appointed expert witnesses during this post-closing submission work? Our experience is that during this time expert witnesses are not required to sign any declarations of statements of independence or provide their calculations under oath/affirmation. In our view, this is not satisfactory, and consideration needs to be given to ensure that expert witnesses are under the

[8] Held in Istanbul on 20 October 2023, session on *"Experts in the international disputes arena: developments and trends"*

same professional duties and obligations and face the same consequences for any failings in the same way as they are liable when they submit their opinions in their expert reports or at the evidentiary hearing. The question that logically arises is: how can this be done when the parties are excluded from the process?

Whereas the authors suggest that the parties should be carefully considering these questions, one way to mitigate the concerns is that the tripartite agreement (signed at the beginning of the engagement discussed above) regulates that all communications between the tribunal and the experts are shared with the parties at the appropriate time, and we are aware of this practice having being implemented. This may, however, and depending on what has been communicated, create a consequential procedural challenge for the parties.

Inadequate disclosure by the tribunal to the expert witnesses/misinterpretation by the expert witnesses

Clear directions and instructions by the tribunal to the expert witnesses are essential to avoid expert witnesses undertaking unnecessary work and making suggestions (or submissions/giving opinions) which are not required (or indeed appropriate).

The role of the expert witnesses at this time should be merely perfunctory, and to the extent that disclosures by the tribunal are inadequate/unclear/open to interpretation, then the expert witnesses may quickly cease to be perfunctory and instead become motivated. Further, if there is the same misinterpretation on the same issue by both expert witnesses, then this may lead to the tribunal receiving, and using in its award, an agreed expert witness response that is incorrect (i.e., unintended by the tribunal).

One way to potentially mitigate this, and of which the authors have experience, is that the requirements of the tribunal are clarified in a teleconference. Expert witnesses will be less likely to go "*off piste*" when direction is given face to face (virtually or in person) and once the expert witnesses have received their instructions, then any deviations should hopefully be mitigated. In a teleconference, the expert witnesses can quickly make clear if they fully understand the instructions. Such teleconferences may however lead to expert witness "clarifications" which are discussed further below.

In short, there is a real risk related to inadequate disclosure/misinterpretation and we suggest that tribunals must be aware of the importance of clear, precise, complete, and comprehensive instructions.

With regards to misinterpretation, the authors also have experience of expert witnesses not understanding the concept of "figures as figures" and refusing to participate in calculations based on the opposing expert witnesses' opinions, whether prior to or post-closing submissions. It appears to the authors that whereas carrying out figures as figures assessments should simply be "business as usual" for expert witnesses, it is still often misunderstood. This will be the subject of a separate article by the authors in due course.

'Submissions' by the expert witnesses – matters that had not previously been raised

There is a real potential in this process that new expert witness opinions/evidence will be shared by the expert witnesses with the tribunal, or at least highlighting certain points. This potential, along with the lack of certainty for the parties, is justifiably not welcomed by the parties. This concern may be partially mitigated given there are three 'actors' in the process,[9] of which two (those being the tribunal and the opposing expert witness) should prevent this from happening, however once an expert witness makes such a submission to the tribunal, it cannot be withdrawn. Again, the parties will not know whether or not this happens (at the time, or maybe ever) and this is naturally a cause for concern.

[9] (i) The tribunal; (ii) claimant appointed expert witness, and (iii) respondent appointed expert witness

Further, the parties may be concerned that the expert witnesses will be asked questions about their evidence that were not previously tested in the evidentiary hearing. In other words, this may result in additional expert witness evidence being adduced by the tribunal that neither party has heard, or to which has been given an opportunity to respond. If this were to happen then the potential for challenging the final award would increase.

A common scenario for further submissions to be made relates to addressing impermissible duplication in final accounts. The authors consider this challenge to be almost inevitable since duplication is difficult to address before the tribunal has engaged on these issues noting that this requires decisions as to fact/liability/valuation. In the author's experience, this has often presented a challenge. Potential mitigations / partial solutions are:

a) fully addressing detailed principles of duplication in the joint expert witness reports (requires tribunal engagement and early understanding of the issues);

b) bifurcation (rarely happens, but has the potential to substantially reduce the scope of quantum expert witness evidence); and

c) expert witness conferencing by the tribunal during the evidentiary hearing (requires the tribunal's full understanding of quantum issues at the hearing).

'Clarifications' by the expert witnesses

It is essential that the expert witnesses have a full understanding of the tribunal's reasoning so that they can, for example, calculate an answer fully compliant with the tribunal's decision on the facts/liability/valuation. Incomplete or redacted reasoning can leave the expert witnesses having a different understanding of what the tribunal requires, leading the expert witnesses requiring the tribunal to provide clarifications, which causes further delay and unnecessary cost. Importantly, by asking for further clarification, it may be that the expert witnesses alert the tribunal to something that it had not previously considered, or the expert witnesses may at least express evidence in a way not previously done.

Clarifications may also be required if the expert witnesses have addressed their opinions in a completely different manner and the tribunal accepts certain parts of each of those opinions in part for a particular head of claim. In these circumstances, it may be extremely challenging to provide a consistent/accurate answer, and some "compromise" will likely be required.

Put simply, 'mixing and matching' elements of fundamentally different opinions may not be possible, and the process of clarification becomes protracted and uncertain.

Additional fees of the expert witnesses

The parties may question why they are required to pay additional expert witness fees when the tribunal should be producing its own final award. Given the volume and complexity of technical documents and opinions involved with construction arbitrations, it might fairly be said that a tribunal cannot sensibly perform all of its own calculations. Notwithstanding, the authors share the view that with the sufficient interaction of the tribunal with expert witnesses as described in our first article,[10] the requirement for expert witness input post-closing submissions can be reduced, as the tribunal will already have what it requires by that stage of proceedings.

[10] See Part 1 dealing with effective delivery of expert evidence

The availability of tribunals and their reputation for engagement with expert witnesses throughout the procedural timetable should, we suggest, be carefully considered by the parties prior to the appointment of the tribunal.

Furthermore, the authors suggest that if the parties are seriously concerned about the potential for the tribunal to directly engage post-closing submissions with the party-appointed expert witnesses, then they should consider more carefully the constitution of the tribunal, which may dictate the requirement. For example, in our experience much of the post-closing submissions work relates to detailed calculations of quantum, but if the tribunal included [for example] a quantity surveyor, then the likelihood of tribunals directly engaging post-closing submissions with the party-appointed experts would significantly decrease. Not only would this result in lower expert witness fees, but this would also address many of the other concerns expressed above. So the decision to be made by the parties in such technical disputes is whether to have a tribunal including technical expertise or otherwise appointing experts post-closing submissions?

Is direct engagement of the party-appointed expert witnesses by the tribunal necessary?

The authors share the view that the use of party-appointed expert witnesses by the tribunal, post-closing submissions in construction arbitrations, is here to stay. Notwithstanding, the authors support the view that early and proactive engagement by the tribunal with the expert witnesses should result in the amount of such use of expert witnesses being reduced, with the consequential effect of less time and money being required post-closing submissions. We suggest that the default intention should be that direct engagement post-closing submissions should be avoided to the extent possible, and the tribunal and expert witnesses should work together during the arbitral process to achieve that goal. We also suggest that the parties carefully consider the constitution of the tribunal to suit the circumstances and complexities of their case.

The authors have experience of tribunals declining expert assistance and deriving incorrect calculations in their awards, whilst we have also experienced proactive tribunals suggesting expert witness involvement at the appropriate time during the proceedings, typically during the evidentiary hearing when it is practical to seek the parties' agreement.

In our first article, we said:

"*As to communication between the expert witnesses and the tribunal, the authors suggest that ongoing and active communication between the tribunal and the expert witnesses is effective and helpful because the expert witnesses have an overriding duty to assist the tribunal with issues within their areas of expertise.* ***Lack of such ongoing and active communication may result in the tribunal getting evidence they did not expect or require*** *and which may then lead tribunals to appoint a further expert witness, who only then gets clear instruction*."

In our view, active engagement between the tribunal and the expert witnesses will increase the likelihood that expert witness evidence will be helpful, and ultimately provide evidence that the tribunal expects and requires thus reducing the extent to which direct engagement of the party-appointed expert witnesses by the tribunal is required.

Party autonomy is a fundamental aspect of arbitration and parties to arbitration need to give careful consideration as to who they appoint as their party-appointed expert witnesses and tribunal and the arbitral procedure that will be adopted.

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