Procedural considerations of being an Expert Witness

Effective delivery of expert witness evidence - the Experts' view

Much has been written about expert witnesses in terms of:

- the good/bad/ugly;
- how to get the best from your expert/s; and
- the best ways of receiving expert evidence.[1]

The authors of this paper (Michael Tonkin[2] and Igor Corelj[3]) are both experienced expert witnesses with a combined experience in excess of 50 years in the international construction industry. Together they have shared their thoughts on this important topic, having also canvassed views from other expert witnesses, instructing solicitors, clients and arbitrators.[4]

One of the challenges with the effectiveness of the process of receiving expert witness evidence is that there is no singular professional body that regulates expert evidence,[5] and so different expert witnesses (despite sharing the same areas of expertise) may have a different understanding as to how to deliver expert witness evidence and, with particular relevance for this article, how to engage in a joint expert witness process. The purpose of this article is not to suggest that that the tribunal should fill that gap and "regulate" expert witnesses, rather how to achieve effective delivery of evidence from the expert witnesses.

Training, experience, background and culture will all play a part in why expert witnesses may have a different understanding of how to present expert witness evidence, however in the authors' experience, this difference in understanding can have a major impact on the expert witness process, leading to frustration from the tribunal, parties, counsel, and indeed the expert witnesses themselves.

Direct, honest and professional communication in-person or by video conferencing[6] should be the most effective way of mitigating future problems, and the authors suggest that this is the case both between the expert witnesses and between the expert witnesses and tribunals.

As to communication between the expert witnesses, such communication should not be difficult because the expert witnesses should be working to the same standard – that being that their opinions

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[1] Redefining the role and value of Expert Evidence - Professor Doug Jones AO RFD CIArb FRI Arb

[2] Michael Tonkin is a Partner and Quantum Expert based in HKA's Dubai office. Michael has acted as a lead expert 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.

[3] Igor Corelj is a Principal and Quantum Expert based in HKA's Dubai office. Igor has acted as a lead expert on 15 occasions and in more than 25 complex engineering and construction arbitrations. Igor has been recognized as a Future Leader in WWL directories since 2021.

[4] i.e. the users of arbitration

[5] Chartered Surveyors are regulated by the RICS, see Practice Statement "*Surveyors Acting as Expert Witnesses, 4th Edition*" but the authors are not aware of any other similar regulations

[6] For the sake of clarity, not by email or telephone

should be the same irrespective of which side has instructed them.[7] Whether or not this is the case is a separate discussion, but the principle is clear.

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.

Some tribunals may feel that they should not need to directly communicate with expert witnesses ahead of any evidentiary hearing as to what the expert witnesses need to do, however, and consequential of the points raised above, the view of the authors is that communication is usually very helpful and, in some circumstances, may be essential. Furthermore, the earlier the communication, the better.

For context, where two experienced and highly professional counsel have a difference in views on a procedural matter and they cannot agree, naturally they turn to the tribunal for direction, and so it is logical in the authors' view that expert witnesses should also be able to do the same. Ongoing communication between the tribunal and the expert witnesses can proactively facilitate better expert witness evidence, save costs, reduce bottlenecks, and should as a minimum be considered.

The purpose of this paper is to propose a solution to some of the challenges that expert witnesses face which might not be visible to tribunals. The expert witnesses' overriding duty is generally accepted to be to the tribunal,[8] and so the more we can do to share the challenges we face, the more tribunals will be able to "*help us help them*".

The authors are of the view that the following process could increase the potential for an effective expert witness process.

1. **Identify and establish with the parties, the issues of which it is considered expert witness evidence to be appropriate**.[9]

It is extremely beneficial for all who are involved in an arbitration to understand what issues will require expert witness evidence and so which disciplines of expert witnesses will be required.

[7] The authors cannot stress enough the simple and fundamental question that expert witnesses should be asking themselves when forming an opinion: would my opinion be the same if I was instructed by the other party? The answer must be yes every time.
[8] May not be express in all jurisdictions.
[9] For example the Protocol for the Use Party-Appointed Expert Witnesses in International Arbitration, Preamble 3. Ciarb.

The benefits of early engagement of expert witnesses in construction arbitrations are often written about[10] and so are not set out again here. Notwithstanding, the authors note that the Ciarb protocol promotes early engagement of expert witnesses.[11]

In the authors' view, the process of early appointment of expert witnesses also needs to robustly establish the sufficient availability of expert witnesses[12] and their commitment to the procedural timetable.[13] If the appointed expert witnesses are not sufficiently available, then the entire expert witness process can fail as a result.[14]

2. Early and ongoing engagement between the tribunal and expert witnesses

The authors agree that regular engagement by the tribunal with expert witnesses is one way in which a tribunal can support the expert witness process and identify any challenges as they happen. Although there is certainly an increase in such early tribunal engagement, in the authors' experience this is not the norm, and we would suggest given the benefits that it should be at least common/more common.

At an early stage of the arbitration process, expert witnesses should be trying to agree broad categories of documents that will be required for their work, but also setting out in which form these documents should be presented by the parties. When this work is done jointly by the expert witnesses, it can provide a significant saving in terms of time and cost.

The expert witnesses should also start at an early stage of the arbitration process to explore issues at a methodology/principle level. This should prevent the parties from producing unnecessary records, and instead focus on producing only those records that are necessary (on both the agreed and disagreed methodologies/principles). This should reduce the time and cost associated with identification of relevant records during document production.

In the authors' view, the expert witnesses should be required to report regularly to the tribunal, setting out: their progress, what can be done in terms of issue of expert evidence and by when, along with any challenges the expert witnesses jointly face (assuming there is no sensible resolution between them). A short report to the tribunal or a virtual Case Management Conference are easily arranged and are cost effective. The authors have experienced both of these (as expert witnesses and arbitrator) and find them to be of considerable benefit to the arbitral process.

Where matters such as sampling of large volumes of documents arise, it is helpful for the expert witnesses to agree suitable methodologies before they proceed, and to the extent they cannot agree,

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[10] For example, The MENA Leading Arbitrators' Guide to International Arbitration, p238-239
[11] Protocol for the Use Party-Appointed Expert Witnesses in International Arbitration, Preamble 3. Ciarb.
[12] Availability equally applies to the lead or named experts as well, where used, their assistants
[13] The MENA Leading Arbitrators' Guide to International Arbitration, p229
[14] This will be the topic of a future article

they could raise this to the tribunal who may wish to intervene. Early intervention by a tribunal (after consultation with the Parties for reasons of due process) might prevent ships passing in the night and ultimately being presented with two analyses that are poles apart simply down to the sampling methodology, with the result of increased costs. The decision on methodology will need to be made at some point and the authors have seen early intervention by the tribunal on sampling prove this point.

3. Post Statement of Defence and Counterclaim (if any) establish within each discipline an initial common list of questions/key issues

It is at this stage in the arbitration proceedings that the parties should have crystalised the issue/s in dispute between them, and therefore the expert witnesses ought to be able to prepare an initial common list of questions/issues upon which they will need to opine.[15]

The expert witnesses should prepare an initial list of questions (detailed or otherwise to suit the circumstances) which may change or develop as the case progresses and share these with the parties/tribunal.

This should assist the parties and tribunal with some initial thoughts as to whether the expert witnesses have the same understanding of the issues as them. Put simply, this is a 'quality control' mechanism which ensures that expert witnesses do not address issues which none of the parties contends.

4. Expert witness services prior to issue of any Expert witness reports

The authors agree that ideally the following should be made available to them before the issue of any expert witness reports:

a) Submission of all statements of case and factual evidence (witness and document production);
b) A common and catalogued data set; and
c) An updated common list of questions/issues.

<u>All statements of case and factual evidence (witness and document production)</u>

The authors support the view that expert witness reports should not be issued until the procedural submission of all statements of case and witness evidence and document production is complete. Whilst expert witnesses can certainly add value earlier in the arbitral process, until these submissions are complete then there are simply too many moving targets to be able to provide expert witness reports with sufficient certainty.

It follows that the authors' do not typically consider memorial style pleadings in construction arbitration as being a cost-effective solution for expert witness evidence. Indeed, the authors' experience is that

[15] This is separate to the benefits of early involved by the parties of their appointed expert witnesses

for construction disputes, memorial style pleadings incur the most expert witness fees and are least likely to have expert witnesses reaching agreement.

Whilst it is understandable that some counsel do not want to make a submission that may eventually not be supported by their expert witnesses, engagement of expert witnesses in memorial procedures (by way of producing expert witness reports) invariably puts pressure on the independence of expert witnesses, especially in instances when communication with the opposing expert witness is not yet instructed. In this position, the expert witnesses will likely be confined to exploring limited documents (for an initial period of time) whilst the parties' legal position is still being developed – without fully knowing the opposing party's case (and factual position).

Put simply, the role of the expert witness is to address the legal position of the parties based on facts, and until these facts are known (be that agreed facts and/or disagreed facts), the expert witness reports may be viewed as being preliminary – and may often (and probably likely) be subsequently superseded. As a result, the memorial style procedure may result in some of the expert witnesses' work being redundant, with associated time and costs being unnecessarily incurred.

A common and catalogued data set

The authors agree that it would be helpful if tribunals directed all expert witnesses to opine based on a common data set to provide opinions on a 'like for like' basis, and this may also extend to disputed data sets (if facts are disputed).

By disputed data sets we mean for example, where a Claimant has a set of say records which the Respondent disputes and the Respondent has a different set of records which the Claimant disputes. This can lead to twice as much work for expert witnesses in preparing two assessments i.e. one assessment based on each.

Perhaps in such an instance the parties and the tribunal may wish to explore an early determination of the facts because disputed facts may lead to disproportionate analyses and likewise unnecessary and numerous options. In a small and simple case this may not be much of an issue, however in large construction matters, the authors have experienced substantial time and money being incurred on such issues.

An updated common list of questions/issues

Prior to issue of the joint report, the expert witnesses should confirm the questions to be addressed on all the key issues and issue these to the tribunal and the parties.

This is yet another step to ensure that the expert witnesses both approach the joint report on the same basis by addressing the relevant issues between the parties.

5. The expert witnesses within each discipline produce a joint report identifying areas of agreement and disagreement, including fully reasoned opinions on each.

As an expert witness, the joint report is perhaps the most important report that is prepared, and it needs to be easily comprehended by the tribunal and be of practical use to the tribunal in preparing its award/s.

Where the authors currently see a significant gap in the delivery of expert witness evidence, is the point at which expert witnesses fully understand the opinion of their opposing expert witness, which is only once such opinion is committed to writing. By "fully understand" we mean receiving fully reasoned opinions, supported with any relevant annexures that are exchanged at the appropriate time, and this does not typically happen until a reply/individual report is issued. This, in the authors' view, is too late since a fully independent opinion cannot be given until all views have been exchanged. In addition, if an expert witness has not previously exchanged their full view, then more time and cost will inevitably be incurred in subsequent consideration of those full views. Unfortunately the authors have plenty of experience of this scenario which is unhelpful to all involved in the process.

Whilst expert witnesses in a joint process should be fully exchanging their honest and professional views (without reservation and without sharing the exchanges with their instructing lawyers[16]) there is, in the authors' experience, a different understanding in how expert witnesses interpret this stage of the process and further, availability of some expert witnesses at crucial times limits what is actually exchanged.

Our proposed solution is that the joint expert witness report contains the following:

1. **Areas of agreement** setting out in a logical enumerated form, the full basis of any agreement noting any areas where factual or legal evidence may impact such agreement; and

2. **Areas of disagreement**. Such disagreements shall be enumerated, and against each item of disagreement the expert witnesses shall provide their full opinion (fully reasoned opinions, supported with any relevant annexures) on the disagreements (only on their own position not the opposing expert witnesses' position) noting any areas where factual or legal evidence may impact such agreement.[17] This goes further than most joint reports in that the expert witnesses' will be seeing each other's full opinions in writing prior to submission of any report to the tribunal, thus allowing for a full dialogue to always happen. This still retains the benefit of a joint report process but incorporates the full opinions that an individual report normally brings.

This procedural step can be extremely effective if both expert witness teams: (i) work on the same basis, (ii) with the same level of understanding, and (iii) by applying the same professional standards expected from them.

This joint expert witness report can then form the final list of issues to be decided by the tribunal in its award and can also assist potential expert witness conferencing (discussed further below).

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[16] Because these are 'developing views' which aid experts' understanding of the opposing experts' thought process - rather than formed opinions

[17] See Prague Rules 6.7 c

The success of this procedural step also depends on the 'soft skills' between the expert witness teams who ideally should be working as one team, splitting the work in an appropriate manner. This could again reduce the time and cost of the arbitration.

The authors have experienced some incredible collaborations which have been applauded by the tribunals (and the parties) for efficiency and clarity of addressing the precise issues on which their assistance was required. The authors are therefore of the view that this can work well in practice – but requires effort, as explained above.

6. The expert witnesses within each discipline next produce individual reply expert witness reports only on areas of disagreement but also containing views in the alternative showing what their conclusions would be if the other expert witnesses' assumptions and methodologies were accepted by the tribunal.

The benefit of previous item 5 should be evident when the expert witnesses prepare their own reply individual report as the issues to be addressed will be clear and the opposing expert witness' views on each issue will be clearly set out and distinct.

If upon the exchange of the reply reports the expert witnesses identify further areas that may be narrowed/explored, then they should jointly report to the tribunal (and the parties) that they should produce a joint statement which in a succinct manner would clearly and unequivocally set out all the agreements and all disagreements on all key issues in the matter.

Documents of such brevity and clarity should be primary documents in exploring expert witness evidence during the evidentiary hearing and may lead to expert witness conferencing (discussed below).

7. Expert witness conferencing

Given that following previous items 5&6 above there will be an enumerated and logical list of agreed and disagreed items, the opportunity for expert witness conferencing by the tribunal ahead of any cross examination should increase. Not only will the issues disagreed between the expert witnesses be clearly listed, but each expert witnesses' opinions against these disagreed items will be set out.[18]

Our suggested approach to receiving expert witness evidence should bring more clarity and focus on fully crystallised issues in the hearing, so that the tribunals get the best possible assistance – and likewise to equip the counsel in testing of the expert witness evidence.

Conclusion

In this article the authors have set out suggestions for effective delivery of expert witness evidence based on positive and tested experiences, which can bring significant time and cost benefits – along with ensuring that the tribunal gets the best assistance on matters which require expert evidence.

[18] The MENA Leading Arbitrators' Guide to International Arbitration, p243-245

Whilst certain suggestions may have become commonplace (such as list of issues and common data sets), the authors believe that benefits of a properly set out (and delivered) joint expert report and communication between the experts and the tribunals, have not been sufficiently explored. Therefore, by sharing the view from the experts' corner we hope to encourage arbitration practitioners (and users of arbitration) to consider these challenges and suggestions to the benefit of arbitration users.

About the Authors:

Michael Tonkin – Partner, HKA, is a Chartered Quantity Surveyor, Chartered Arbitrator, RICS Accredited Expert Witness and CEDR Accredited Mediator with over 30 years of construction industry experience

Igor Corelj – Principal, HKA, is a Chartered Quantity Surveyor and structural engineer with over 17 years of international construction industry experience.