



The engagement of expert witnesses in complex construction disputes

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At a recent arbitration conference, HKA Partner Jonathan Humphrey was invited to participate in a session discussing the arbitration of international construction disputes.

Jonathan was posed the following question:

“A challenge with complex construction disputes is managing the number of experts, which may include technical construction experts as well as financial/quantum experts.

In construction matters, the delay or other technical experts may be involved in the investigation of claims early on. However, the quantum expert may not be engaged until later in the process.

As a financial and quantum expert engaged in a range of disputes, including construction arbitrations, what are some of the techniques that can be used to manage the expert evidence process?”

In response, Jonathan shared some key insights around how to effectively engage expert witnesses to improve outcomes.

Engaging experts effectively at the timetable stage

Tribunals can achieve improved outcomes (and reduced costs) through early interactions with experts at the timetable stage.

Jonathan noted that this is a contentious point in Australia, more so than in any other jurisdiction in which he has practised, citing the fear of discovery applications against experts in litigation.

This issue is all but non-existent in arbitration: whether a pleadings-style common law approach is adopted; and indeed, isn't an issue with a memorial-style civil law approach where the expert has to be involved from the start.

Jonathan noted:

*“While you will struggle to find an expert who doesn't want to be involved earlier in the process, generally doesn't it make sense? After all, there are **three issues** that clients should consider before advancing a claim:*

- *The “merits” of the claim – which tends to be the main area of focus*
- *The potential damages – why is a claim being advanced if not to seek some form of recovery*
- *The recoverability and enforceability of any award.”*

Any concern that an expert is assisting with the preparation of the claim should actually be viewed as a positive and embraced.

Jonathan noted that when reviewing a client's assessment of loss, unfortunately, they were often incorrect after a significant amount of effort and cost had gone into producing that assessment of the loss.

“It would be faster and ultimately cheaper for the client if the expert was involved from the start. They just need to perform their work from the standpoint of independence.”

Jonathan went on to point out several cases in which he'd identified significant time and duplication of work costs that might have been avoided if an expert had been engaged earlier:

“There was a recent case where the client just wanted to get out of the contract. However, when we got involved at the lawyer's insistence, we identified the client actually had a claim for EUR 60m - which they won.”

When considering construction claims specifically, there is a tendency to focus on time and cost claims, with little thought given to other potential heads of claim. These can include claims for loss of profits, opportunity costs, quantum meruit and financing costs. Without these being identified early, they will not be included in the pleadings, so ultimately may not be recoverable.

A considered approach for engaging experts during claims preparation

Jonathan outlined that in his experience, construction disputes lead the way in early involvement of experts in the timetable, often through the adoption of the “Kaplan Opening” or the early interaction of experts.

*“It is becoming the **norm** that the first step in the expert process on construction arbitrations is for the experts to get together and produce a “**joint report**”. This can be to set out an agreed list of questions to be answered, identify the documents which are to be considered, or define an approach and methodology.”*

He had observed more engagement from Tribunals as an output of this process where case management conferences are convened to assist in gaining the maximum benefit from the process.

*“In a recent case, there were differences between me and my counterpart as to the **documents** which were required to evidence the claim. A CMC was held*

at which the experts **explained their positions**. The Tribunal **“suggested”** to the opposing party during the CMC that if an expert considered reasonable documentation was required so that they could confirm the claims, wouldn't this be a reasonable thing to provide, which could ultimately corroborate their claims. This direct request to the party **proved extremely successful.**”

Engaging with experts effectively at the merits hearing

Engaging with experts effectively at the merits hearing can narrow issues under consideration, improving tribunal outcomes.

Jonathan explained that anything that can narrow the issues between the experts is of great benefit to the Tribunal during the merits hearing.

This can start with the early involvement of the experts in assisting in assessing the claim with steps scheduled in the

procedural timetable. In addition, the production of joint expert reports before the hearing is extremely beneficial in directing the Tribunal and the parties to the key issues requiring consideration.

Jonathan also noted:

“Hot tubbing is also a useful process for the Tribunal to hear the views of the expert side-by-side, rather than having a delay between the responses. This potentially can reduce the time for questioning at the hearing.”

Further, it was discussed that questioning of experts by another expert can be a useful tool so an expert's view can be challenged by a knowledgeable peer. However, Jonathan did note there is a risk that this can be seen as advocacy, and this process is of mixed use depending on how it is managed by the Tribunal.

All-in-all, improved usage of expert witnesses during the timetable, claims, and merit hearings will assist the Tribunal in being more informed, prepared and having the key issues to focus on, which improves their consideration of the issues.

About Jonathan Humphrey

Jonathan is a Chartered Accountant with over 20 years of experience in forensic accounting. He has been appointed as an expert more than 50 times in commercial and investment treaty cases, dealing with matters of damages and quantum. Jonathan is recognised in the prestigious Who's Who Legal as a global thought leader.

Jonathan has acted as an expert witness in multiple forums, including international arbitration under ICC, UNCITRAL, LCIA, SIAC, DIAC and HKIAC rules, court litigation and mediation. He has given oral evidence in commercial and investment treaty cases with disputed values of up to US\$1.5 billion.

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