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HICAC 2025

HICAC 2025 – HO CHI MINH CITY INTERNATIONAL CONSTRUCTION ARBITRATION CONFERENCE

Raising the Bar:

Enhancing Quality in Dispute Resolution for Vietnam's Construction Projects – Bridging International Expertise with Domestic Practice

10th & 11th APRIL 2025

REX HOTEL SAIGON
141 Nguyen Hue, District 1, Ho Chi Minh City

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HICAC 2025

2025 **HO CHI MINH CITY INTERNATIONAL CONSTRUCTION ARBITRATION CONFERENCE**

Raising the Bar:

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INTRODUCTION

Building on the success of the 2024 event, the Vietnam International Arbitration Centre (VIAC) and the Society of Construction Law – Viet Nam (SCLVN) co-organize the **Ho Chi Minh City International Construction Arbitration Conference – HICAC 2025**. This year's Conference main theme is "Raising the Bar: Enhancing Quality in Dispute Resolution for Vietnam's Construction Projects – Bridging International Expertise with Domestic Practice".

HICAC 2025 aims to bring together professionals from the construction industry, legal experts, arbitrators, and academics to discuss the latest trends, practices, and developments in construction arbitration. Vietnam is witnessing significant growth in both construction activities and the demand for quality and efficient construction dispute resolution. This conference, featuring diverse domestic and international perspectives, will provide valuable insights into legal regulations and practical applications, helping businesses in navigating dispute resolution. In addition to informative panel discussions, the conference will provide networking opportunities to foster collaboration and promote the best practices among international delegates and enterprises. The conference will also be a timely platform to contribute to legal reform, particularly the Law on Construction and the Law on Commercial Arbitration, facilitating business activities and streamlining the dispute resolution process.

05
Content sections

39
Domestic & Foreign Expert

06
Sideline events

150+
In-person Participants

10+
Partners

MAIN EVENT

Time

Day 01
8.30 AM – 5.00 PM
10th April 2025 (Thursday)

Day 02
8.30 AM – 12.00 PM
11th April 2025 (Friday)

Venue

REX HOTEL SAIGON,
141 Nguyen Hue, Ben Nghe ward,
District 1, HCMC, Vietnam

TENTATIVE AGENDA

GENERAL SESSION

Raising the Bar: Enhancing Quality in Dispute Resolution for Vietnam's Construction Projects

8.30 AM – 12.00 PM, 10 April 2025 (Thu)
Lotus Ballroom, Rex Hotel Saigon

Duration	Content	
08.30 – 09.00 AM	**Opening speech** Representative from Society of Construction Law – Vietnam (SCLVN) Representative from Vietnam International Arbitration Centre (VIAC)	
09.00 – 09.30 AM	**KEYNOTE SPEECH: A Spectrum of Dispute Resolution Choices : What does Strategic Thinking Inform?** **Dr. Hamish Lal** – *Partner, Hamish Lal Partners, Immediate-Past Chairman of the Society of Construction Law and of The Adjudication Society*	
Session P1: Enhancing Quality in Construction Arbitration: Experiences from International Practitioners		
09.30 – 09.50 AM	**Enhancing Quality in Construction Arbitration: Experiences and Expectations of a Repeat User** **Mr. Elliott Geisinger** – *Partner, Schellenberg Wittmer Ltd*	
09.50 – 10.10 AM	**Tea-break**	
10.10 – 10.30 AM	**Dispute Avoidance – Is it realistic?** **Mr. Gerard P. Monaghan** – *Chartered Engineer; Chartered Arbitrator; Accredited Mediator, FIEI, FCIArb*	
10.30 – 10.50 AM	**Enhancing Expert Evidence in Modern Arbitration** **Mr. Ho Chien Mien** – *Co-Head of the Allen & Gledhill's Construction & Engineering Practice*	
Session P2 – Roundtable Discussion: Raising the Bar in Dispute Resolutions for Construction Projects in Vietnam		
10.50 – 12.00 PM	**Moderator**	**Mr. Nguyen Nam Trung** – *Chairman of the Society of Construction Law - Viet Nam (SCLVN)*
	Panelists	**Dr. Hamish Lal** – *Partner, Hamish Lal Partners, Immediate-Past Chairman of the Society of Construction Law and of The Adjudication Society*
		Mr. Elliott Geisinger – *Partner, Schellenberg Wittmer Ltd*
		Mr. Gerard P. Monaghan – *Chartered Engineer; Chartered Arbitrator; Accredited Mediator, FIEI, FCIArb*
		Mr. Ho Chien Mien – *Co-Head of the Allen & Gledhill's Construction & Engineering Practice*
12.00 PM	**End of General Session**	
12.00 – 1.30 PM	**Lunch time**	

Ho Chi Minh City International Construction Arbitration Conference 2025

A Spectrum of Dispute Resolution Choices -

What does Strategic Thinking Inform

Dr. Hamish Lal[1]

1. It is a real privilege for me to give this Lecture. I thank the Vietnam International Arbitration Centre for the generous invitation to spend some time with the 2025 Conference.

2. I am pleased to see many friends and esteemed colleagues here today. In particular, I am delighted to see and thank Mr Huu Huynh of the Vietnam International Arbitration Centre and Mr Trung Nguyen of the Society of Construction Law. It is wonderful to be here in Saigon.

A Scenario

3. Imagine the following scenario. I am a Contractor working internationally but Head Quartered in Vietnam. The Project has been subject to Change Orders, Access has been delayed, parts of the Project were impacted by bad geotechnical conditions which were outlined in the Rely Upon Information, and there were delays in the testing and commissioning because the Engineer was replaced during the Project. Such issues are common in international construction projects. The Owner / Employer says he has right

[1] Partner, Hamish Lal Partners hamish.lal@hamishlalpartners.com

to Delay Damages which he says ought to be greater than the 10% limit in the Contract because I acted with "manifest error" when conducting certain tests. The Project Ledger shows that I have losses greater than USD 50 Million excluding the Delay Damages. I also have not been paid the last 3 IPCs (in fact the Owner had stopped issuing IPCs). I have a Dispute.

4. There is an array of dispute resolution methods. But, what is the General Manager and Board of Directors thinking:

    a. Speed is important. The s-curve is ahead of the payment curve.
    b. How much will Dispute Resolution Cost and is that Cost recoverable?
    c. How will Dispute Resolution impact the Project Team and Management – is the Dispute winnable – do we have access to key people; documents; and messages.
    d. If we go to Arbitration, will we win and be able to enforce the Final Award?

5. Strategy is important. Strategy provides the lens through which Parties view the various dispute resolution methods:

    a. Mediation
    b. Adjudication
    c. Dispute Boards
    d. Expert Determination
    e. Arbitration

6. In my view, the fundamental point that informs Strategy on both sides is having "a trusted expert assessment viewed through the lens of an arbitral process". Very very often, experts will look at matters through the 'lens' of a "quick but very approximate" adjudication or a 'friendly' standing DAB. This is wrong.

ADJUDICATION

7. Adjudication can be contractual or Statutory. For example, Singapore's Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed). Statutory adjudication may not be an option for the Scenario above. Put simply, Adjudication is at its core a fast and inexpensive method of deciding "disputes" but on a provisional basis, with the full merits of the dispute deferred to arbitration or court process. Costs are not recoverable. Discovery and Document Production is not a feature. Adjudicators can get the law wrong, get the facts wrong or both, and still the Decision is deemed enforceable. Improvement of cash flow for contractors underlies statutory adjudication. The temporary answer given by statutory adjudication is often accepted by parties as a "good enough" outcome for everyone. People often adopt this "good enough" answer and move on without the time, effort and trouble of a full trial. This fact has demonstrated that a quick rough and ready answer given within a few months may in fact be more useful to businesses in the construction industry than an in-depth and forensically meticulous answer achieved only years later. In my Scenario, Adjudication is not an option.

DISPUTE BOARDS

8. Dispute Board mechanisms pre-date statutory adjudication. Dispute Boards, meaning, Dispute Review Board; Dispute Adjudication Board; Dispute Avoidance & Adjudication Board:

   a. At best provide Binding Decisions subject to Arbitration that then renders a Final & Binding Award.

   b. FIDIC has been the ambassador or promotor of Dispute Boards.

c. Some will advocate very strongly in favour of DABs. Others are afraid to challenge such opinions. Undoubtedly, there are success stories. There are also cases where:

   i. DAB is used a 'stepping-stone' in the Multi-Tier Process as the final step pre-Arbitration.

   ii. Cost of a standing DAB become too high.

   iii. DAB Decisions are interrelated such subsequent Decisions lead to odd results or there is 'break down' in the overall system because a challenge to one Decision in the sequence impacts related Referrals.

9. One concern with contractual adjudication is that the enforcement of a determination may be cumbersome and convoluted. Typically, decisions and determinations of a dispute board must first proceed to an arbitration award and only after that to court enforcement. One cannot directly grant judgment for the money that has been contractually adjudicated because that would be a final decision and would raise an issue estoppel if the dispute proceeds for fuller determination on its merits.

10. FIDIC Gold Book has formulated a solution. However, there are concerns that such Arbitral 'enforcement' Awards are not enforceable in certain Civil Law Jurisdictions.

11. Another conceptual answer is for a court to be asked to grant specific performance of the obligation to comply with the temporary determination of how much should be paid. That would be a final order, but its result is simply that the paying party has performed

its obligation to comply. Later, there could be an adjustment that would take account of that compliance in the same way as when the obligation is complied with voluntarily. The contract could include a clause providing for this. For example, it could state that parties are obliged to comply with the outcome of the contractually mandated adjudication process pending a final resolution of the dispute. It should also state that this obligation may be specifically enforced either in a chosen court or in any court of competent jurisdiction.

12. In my Scenario, let us assume that the General Manager mindful that his legal and expert costs will not be recoverable; that the Employer will most likely not comply with the Decision; that the DAB does not have strong case management powers and that Arbitration is the only route to get full and proper relief, has decided to 'side-step' this Multi-Tier step and proceed with all its claims to Arbitration. This decision also raises questions of jurisdiction and admissibility.

13. Here, care is needed: In *Maeda Kensetsu Kogyo Kabushiki Kaisha (Maeda Corp) v Bauer Hong Kong Ltd* [2020] HKCA 830 the claimants formed a joint venture, which was the main contractor under two contracts for the construction of railway tunnels. The joint venture subcontracted the diaphragm wall works for each tunnel to Bauer. The subcontracts contained a clause requiring Bauer to state the contractual basis of its claim within 28 days of giving initial notice of a claim for any additional payment or expense:

> *"21. Claims*
>
> *21.1 If the sub-contractor intends to claim any additional payment or loss and expense due to:*
>
> *21.1.1 any circumstances or occurrence as a consequence of which the contractor is entitled to additional payment or loss and expense under the main contract; …*

> *21.1.6 any variation or subcontract variation, as a condition precedent to the sub-contractor's entitlement to any such claim, the sub-contractor shall give notice of its intention to the contractor within fourteen (14) days after the event, occurrence or matter giving rise to the claim became apparent or ought reasonably to have become apparent to the sub-contractor…*
>
> *21.2 If the subcontractor wishes to maintain its right to pursue a claim for additional payment or loss and expense under clause 21.1, the sub-contractor shall as a condition precedent to any entitlement, within twenty eight (28) days after giving of notice under clause 21.1, submit in writing to the contractor:*
>
> *21.2.1* ***the contractual basis*** *together with full and detailed particulars and the evaluation of the claim; [and various other supporting documents] …*
>
> *21.3 The sub-contractor shall have no right to any additional or extra payment, loss and expense, any claim for an extension of time or any claim for damages under any clause of the subcontract or at common law unless clauses 21.1 and 21.2 have been strictly complied with."*

14. A dispute arose under the subcontracts, which was referred to arbitration. Bauer's primary case was that unforeseen ground conditions had given rise to a variation of the scope of the works under the express variation provisions of the subcontracts. In the alternative, Bauer made a 'like rights' or 'equivalent rights' claim under Clause 21.1.1. The arbitrator rejected Bauer's primary claim, and the issue between the parties became whether the 'like rights' claim had been properly notified pursuant to Clause 21.2 – there was no dispute that Bauer's Clause 21.2 notice did not make express reference to a claim under Clause 21.1.1, and referred only to the variation claim under Clause 21.1.6. The arbitrator made an award in favour of Bauer, holding that the contractual basis stated in the notice did not have to be the contractual basis on which the party in fact succeeded at arbitration. The claimant appealed.

15. Both the Court of First Instance and the Court of Appeal disagreed with the arbitrator's assessment. The wording of Clause 21.2.1 was held to be clear and unambiguous. Both the Court of Appeal and the court below considered that the arbitrator's construction of it – that the principal purpose of the clause was to enable the joint venture to know the

factual basis of the claim, so that it could decide what steps to take – was contrary to commercial common sense. The Court of Appeal held, at [60]-[61]:

> *"…[t]he arbitrator's interpretation of Clause 21.2.1 would negate the commercial purpose of achieving finality, as a claim can be advanced on a different contractual basis in an arbitration which may be years down the line.*
>
> *61. The other commercial purpose for this provision is similar to what was mentioned above in The Yellow Star. In a chain contract situation, the Contractor would wish to know whether the Sub-Contractor's claim would need to be passed up the line. If the claim is based on other matters, such as breach of the Sub-Contract by the Contractor (cl.21.1.2), it would not need to be. The arbitrator's interpretation may prejudicially affect this commercial purpose as well."*

16. In the Scenario. The Contractor will need to check if the "claims notification requirements" are so strict. If so, the strategy will need to reflect the claims made and notified. This conundrum impacts *both* Arbitrators and the Parties. Arbitrators seeking to provide relief even there is imperfect compliance with the Contract struggle. It may mean that good entitlement based on the merits may need to be left on the cutting-floor. Claims outside of the Contract, such as unjust enrichment or quantum meruit may need to be pleaded as alternatives by a contractor in a situation as Bauer was in.

ARBITRATION

17. In the Scenario, the Contractor is driven by recovery of all its legal and expert fees, a final, binding and enforceable Award and an arbitral process that will improve the prospects of getting to the truth. I want to look at four questions that the Board of Directors raise:

a. **Is the Arbitration Agreement "solid". What does this mean?** Let assume the Seat is defined; that the law of the arbitration agreement is also defined; and that Rules are specified together with the Arbitral Institution. Counsel explains that we are good. We may have issues with compliance with the Multi-Tier Process but the Arbitration Agreement is well constructed.

18. The General Managers' concern may have come from *Baker Hughes Saudi Arabia Company Limited v Dynamic Industries & Others* No 23-30827 (5th Cir, 27 January 2025)[2] Here the Arbitration Agreement made reference to the DIFC-LCIA Rules. One Party argued that this meant that the only Arbitration Institution that could administer the Arbitration was the DIFC-LCIA. This had been closed by Dubai Decree 34 and so that Party argued that in the absence of the DIFC-LCIA Institution, the Parties were free to commence Court Litigation in the US. The US Fifth Circuit Court of Appeals decided that reference in the arbitration agreement to "Arbitration Rules of the DIFC-LCIA" did not mean that the arbitration had to be administered by the DIFC-LCIA Arbitration Centre but that another institution could happily administer the arbitration.

19. The Second issue raised by the Board concerned **the dangers of the Arbitrators failing due process or exceeding jurisdiction**. The concern came from a recent Singapore Court of Appeal Judgement of Wan *Sern Metal Industries Pte Ltd v Hau Tian Engineering Pte Ltd* [2025] SGCA 5 Here, Chief Justice Sundaresh Menon giving judgement explained the need for increased vigilance when an Arbitrator is handling a

[2] *Baker Hughes Saudi Arabia Company Limited v Dynamic Industries, Incorporated; Dynamic Industries International, L.L.C.; Dynamic Industries International Holdings, Incorporated*, Case: 23-30827, Filed 27 January 2025 https://www.ca5.uscourts.gov/opinions/pub/23/23-30827-CV0.pdf

"Documents Only" procedure. Here, put simply, the Arbitrator was found to have breached rules of natural justice because she decided a point raised very late by one Party, without giving the other party to respond on that specific point. International Construction Arbitrations can raise complex and overlapping issues and so this is a natural hazard for Parties and Arbitrators. A good expert is able to assist. The technical or expert Arbitrator must be careful – the Award needs to reflect the contours of the Parties legal arguments rather than 'this is the correct valuation' based on the Arbitrator's expertise. The General Manager is still keen on Arbitration.

20. The Singapore Court of Appeal looked at a similar issue in the context of international construction arbitration. The case is *CAJ V CAI APPEAL [2021] SGCA 102*. Here, CAI commenced Singapore-seated arbitration proceedings against claiming liquidated damages because of a 144-day delay in mechanical completion. CAJ argued that the mechanical work was completed on time, that any delay was a result of the rectification measures and that CAI had waived its right to claim liquidated damages or, alternatively, was estopped from making a claim on this basis. In closing submissions, CAJ advanced the argument for the *first time* that it was contractually entitled to an extension of time, which would reduce liquidated damages (the "EOT Defence"). CAI objected to the EOT Defence on the basis that raising it at this stage was procedurally unfair as it prevented CAI from addressing the issue during document production, witness evidence or cross-examination of witnesses. CAI asked the tribunal to dismiss this new argument.

21. In its final award, the arbitral tribunal found that CAJ did not achieve the mechanical completion by the stipulated date. The tribunal also rejected the estoppel defence but *accepted* the EOT Defence on the basis that CAI had been granted the opportunity to

respond to the defence in its written closing submissions. As a result, the time for mechanical completion was extended by 25 days such that CAI was entitled to receive liquidated damages for 74 instead of 99 days.

22. CAI applied to the Singaporean High Court to set aside the final award in part on the following grounds: (i) in allowing the EOT Defence, the tribunal had exceeded its jurisdiction arising out of the parties' submission to arbitration; and (ii) the final award was in violation of the principles of natural justice. The High Court allowed the set aside application on three grounds, namely that: (i) CAI did not have a fair opportunity to respond to the EOT Defence, as it was a "completely new defence which was factually and conceptually distinct from the Estoppel Defence"; (ii) the tribunal had relied substantially on its "professed experience" in reaching its decision on the EOT Defence, without explaining how this was relevant to the parties' positions and (iii) the EOT Defence was beyond the scope of the parties' submission to arbitration.

23. CAJ appealed, arguing that the Judge ought to have found that the EOT Defence fell within the scope of the Tribunal's jurisdiction. According to the appellants, (i) the Judge took too narrow a view of the scope of the parties' submission to arbitration, as well as the Terms of Reference, the pleadings and the draft Lists of Issues; (ii) there had been no breach of natural justice in the making of the Award. The Court of Appeal dismissed the Appeal. It held that the Tribunal's decision on the EOT Defence had been made in excess of jurisdiction:

- The EOT Defence was a creature of a contractual provision. There is the procedural requirement that the appellants submit a notice of a claim for an extension of time, along with the requisite particulars justifying such extension. It also goes without saying that such a defence must be pleaded [31].

- The court should not construe the parties' pleadings, the Lists of Issues and the Terms of Reference too narrowly. However, it was impermissible for the appellants to invite the court to adopt a broad reading of the pleadings, the Lists of Issues and the Terms of Reference in order to read into them a defence which was not pleaded. It was untenable for the appellants to suggest that the EOT Defence fell within the scope of the submission to arbitration simply because it would have a bearing on the respondent's claim for liquidated damages [45].

- The respondent did not have a fair and reasonable opportunity to respond to the EOT Defence and this breach of natural justice was connected to the making of the Award and materially prejudiced the respondent's rights. If the respondent had been given the opportunity to lead further evidence, test the appellants' evidence and tender further legal submissions, this could have reasonably made a difference to the Tribunal's determination [54].

- So long as the Tribunal's decision on the EOT Defence was based in part on its "unarticulated experience" in relation to which the respondent had not been afforded any opportunity to address, that in itself constituted a breach of natural justice. The Tribunal's prior experience dealing with extension of time claims for other construction projects would be immaterial in deciding on the appropriate extension of time in this case without the benefit of pleadings, specific evidence (both factual and expert) and arguments to determine the proper extension of time to be granted. Once this glaring fact is placed in the correct perspective, it would be immediately apparent that the failure of the Tribunal to inform the parties as to how its "experience" would bear on the extension of time issue was another classic case of breach of natural justice [55].

24. The conundrum for an arbitrator is clear: she has "expertise" in delay claims; understands that a party has not actually pleaded a claim for an extension of time; wants to give the correct answer; and thus applies the facts to arrive at such an answer. The trend in some Seats that the direct and bright red arrow piercing through and tying, specific claims, determinations, NODs, DAB decisions, and then to the precise causes of action in Arbitration, suggests that Arbitrators must be very careful.

ENFORCEMENT

Transnational issue estoppel in relation to arbitration challenges.

25. The next point concerning the Contractor is enforcement. In other words, working on the assumption that the Arbitral Tribunal finds in favour of the Contractor, there was a concern that the Award would not ultimately lead to monies being paid. This raises two legal questions: would an Award be set aside at the Seat or could the Award be held to be unenforceable at a jurisdiction where enforcement was sought? This brings into play transnational issue estoppel.

26. This is where a court considers an issue concerning the status or validity of an Award *after* the same issue has been considered by another court in another jurisdiction. In practical terms, one needs to consider what (if any) preclusive effect should be given to prior decisions made by courts in other jurisdictions. The further deeper question is whether the answer differs depending on whether the *first* court is the seat court or an enforcing court.

27. There are two competing legal theories concerning how arbitration relates to national courts. The first is the "delocalisation theory" – here arbitration is seen as a transnational legal process operating independently of national law. On this view, "no single state, not even the seat of the arbitration, has the final say on the validity or

enforceability of an award."[3] The arbitral process and award is subject to judicial scrutiny only at the place of enforcement.[4] This is an approach favoured in Civil Law jurisdictions. For example, in the *Putrabali* case, the French *Cour de cassation* held that "[a]n international arbitral award, *which does not belong to any state legal system*, is an international decision of justice and its validity must be examined according to the applicable rules of the country where its recognition and enforcement are sought".[5]

28. Most common law jurisdictions take a different view: The "territorialist" or "jurisdictional" theory of arbitration.[6] It treats every arbitration as connected to a particular jurisdiction – that is, the seat – so that the process is subject to a dual system of control. This is important. The setting-aside of an award at the seat will generally be regarded as being universal in effect, so that once set aside at the seat there is no award to enforce.[7]

29. A recent example of this jurisprudence is *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56. Here, Deutsche Telekom had obtained an order enforcing an award against the Republic of India ("India"). India then applied to set that enforcement order aside on the ground that there was no valid arbitration agreement. India had previously applied (unsuccessfully) to set the award aside in Switzerland. In

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[3] The Honourable the Chief Justice Sundaresh Menon, Supreme Court of Singapore, "The Role of the National Courts of the Seat in International Arbitration", keynote address at the 10th Annual International Conference of the Nani Palkhivala Arbitration Centre (17 February 2018) ("*The Role of the National Courts of the Seat in International Arbitration*") at para 8.

[4] Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 7th Ed, 2023) ("*Redfern and Hunter*") at para 3.89.

[5] *Société PT Putrabali Adyamulia v Société Rena Holding et Société Mnugotia Est Epices* [2007] Rev Arb 507 at 514, as translated in *Redfern and Hunter* at para 3.90.

[6] *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 ("*Deutsche Telekom*") at [121].

[7] *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 at [77]; *Prometheus Marine Pte Ltd v King, Ann Rita and another appeal* [2018] 1 SLR 1 at [46]; *Deutsche Telekom* at [77].

those proceedings, the Swiss Federal Supreme Court rejected the same arguments that India was advancing in the Singapore enforcement proceedings. The Singapore Court of Appeal applied the doctrine of transnational issue estoppel and held that India was precluded from contesting the enforcement of the award on grounds that had already been rejected by the Swiss seat court. The Court of Appeal also endorsed – albeit in *obiter* – what it termed the "Primacy Principle". That principle holds that a seat court's decision on matters going to the validity of an award should be treated as presumptively determinative, so that the onus is on the party resisting enforcement to prove otherwise.

30. The Primacy Principle stems from the notion that the seat court occupies a special position within international arbitration. It is the court that the parties have chosen to vest with supervisory jurisdiction over the arbitration, and so it would follow that the seat court's decisions on matters pertaining to the validity of an award should be regarded as presumptively determinative. In *Deutsche Telekom*, it was said that the basis for the Primacy Principle lies in "the New York Convention read with the Model Law and the [International Arbitration Act], which recognise the special role and function of the seat court". The Court of Appeal identified three situations where the seat court's decision might be held not to be determinative, namely: where that decision conflicts with the public policy of Singapore; where there were serious procedural flaws in the seat court's decision-making process akin to breach of natural justice; and where the decision is shown to have been perverse. The Court of Appeal stressed that this list was not intended to be exhaustive.

31. Where the Primacy Principle is grounded in the scheme of the New York Convention and the Model Law, transnational issue estoppel is a common law doctrine of wider

and general application. It reflects a particular application of the issue estoppel doctrine which, together with cause of action estoppel and the rule in *Henderson v Henderson* (the so-called "*Henderson* principle"), gives the law of *res judicata* most of its content. Jurisprudential thinking then tends to the conclusion that there is nothing internal to the logic of issue estoppel that compels a distinction between the seat court and enforcement courts. On that view, a *prior* decision of an enforcement court can give rise to an issue estoppel precluding the relitigation of issues not only before parallel enforcement courts, but also before the seat court.

32. The Singapore Court of Appeal acknowledged these difficulties in *Deutsche Telekom* and suggested that if the doctrine of transnational issue estoppel is to be disapplied in relation to prior enforcement court decisions, then that may be a result defensible on policy grounds. Currently, whether a transnational issue estoppel can arise out of a prior enforcement court decision remains an open question in Singapore.

33. English law has fully embraced conventional *res judicata* principles in relation to the relitigation of issues post-award. Under English law, an issue estoppel may arise out of not only prior seat court decisions,[8] but also prior enforcement court decisions (so far as the issues in question relate to the validity of the award).[9] The English courts have also endorsed the *Henderson* principle as a further control which is "consistent with the policy of sustaining the finality of decisions of the supervisory courts".

[8] See, *eg*, *Carpatsky Petroleum Corpn v PJSC Ukrnafta* [2020] EWHC 769 (Comm) ("*Carpatsky*").
[9] *Diag Human SE v Czech Republic (No 2)* [2014] EWHC 1639 (Comm) ("*Diag Human*") at [51]–[63].

34. Australian law, by contrast, has articulated and adopted a doctrine akin to the Primacy Principle. The Federal Court of Australia's decision in *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* (2013) 304 ALR 468 ("*Gujarat NRE*"), held that "it will generally be inappropriate for this court, being the enforcement court of a Convention country, to reach a different conclusion on the same question of asserted procedural defects as that reached by the court of the seat of arbitration".

35. As has been seen, there is general agreement that weight should be accorded to the prior decisions of courts from other jurisdictions concerning the status or validity of an award. Unresolved reservations remain where the prior decision is one of an enforcing court and the matter now comes before the seat court on a challenge to the award.

THE ADVERSE INFERENCE

36. So, having looked at the law of the seat and the risks of an enforcing jurisdiction deciding something different, the Board in the Scenario are content to proceed. The General Manager then asks **what happens if the Owner / Employer does not provide evidence or documents that it is ordered to provide by the Arbitrators during the Document Production process**,?

37. Contemporaneous evidence isolated in contemporaneous documents such as letters, emails, notes, messages, and minutes of meetings is vital in international arbitration.. The Document Production process is complex. The orthodox arbitral rules and soft law are open to abuse such that a party can participate in the Document Production process but then elect to ignore the Tribunal's Order on Production; make only selective disclosure; and/or fail to provide documents that patently exist and correspond with other factual

exhibits. The Tribunal's power to make an adverse inference in respect of such behaviours lacks 'teeth' and thus raises concerns.

37. Some advocate a robust strategic re-think of the Tribunal's powers when its Document Production Orders are blithely ignored. Should institutional rules be amended such that ignorance is visited by costs orders and strike-out of claims and defences? Should the 2010 IBA Rules on the Taking of Evidence in International Arbitration be now revised to supplement the adverse inference proposition in Article 9(5) with discretion to strike out relevant claims and defences?

38. The Document Production phase is important. Marieke Van Hooijdonk and Yves Herinkckx[10] explain that the process "*is an invaluable tool for demonstrating to an arbitral tribunal facts that a party could not prove if it had to rely only on the documents already in its possession before commencement of the case. Despite clear disallowance of fishing expeditions under the IBA Evidence Rules, the process can help a claimant whose own records are initially less than convincing*". Van Hooijdonk and Herinkckx make another compelling observation that is often overlooked: "*Conversely, and this is a worthwhile feature of the system as well, the knowledge that one will have to disclose detrimental documents to the opponent can somewhat refrain prospective claimants from making overly enthusiastic demands or fanciful assertions*".

39. Article 3(3) of the IBA Rules requires (i) that document requests be specific, (ii) that the requested documents are relevant to the case and material to its outcome, and (iii) that the requested documents are not in the possession, custody or control of the requesting

[10] The Impact of IBA Guidelines and Rules, Marieke Van Hooijdonk and Yves Herinkckx in Do Arbitral Awards Reveal the Truth? Reports from the Third Joint CEPANI-NAI Colloquium held 21 March 2019 in Brussels.

party. A request must explain the relationship between the requested documents and the issues in the case with sufficient specificity.[11]

40. Relevance relates to the well-known standard that the documents sought relate to issues closely connected or appropriate to what is being considered in the dispute. Materiality has been explained as: "*a document is material to the outcome of the case if it is needed to allow complete consideration of the factual issues from which legal conclusions are drawn*"[12] or more broadly: "*to be 'necessary', to the case being made does not mean that the case cannot be won without it, but that the case cannot be presented optimally without it*".[13]

41. Some civil law practitioners may also cite the burden of proof factor. The IBA Rules contain no requirement that the requesting party must have the burden of proof with respect to the issue about which documents are sought. Rather, the fact that document requests are used to ventilate consideration of facts tends toward analysis of the relevance and materiality of the documents sought (not which party bears the burden of proof on the issue).

42. Consequences for Non-Production: Article 9(5) of the IBA Rules provides that a tribunal can draw adverse inferences when a party has failed to comply with a tribunal's order. Article 9(5) states:

> *If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document*

[11] Commentary of the IBA Rules of Evidence Review Subcommittee ("IBA Commentary"), 2010 IBA Rules of Evidence Review Subcommittee, at p. 9 et seq.
[12] Reto Marghitola, 'Document Production in International Arbitration', International Arbitration Law Library, Volume 33 'Chapter 5: Interpretation of the IBA Rules', at pp. 52-53.
[13] Jeffrey Waincymer Procedure and Evidence in International Arbitration Part II: The Process of an Arbitration, Chapter 11: Documentary Evidence at para. 859.

> *ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.*[14]

43. Under Article 9(7) of the IBA Rules, non-compliance with procedural orders can also be considered in the allocation of costs.[15] For instance, the tribunal can allocate the full costs of the document production procedure to the party, which did not comply, even if that party was successful on the merits.[16] However, whether costs alone act as a sufficient deterrent to misbehavior in production remains in question.[17]

44. The Ciarb Guidelines on Managing Arbitrations and Procedural Orders include sanctions in instances where a party deliberately causes delays by repeatedly failing to comply and/or frustrates the proceedings through non-production of documents including peremptory orders; costs orders and excluding evidence from the record.[18]

45. There are a number of practical problems with the adverse inference. Many scholars have recognized that the problems inherent with the adverse inferences have led tribunals away from drawing adverse inferences and instead relying on the evidence (or lack of evidence) presented to them. An abstract power to draw adverse inferences does not address the serious abuse of the document production process. The following provides examples of the problems for the adverse inference:

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[14] IBA Rules, Article 9(5).
[15] Gary Born, International Commercial Arbitration, 2316 (Kluwer 2014).
[16] Reto Marghitola, 'Document Production in International Arbitration', International Arbitration Law Library, Volume 33 'Chapter 9: Sanctions', pp. 179-180.
[17] Jeffrey Waincymer Procedure and Evidence in International Arbitration Part II: The Process of an Arbitration, Chapter 11: Documentary Evidence at p. 880.
[18] Ciarb, Guideline on Managing Arbitrations and Procedural Orders, Article 3.2.

(a) Commentators argue an adverse inference should only be drawn at the end of the proceedings.[19]

(b) An adverse inference requires proof by the requesting party that there are reasonable grounds to believe the documents exist and are not being produced.[20] This leaves easy arguments open to the misbehaving party that the documents simply do not exist.

(c) Tribunals are reluctant to draw adverse inferences:

i. The adverse inference is only an evidential *inference*. It is not as strong as actual evidence (which is being withheld). Therefore, tribunals may be more inclined to make rulings based upon the evidence available rather than the evidentiary inference of what *might* exist, but has not been seen.[21] Further, arbitrators perceive an increased risk of challenge to an award if it is based upon adverse inferences.[22]

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[19] Simon Greenberg and Felix Lautenschlager, 'Part I: International Commercial Arbitration, Chapter 9: adverse inferences in International Arbitral Practice', in Stefan Michael Kroll, Loukas A. Mistelis, et al. (eds), International Arbitration and International Commercial Law: Synergy, Convergence and Evolution. *See also*, Sam Luttrell, 'Ten Things to Consider When Seeking Adverse Inferences in International Arbitration', in Carlos González-Bueno (ed), 40 under 40 International Arbitration (2018).

[20] This derives from three of the five criteria of the "Sharpe test" to be met in order to draw adverse inferences in international arbitration: (i) the party seeking the adverse inference must produce all available evidence corroborating the inference sought; (ii) the requested evidence must be accessible to the inference opponent; (iii) the inference sought must be reasonable, consistent with facts in the record and logically related to the likely nature of the evidence withheld; (iv) the party seeking the adverse inference must produce *prima facie* evidence; and (v) the inference opponent must know, or have reason to know, of its obligation to produce evidence rebutting the adverse inference sought. (Jeremy Sharpe, 'Drawing Adverse Inferences from the Non-Production of Evidence' Arbitration International 22, no. 4 (2006), at p. 551).

[21] C. Reymond 'The Practical Distinction between the Burden of Proof and Taking of Evidence: A Further Perspective' in (1994), 10 Arb. Int'l, 323 at p. 325. ("*On balance, I tend to think that the arbitrator has the duty and the authority to indicate to the parties that if they want to prove or disprove a fact or a set of facts that is central in the arbitration, they have to adduce the evidence that he considers as appropriate, documents v. witnesses, contract with a third party v. letters referring to that contract, expert evidence v. declarations of witnesses, etc. It is always awkward for an arbitrator to dismiss a claim on the basis of the failure of a party to bring evidence which it had the burden of providing unless there was a clear indication to that effect beforehand.*")

[22] Sam Luttrell, 'Ten Things to Consider When Seeking Adverse Inferences in International Arbitration', in Carlos González-Bueno (ed), 40 under 40 International Arbitration (2018), at p. 294.

ii. It is difficult for the tribunal to know the contours of the adverse inference to be drawn. Put simply, the inference is based upon evidence which is presumed to exist but has not been seen. Is the non-production *fatal* to the claim, defence or point of fact being asserted or is the non-production only tending to show that the claim, defence or point of fact may not be as strong as it is asserted?

46. There are other tools available to the tribunal to address misbehaviours. Institutional rules and/or laws of the seat are fundamental. National courts enjoy power to sanction procedural non-compliance through the dismissal of particular claims or defences (or even the whole case). Should Tribunals also have the power to terminate all or part of the proceedings under national laws for procedural non-compliance but also when the result of such procedural misbehaviour is serious legal defects in the claims or defences which are no longer salvageable (something akin to summary judgement). So, the risk that key documents will not be disclosed by the Employer / Owner is a risk in the above Scenario. Lawyers working closely with Experts need to draft precise Requests and then hope that the Tribunal Orders production of such Documents. The use of Final Orders is good. The skill is to make strategic use of Adverse Inferences.

End Note

47. Parties to Disputes need to think strategically. The key is getting early involvement of Experts – especially Delay Experts – to look at the claims through the lens of an arbitral process. This means Lawyers and Experts have to examine what the Client says, the documents that the Client has in its possession but also assess what is missing and the consequent risks. All Dispute Resolution Methods have risks – to win needs strategic thinking.

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Ho Chi Minh City International Construction Arbitration Conference – HICAC 2025

Enhancing Quality in Construction Arbitration: Experiences and Expectations of a Repeat User

Elliott Geisinger
Partner, Schellenberg Wittmer Ltd
Geneva, Zurich Singapore

Introduction: Where do we stand?

- Theme of this conference = "*enhancing*"… not "*fixing*"
- Generally speaking: international arbitration = a good tool for resolving international construction disputes
  - Specialised arbitrators
  - Flexibility of the procedure
  - Generally good record of enforceability of awards
  - One-shot process ➔ overall process generally takes less time to get final decision

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Introduction: Where do we stand? (cont'd)

- But… (justified) complaints
  - "Drowning in teacups"
  - Average duration of the proceedings
  - Average cost of the proceedings
  - Long time needed for drafting of the award(s)
- Therefore: certainly room and need for improvement
- This presentations aims to bring you
  - Thoughts on improvement
  - Seen from the perspective of a repeat user (my clients' / my own views as counsel or arbitrator)
  - Aim = to trigger reactions during Q&A session

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Introduction: Where do we stand? (cont'd)

- This presentation = divided into three parts

1. Potential for improvement upstream from the arbitration proceedings
2. Potential for improvement during the arbitration proceedings
3. Thoughts on what happens after the arbitration proceedings

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1. Potential for improvement upstream from the arbitration proceedings

- First area for improvement: better contract management (even for sophisticated parties)
  - Better up-front legal analysis of the contract provisions for the usual "traps", for instance
    - "Guillotine" deadlines
    - Requirements as to form for certain notices
    - Substantive requirements, e.g., for documentation to submitted with claims / for delay analysis techniques to be used
  - Better advance training of project teams regarding these usual "traps"
  - Better record-keeping, for instance
    - Where systems such as Aconis are used
    - For successive electronic versions of programmes of works

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1. Potential for improvement upstream from the arbitration proceedings (cont'd)

- (Better contract management, cont'd)
  - Better use of qualified in-house legal teams or outside counsel
    - To monitor the project (e.g., to verify that MoMs, etc. do not contain "time bombs" or to ensure that notices are sent timely)
    - To give advance notice of upcoming contractual / legal issues in critical project phases (e.g., managing events leading to taking-over)
    - To draft key correspondence (e.g. claims) when necessary
    - In all cases: legal teams must have strong experience of construction arbitration

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1. Potential for improvement upstream from the arbitration proceedings (cont'd)

- Second area for improvement: more frequent and more intelligent use of DAABs, etc. (covered by Gerry Monaghan)
  - Can be very effective tool
  - Example: construction of new railway tunnels through the Swiss Alps
    - Total value of the construction: approximately CHF 22.8 billion (USD 26.4 billion)
    - Not one single major dispute went to court: all disputes resolved before compulsory DABs
  - However: careful not to over-do a good thing
    - Risk of multiple parallel processes involving different parts of the same disputed question between the same parties ➔ e.g., timelines under 2017 FIDIC Conditions of Contract
  - Also: potential for waste of time if one party challenges everything

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2. Potential for improvement during the arbitration proceedings

- Better advocacy by counsel
  - Responsibility for "drowning in a teacup" syndrome ➔ lies mainly with counsel
  - Tendency to tell the whole (long) factual narrative in excessive detail
  - ➔ Let the arbitral tribunal sort the relevant from the irrelevant
  - Leads to
    - Unnecessary length and complication of written submissions
    - Unnecessary volume of documentary evidence
    - Unnecessary number of fact witnesses
    - (Over-use of experts… addressed later)
    - Unnecessarily long – and sometimes confusing – examination of witnesses and experts at the hearing

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2. Potential for improvement during the arbitration proceedings (cont'd)

- (Better advocacy by counsel, cont'd)
  - Need for more discipline
    - One must first conduct a thorough analysis of contractual / legal bases for claims / defences
    - Then (and only then) identify the facts that are relevant for these contractual / legal bases
    - Identify irrelevant and/or non-contested facts
  - All of this narrows down the scope of facts requiring evidence-taking
    - ➔ fewer documents
    - ➔ fewer fact witnesses (and narrower scope of testimony)
    - ➔ more focused expert evidence
    - ➔ shorter examination time at hearings (very important!)

9/17

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2. Potential for improvement during the arbitration proceedings (cont'd)

- Pro-active, hands-on arbitral tribunal
  - (Where possible) identify main issues and prioritise decisions on those issues, for instance
    - Highest-value claims
    - Issues that are potentially dispositive of certain claims
  - Intermediate Case Management Conferences after each main phase of the proceedings and before the hearing, with pro-active guidance from arbitral tribunal on
    - How the arbitral tribunal understands the parties' positions (no opinions, just tribunal's understanding)
    - Which issues require further briefing / clarification from the parties
    - Which issues truly require expert evidence

10/17

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2. Potential for improvement during the arbitration proceedings (cont'd)

- (Pro-active, hands-on arbitral tribunal, cont'd)
  - More hands-on approach to hearings
    - Provide parties with list of issues of main interest to the arbitral tribunal before the hearing
    - Proactive role in determining which issues / witnesses / experts truly require time at hearing (subject of course to due process, etc.)
    - Take the lead for examination of witnesses, experts? (can raise "cultural issues")
    - At a minimum: take active role and engage with counsel, witnesses and experts at the hearing

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2. Potential for improvement during the arbitration proceedings (cont'd)

- (Pro-active, hands-on arbitral tribunal, cont'd)
  - Availability for settlement facilitation (**not** mediation or conciliation)
    - On entire dispute
    - On only certain parts of the dispute
  - Can also be "culturally sensitive"

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2. Potential for improvement during the arbitration proceedings (cont'd)

- Better approach to expert evidence (only a few thoughts… covered mainly by Ho Chien Mien)
  - Expert witnesses (instructed by parties' counsel)
    - Involve them (internally) as early as possible
    - Wait for the crystallisation of the factual issues in dispute to file the expert evidence
    - Never hesitate to order joint reports before or after hearing
    - Never hesitate to "hot-tub" experts at the hearing
  - My experience: usefulness of arbitral tribunal's "technical advisor" (with consent of the parties)

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2. Potential for improvement during the arbitration proceedings (cont'd)

- The potential of AI in construction arbitration
  - Used extensively as internal tool by counsel
  - What about use in case management? (with consent of the parties, of course)
  - What about use in accelerating drafting of the awards? (with consent of the parties, of course)
  - No strong personal views… welcoming audience's thoughts during Q&A

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3. Potential for improvement after the arbitration proceedings have ended

- Finally… enforcement of the award
  - This presentation = an example of what **not** to do
  - Never, ever wait until the award has been rendered to give thought to enforcement
  - Always address enforcement before even bringing arbitration
    - Generally not an issue with large international construction & engineering firms based in New York Convention jurisdictions
    - But careful: not all parties to the NYC are arbitration-friendly when it comes to enforcement against their nationals and/or have slow-moving judicial system
    - Can be tricky ➔ always explore possibilities of obtaining pre-award freezing orders, attachments, etc.
    - Should always be the very first item on any arbitration checklist
    - Not specific to construction arbitration

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Thank you.

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Enhancing Expert Evidence in Modern Arbitration

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Abstract: This paper examines the key problem areas relating to expert evidence, from the perspective of parties and the tribunal, with a focus on costs and impartiality. Then, it evaluates three primary solutions that tribunals have adopted to appointing experts – namely, joint experts, tribunal-appointed experts, and party-and-tribunal experts. Finally, it recommends that parties and tribunals alike must carefully consider the appropriateness of each solution, to accommodate the real-world demands of complex issues.

Keywords: Appointment of experts, Joint expert evidence, Tribunal-appointed experts

1. Introduction

Expert evidence has always been integral part of arbitration. High stakes commercial disputes, especially those involving construction and energy, often involve multitudes of witnesses playing decisive roles in guiding the tribunal through difficult and technical issues.

In recent years, however, a new perception has developed, fuelled by arms races of experts, ballooning costs and resulting procedural complexities. Courts have begun to tighten standards and procedures to discourage the use of expert witnesses as hired guns. In Singapore, for example, the new Rules of Court 2021 provide that "*as far as possible, parties must agree on one common expert*".[1]

However, whilst these civil litigation rules endeavour to regulate the use of expert evidence, the commercial reality is that parties nevertheless feel compelled to deploy multiple experts for fear of being outmanoeuvred. Indeed, as highlighted by Chua Lee Ming J:

> "*Anecdotally, [Order 12 r 3(1) of the ROC 2021] has not given rise to any significant issues and* ***common experts are the exception***."[2]
>
> (emphasis added)

Additionally, with party autonomy as the most fundamental in arbitration, arbitral rules have also historically been less prescriptive with respect to rules surrounding the appointment of experts. Indeed, most institutional rules include provisions which expressly tribunals to appoint experts,[3] but they do not establish a preference for party-appointed or tribunal-appointed experts; nor are there any prescriptive rules regulating the use of expert evidence. One example is the UNCITRAL Notes on Organising Arbitral Proceedings, a set of non-binding guidelines for

[1] Order 12 r 3 of the Singapore Rules of Court 2021.
[2] Justice Chua Lee Ming, "The Rules of Court 2021: Perspectives from the Bench (The General Division of the High Court)" (2024) 36 SAcLJ at para 44.
[3] Article 25(3) of the International Court of Commerce ("**ICC**") 2021 Rules of Arbitration; Article 41.1 of the Singapore International Arbitration Centre ("**SIAC**") 2025 Arbitration Rules; See also Article 26(1)(a) of the UNCITRAL Model Law on International Commercial Arbitration 1985 (2006 Amendment) ("**UNCITRAL Model Law**").

best practices, which encourages parties to consider using a single joint expert as an efficient alternative to duelling experts.[4]

This paper examines the key problem areas relating to expert evidence, from the perspective of parties and the tribunal. Then, it evaluates three primary solutions that tribunals have adopted to appointing experts – namely, joint experts, tribunal-appointed experts, and party-and-tribunal experts. Finally, it recommends that parties and tribunals alike must carefully consider the appropriateness of each solution, to accommodate the real-world demands of complex issues.

2. Key issues relating to expert evidence

2.1. "Bouquets and Brickbats"

Well-prepared expert evidence can be a double-edged sword in arbitration. On the positive side, party-appointed experts often provide crucial clarity on complex matters outside the tribunal's own expertise. For example, in technical construction disputes, experts help dissect issues of project delays, specialised defects, and the quantification of delay-related claims.

A skilled delay expert can illuminate the causes of project overruns, identify the extent of critical delay on the schedule, attribute responsibility for those delays, and even assist in quantifying the financial impact. In this way, a well-prepared expert report serves as a "bouquet" – it can greatly assist both parties and arbitrators in understanding highly technical evidence and evaluating the merits of claims and defences. Indeed, almost every complex business or construction arbitration today relies on expert testimony to some degree, reflecting the indispensable role experts play in helping tribunals reach informed decisions on specialised issues.

On the other hand, expert evidence also attracts "brickbats". In this regard, A common criticism is the perceived partiality of party-appointed experts. Indeed, the opinions of delay expert witnesses usually support the interests of the parties who call them. As the learned author Tristram Hodgkinson explains:

> "*It has long been recognised by the courts that bias is not the preserve of lay witnesses, and that experts may display it in their evidence. Indeed, in many respects the incentives for experts to favour one party contrary to their actual belief are substantial. First, expert witnesses are paid for their evidence. Secondly, they may be retained on a regular basis by a particular client or group of clients in different cases. Thirdly the expert may hope to gain favour with a client generally, perhaps because he hopes that non-legal professional engagements may be forthcoming or continue*."[5]

[4] United Nations Commission on International Trade Law, *UNCITRAL Notes on Organising Arbitral Proceedings* (2016) at [98].
[5] Hodgkinson, T., Expert Evidence: Law & Practice (Sweet & Maxwell, 1990) at p 213, cited in *Vita Health Laboratories Pte Ltd and Others v Pang Seng Meng* [2004] SGHC 158 at [81].

Unlike court-appointed neutral experts, party experts are engaged and paid by one side, which can lead to the impression that they act as that party's additional advocate. Critics frequently characterise such experts as **"**hired guns**"** whose opinions invariably support the case of the side retaining them.[6] In fact, in the 2021 BCLP Survey, 51% of respondents agreed that "party-appointed [experts] are "hired guns" or "advocates in disguise"".[7] This raises doubts about the true independence of some experts and whether tribunals are really getting objective assistance or merely partisan submissions in another form.

2.2. Issues from the Parties' Perspective

Significant Time and Costs

From the parties' point of view, the use of experts in arbitration is rife with practical and strategic dilemmas. A first concern is the significant time and costs involved in engaging experts across multiple disciplines. Large-scale construction disputes in Singapore often require an army of experts to cover the gamut of issues in contention – delay experts, quantum (damages) experts, and various technical specialists, such as experts in ACMV systems, M&E engineering, or water-proofing, just to name a few.

While this may be necessary to do justice to highly technical claims, the financial burden is considerable. Parties must fund multiple expert investigations and reports, sometimes incurring millions in expert fees, and endure the extended timelines needed for these experts to analyse data and prepare opinions.

Appointment of Experts as a Prisoner's Dilemma

Adding to this is a strategic conundrum often likened to a **"**Prisoner's Dilemma". Parties who forgo engaging an expert would be (or at least would perceive themselves to be) in a weaker position, as opposed a counterparty who has appointed one. For example, in the 2025 Singapore Court of Appeal decision in *Palm Grove v Hilton*, a central issue in the underlying arbitration turned on the fact that the claimant had failed to adduce independent expert reports to prove the standard of what a "*prudent international hotel operator*" would have done under the contract.[8] The tribunal found that industry data alone was insufficient and, in the absence of expert testimony on the issue, it was "*unable to assess*" the counterclaim.[9]

No party wants to be the only one at the hearing without expert support on a critical technical issue, lest the tribunal accept the other side's expert evidence by default. This creates a strong incentive for both sides to deploy experts pre-emptively on all possible issues, even if some might ultimately prove unnecessary. As Professor Doug Jones observes:

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[6] See, for example, Markus Altenkirch, "Quo Vadis Party-appointed Experts?" (18 December 2018) https://www.globalarbitrationnews.com/2018/12/18/quo-vadis-party-appointed-experts/, last accessed 2025/03/31.
[7] Bryan Cave Leighton Paisner, *BCLP Arbitration Survey 2019: Expert Evidence in International Arbitration* (the "**2021 BCLP Survey**"), at p 9.
[8] *Palm Grove Beach Hotels Pvt Ltd v Hilton Worldwide Manage Limited and Hilton Hotels Management India Private Limited* [2025] SGCA 14 ("***Palm Grove v Hilton***") at [37].
[9] *Palm Grove v Hilton* at [37].

> "*There often arise situations where one party wishes to adduce expert evidence on a certain topic while the other party has not thought it necessary, or where one party has called a multitude of experts on the topic, where the other has only called one. Such asymmetric use of experts creates perceptions of unfairness between the parties, causing the other party to call expert evidence despite the fact that it may be wholly superfluous. This leads to greater, usually unnecessary, reliance on experts.*"[10]

In other words, neither party can risk unilaterally disarming in the expert battle, for fear of losing an important issue by default.

However, an aggressive strategy of over-appointing experts can backfire if the quality or impartiality of the evidence suffers. Parties often assume that piling on more experts will inevitably strengthen their case. In reality, tribunals value the cogency and reliability of expert testimony over sheer quantity. An expert who strays into advocacy or lacks credibility can do a party's case more harm than good. Likewise, duplicative or unfocused expert opinions will not impress a tribunal; they will simply prolong the proceedings. In some instances, over-reliance on experts is "*nothing more than a drain on [the] time, money and efficiency of the arbitral process*".[11] Moreover, there is also a risk of diminishing returns – the tenth expert report might add very little value beyond the first nine, despite the extra cost.

2.3. Issues from the Tribunal's Perspective

Difficulties in making a determination between opposing expert views

From the Tribunal's perspective, a key difficulty is how to evaluate diametrically-opposed expert opinions on highly technical questions. It is not uncommon for two well-qualified experts to arrive at completely contradictory conclusions, each bolstering their respective client's narrative in areas like delay causation or defect responsibility. The tribunal, usually comprising legally trained arbitrators rather than subject-matter specialists, may experience a form of decision paralysis when confronted with these polarised expert views.

With no neutral baseline and little overlap between the opposing testimonies, the tribunal must somehow discern the truth or at least prefer one opinion over the other. Cross-examination is meant to pressure-test expert theories, but many experienced arbitrators admit that traditional cross-examination alone is often inadequate to determine which expert is right. As the late Professor Martin Hunter explained:

> "*One side's expert says, with great conviction, "faulty design of the bridge". Equally convincingly, the other side's expert says "defective materials used in construction of the bridge". Cross-examination of*

[10] Jones, D., "Ineffective Use of Expert Evidence in Construction Arbitration" (16 November 2020) https://dougjones.info/content/uploads/2017/07/Ineffective-Use-of-Expert-Evidence-in-Construction-Arbitration-1.pdf, last accessed 2025/03/31, at p 5.
[11] Jones D., supra n 10, at p 5.

experts by counsel is considered by many international arbitrators as an inadequate tool to assist them in making a determination between the opposing views of such experts."[12]

In practice, a tribunal might end up favouring the expert who appeared more persuasive or withstood cross-examination better, rather than the one who is necessarily correct on the merits.

Managing parties' expectations and the risks of setting aside applications

Tribunals must also manage the parties' expectations regarding the admissibility and weight of expert evidence. Arbitrators are acutely aware that if they exclude expert evidence or give it little weight, an aggrieved party may later invoke natural justice and due process grounds in an attempt to challenge the award.

For example, in the 2021 Singapore High Court decision of *Year Sun v Gunvor*, the claimant commenced an application to set aside an SIAC award, on the ground that it was "*not given a full or reasonable opportunity to be heard*" under Article 18 of the UNCITRAL Model Law due to the tribunal's direction "*not to submit expert evidence on certain aspects of industry practice*".[13] Although the Court eventually found that there was no breach of natural justice since "*the arbitrator's decision was reasoned and arrived at after considering the arguments raised by both parties*",[14] good tribunals must be acutely aware of such risks and aim to avoid further setting aside actions after the arbitration.

3. Strategies for Appointment of Experts

As earlier explained, there is much flexibility in the way expert evidence in international arbitration is presented. Institutions rarely impose prescriptive rules, and several models exist for appointing experts. This section evaluates three main models of expert appointment – (A) joint party-appointed experts, (B) tribunal-appointed experts only, and (C) both tribunal-appointed and party-appointed experts.

3.1. Joint Party-Appointed Experts

Under this model, both parties agree to appoint a single joint expert who provides an opinion on the issues for both sides. As described earlier, institutional rules do not mandate or prohibit joint appointments, as this is simply a matter of party agreement. In practice, the parties share responsibility for choosing the expert and tribunals may facilitate discussions for a joint expert at early case management conferences.[15]

While the option for joint experts has always been open to parties, they remain rare in international arbitration. The biggest hurdle is that it is difficult for parties with conflicting interests to agree on a single expert.

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[12] Hunter, M., "Techniques for Eliciting Expert Testimony, Expert Conferencing and New Methods" (2006) http://cdn.arbitration-icca.org/s3fs-public/document/ media_document/media01223294014605 0jmh-techniques-for-eliciting-expert-testimony.pdf, last accessed 2025/03/31, at p 2.
[13] *Year Sun Chemitanks Terminal Corp v Gunvor Singapore Pte Ltd* [2021] SGHC 229 ("***Year Sun v Gunvor***") at [19].
[14] *Year Sun v Gunvor* at [66].
[15] Chartered Institute of Arbitrators, *Party-appointed and Tribunal-appointed Experts* (2015) at p 13.

Furthermore, the use of a joint expert may not be appropriate for deeply contested issues. For example, where the subject matter is highly complex or the experts might adopt fundamentally different methodologies, relying on a single opinion can be problematic.[16] A joint expert may end up choosing one analytical approach, and important alternative theories might not be fully explored. This is particularly true in construction disputes for issues such as delays, where multiple methodologies exist (time-impact analysis, as-planned vs as-built, etc.). Where there is only a joint expert, his views are not tested by an opposing expert peer, so mistakes or biases may go unchecked.

3.2. Tribunal-Appointed Experts Only

In this model, the arbitral tribunal itself appoints one or more experts to address specific issues, and no party-appointed experts are used. The tribunal's power to appoint experts is well-established in international arbitration. Apart from its inherent powers, major institutional rules and national laws explicitly authorise tribunal-appointed experts.[17]

Procedurally, a tribunal-appointed expert is typically selected by the arbitrators (often after inviting the parties to comment on potential candidates to ensure neutrality).[18] Additionally, institutional rules usually prescribe for the tribunal-appointed expert to be questioned at an oral examination.[19]

Although this model is cost-effective and theoretically neutral, in practice, tribunal-appointed experts have been more commonly used only in civil law traditions. Common law-trained arbitrators and counsel, such as those in Singapore, have historically been more hesitant, preferring party-driven evidence. Such common law-trained counsel often prefer the ability to present and shape expert evidence, even if this comes at a higher cost.

Furthermore, there is also the risk that the tribunal may lean too heavily on its appointed expert, thereby fettering its own discretion.[20] If the arbitrators uncritically accept the expert's conclusions, the award may be vulnerable to challenge for delegating the decision.

A practical point to note is that parties may "double up" and engage shadow or supplemental experts anyway, to review the tribunal expert's report and assist in formulating questions or critiques, especially if they distrust the tribunal-appointed expert. This undermines the very cost and time savings intended.[21]

3.3. Both Tribunal-Appointed and Party-Appointed Experts

[16] Justice Chua Lee Ming, supra n 2.
[17] Article 25(3) of the ICC 2021 Rules of Arbitration; Article 41.1 of the SIAC 2025 Arbitration Rules; See also Article 26(1)(a) of the UNCITRAL Model Law.
[18] Chartered Institute of Arbitrators, *Party-appointed and Tribunal-appointed Experts* (2015) at p 6.
[19] See, for example, Art 41.6 SIAC 2025 Arbitration Rules.
[20] NB: This concern is less prominent in jurisdictions like Singapore, which has well-established arbitrators and institutions. However, see, for example, Ian Meredith, "Expert Evidence in International Arbitration: Common Criticisms and Innovative Solutions" https://www.klgates.com/Expert-Evidence-in-International-Arbitration-Common-Criticisms-and-Innovative-Solutions-8-24-2021, last accessed 2025/03/31, on the experiences relating to the Gulf Cooperation Council.
[21] See also Ian Meredith, supra n 20.

Lastly, parties may choose to capture the benefits of both systems by involving both tribunal-appointed experts and party-appointed experts in the same arbitration. There are different permutations of this approach. One common scenario is when a tribunal, despite having party experts, decides to appoint its own neutral expert to help resolve conflicting testimony.

The benefit of such an approach is simple – it provides a more complete picture and preserves parties' autonomy in the ability to present their case fully. Parties are able to present their case, whereas the tribunal's own expert can offer a sanity check and highlight areas of agreement or disagreement between the party experts.

Additionally, as opposed to the other two approaches discussed, when both parties have had their own expert heard and the tribunal has had independent expert help, parties are more likely to accept that the process was fair and thorough. Even if a party disagrees with the tribunal's decision on technical matters, it cannot easily claim it lacked opportunity to present its evidence. This makes it extremely difficult for parties to justify any setting aside applications in the future.

However, this model is not all roses. The biggest and most obvious concern is that this model the most expensive of all. Appointing a tribunal-appointed expert in addition to party-appointed experts means there are now three sets of experts to pay. Furthermore, managing three experts instead of one or two means more expenditure and can elongate the timeline. There will also likely be multiple rounds of exchanging reports and hearings might be extended to accommodate examinations of all experts.

Overall, each model for appointing experts in arbitration offers distinct advantages and drawbacks. In this regard, there is no one-size-fits-all solution and the optimal strategy depends on the particular needs of the case, the willingness of parties to cooperate on expert issues, and the arbitrators' judgment in maintaining fairness. This shall be discussed in Section V below.

4. Other Practical Challenges

Beyond choosing whether to rely on a joint expert, a tribunal-appointed expert, or a hybrid of both party- and tribunal-appointed experts, a myriad of other practical considerations often arise in the context of expert evidence. In respect of the challenge to arbitrators in determining which expert's decision is more persuasive, a big factor comes down to how these experts are cross-examined.

In the traditional, counsel-controlled approach to expert examination, each party's expert provides his/her examination-in-chief followed by cross-examination. However, witness conferencing (also known as "hot-tubbing") is an alternative practice whereby two or more experts at a hearing give their evidence concurrently. This enables simultaneous questioning and discussion on key expert issues.

Hot-tubbing provides many advantages. For example, hot-tubbing minimises the aggressive nature associated with cross-examination, thereby providing experts with a more constructive platform to present their views. Hot-tubbing provides experts with greater opportunities to explain their opinions in-depth, compared to the narrow scope of traditional cross-examination. Hot-tubbing also creates an environment that encourages experts to find common ground. When sitting in the hot tub alongside industry peers, experts are compelled to respond reasonably, enhancing their credibility through reasoned argumentation.

However, hot-tubbing may not be particularly useful for controversial topics, such as delay disputes.
Delay experts are rarely able to agree on what methodology to use, the baseline programme or the relevant critical path and so there is little point in making the delay experts sit in the hot tub at the same time.

Hot-tubbing may encourage the dominance of one delay expert in the discussion. This dynamic could affect the equal contribution of all delay experts. In the interest of time, delay experts may face the risk of oversimplifying their explanations. Time constraints could contribute to discussions remaining at a superficial level. Therefore, with respect to delay experts, it is likely to be more appropriate for delay experts to be cross-examined in the conventional format rather than in the hot-tubbing process.

5. Conclusions and Recommendations

In conclusion, dealing with expert evidence remains a major bugbear in international arbitration for both parties and tribunals alike. Whilst it is often indispensable for resolving complex technical issues, the related costs and confusion can be worrisome if not properly managed. Ensuring that expert testimony genuinely aids the tribunal requires diligence and foresight from both the disputing parties and the arbitral tribunal. What follows are my recommendations, drawn from both my experience in Singapore and international best practices.

5.1. Recommendations for Parties

Prioritise the independence and impartiality of experts

First, parties should prioritise the independence and impartiality of their experts. If an expert comes across as an advocate rather than an impartial assessor, the tribunal is likely to discount their evidence significantly. In the aforementioned 2021 BCLP survey, out of the 51% of respondents who agreed that party-appointed experts tend to be "hired guns", 24% did not think that this was a problem.[22] This was because 93% of practitioners agreed that tribunals should place *"limited weight"* on a party-appointed expert's evidence if the expert fails to remain independent.[23]

[22] 2021 BCLP Survey, supra n 7, at p 9.
[23] 2021 BCLP Survey, supra n 7, at p 9.

In practice, no matter how credentialed or eloquent an expert is, a **"**hired gun**"** will have little persuasive value. An expert who remains impartial and objective not only enhances their own credibility but ultimately bolsters the party's case.

Clearly identify the nature of disagreement if disagreeing to a joint-appointed expert

Second, parties should clearly identify and explain the nature of any disagreement over the appointment of joint experts, rather than reflexively insisting on the traditional model of party-appointed experts. Take for example a construction delay claim, where parties dispute on the methodology to be adopted – one party insists on using a time-impact analysis while the other relies on the traditional as-planned vs as-built analysis. If parties are unable to come to an agreement on a joint-appointed expert because of the two fundamentally different scheduling methodologies, it would be more constructive for the parties to candidly acknowledge the methodological disagreement at the outset, rather than simply objecting to a joint expert without explanation.

By highlighting the nature of the agreement, the parties can help frame the issue for the tribunal. This allows the tribunal to consider tailored solutions. For instance, the tribunal may appoint a neutral tribunal-appointed delay expert not generally, but just to critique the applicability of the competing approaches and to assist in determining which methodology is better suited to the case.

5.2. Recommendations for Tribunals

Early assessment of whether expert evidence is necessary, and which arrangement is most appropriate

Similarly, tribunals should exercise proactive case management in respect of expert evidence and conduct an early assessment of whether expert evidence is truly necessary and, if so, determine at the outset the most appropriate model for appointing experts.[24] In practice, this means that the tribunal should canvass with the parties which technical issues will require expert input at the procedural conference or as soon as pleadings clarify the issues.

If expert evidence is needed, the tribunal should then deliberate on the optimal appointment model – whether to proceed with each side appointing its own expert, to use a single joint expert, to appoint an independent expert itself, or some other combination. Crucially, this decision should be tailored to the case and focused on party agreement. Tribunals should strongly encourage low-cost alternatives if they are appropriate, but they must also be careful not to overstep boundaries, lest parties allege that they were unable to present their case.

A tribunal that thoughtfully chooses an appointment model early and communicates this choice to the parties with reasons can greatly streamline the proceedings. Importantly, the appropriate expert model may vary by issue type. Take the example of construction arbitration:

[24] See, for example Charted Institute of Arbitrators, *CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration* (2015), at Art 2.

- For quantum claims (such as valuation of work done, cost overruns, or damages for delays), the underlying methodologies are often relatively standardised. Quantity surveyors or accounting experts will typically draw on established industry techniques to measure loss or value. Here, a jointly appointed quantum expert or a tribunal-appointed expert can be highly effective. Because both parties ultimately need to rely on the same accounting or measurement principles (even if they dispute certain figures), having one neutral expert conduct the analysis can save time and avoid duplication.

- In contrast, delay claims often involve widely divergent analyses, where experts may legitimately adopt different methodologies to examine schedule impacts. Multiple methods may be accepted in principle, yet they can yield very different conclusions regarding the extent of delay. Faced with this situation, a tribunal should hear from both sides of party-appointed experts or consider appointing its own delay expert to evaluate the claims of the party-appointed experts, especially for higher-value disputes where the quantum of disputes justifies the additional cost of experts. This also applies to other technically complex issues, such as defects claims, tribunal, typically composed of legal experts, may not have deep expertise in, for example, structural engineering or soil mechanics.

Transparency in expert-appointment process

Finally, whenever a tribunal decides to adopt an approach involving a joint expert or tribunal-appointed expert, it should clearly explain its rationale and institute procedural safeguards to protect the parties' rights. Transparency at this stage is critical. The parties should be informed, via a reasoned procedural order, why the tribunal believes a joint or neutral expert is necessary or preferable – for example, because the quantum issues are largely technical and agreement on a single expert will save time and costs, or because the methodologies diverge and an independent analysis will assist the tribunal.

These safeguards ensure that parties' rights are preserved and minimise the risk that disgruntled parties may subsequently allege a breach of natural justice in seeking to set aside an unfavourable award.

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BOUQUETS

- Expert evidence helps the parties and counsel understand highly technical issues and understand the relative strengths and weaknesses of their claims.
- For example, in a delay-related claim, expert evidence can assist to:
  - determining the causes of the delay
  - the amount of critical delay
  - the party responsible for the critical delay
  - the quantification of the claim

BRICKBATS

- Opinions of delay expert witnesses usually support the interests of the parties who call them.

  ***Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR(R) 162 at [81]**

  "*… in many respects the incentives for experts to favour one party contrary to their actual belief are substantial. First, expert witnesses are paid for their evidence. Secondly, they may be retained on a regular basis by a particular client or group of clients in different cases. Thirdly the expert may hope to gain favour with a client generally, perhaps because he hopes that non-legal professional engagements may be forthcoming or continue.*"

- Poorly prepared delay expert evidence can:
  - undermine the case of the party which the expert is giving evidence for
  - unnecessarily complicate the issues before the Tribunal so that it is counter-productive
  - result in disproportionately high costs being incurred and the extravagant use of trial time

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BRICKBATS – MY EXPERIENCE

- Experts often come to diametrically-opposed opinions on the same issue:
  - Highly technical issues (like defects and delays) can have very different methodologies of assessment
  - Experts tend to prefer their clients, even if this may not be objectively correct
- Difficulties:
  - As an arbitrator, it is difficult to identify who is right.
  - As counsel, it is difficult to persuade the Tribunal.
  - As an expert, it is difficult to translate difficult technical issues into lay language
- Delay reports can be massive and expert reports can hinder more than help
- Expert reports on issues as diverse as geotechnical reports, underground vibrations and its impact on facades, properties of stones and structural steel, are frequently lost in translation.

BRICKBATS – MY EXPERIENCE *(MILLENIA V DRAGAGES)*

Millenia Pte Ltd v Dragages Singapore Pte Ltd and others [2019] 4 SLR 1075

Two granite stone panels fell from the façade of a 35-storey office building. Two passers-by were injured by the debris of the 2nd Panel, and significant property damage was caused. The issue was what caused the panels to fall?

- Claimant: Respondent's design and construction were defective
- Respondent: Vibration from adjacent tunnelling works caused defects

31 witnesses (liability tranche) – 15 fact witnesses, 16 expert witnesses:

6 Façade and Material Experts
2 Structural Dynamics Experts
2 Vibration Experts
2 Geotechnical Experts
4 Quantum Experts

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BRICKBATS – MY EXPERIENCE *(MILLENIA V DRAGAGES)*

Millenia Pte Ltd v Dragages Singapore Pte Ltd and others [2019] 4 SLR 1075

"218 I now come to my assessment of the credibility of the façade experts. The evidence on the defects was complex and complicated. ***Unfortunately, the façade experts could not reach a consensus on many issues. I therefore had to choose between competing opinions on many points****.*

219 Of all the experts, I found Mr Hartog the most objective and credible although I do not accept his evidence on every point. I also found the evidence of Mr Mann and Mr Hugh Keithly ("Mr Keithly"), ***the façade experts engaged by the Meinhardt Parties, generally credible, though I had to caution Mr Keithly on one occasion not to advocate his client's case****.*

…

660 The central issue addressed by the quantum experts was the question of whether the Rectification Option would be less costly than the Reclad Option. It is important to note at the outset that ***the evidence on this point was limited in utility****. Importantly,* ***there was no agreement on the remedial methods that the Rectification Option would involve****."*

NEW DEVELOPMENTS – CRITICISMS OF EXPERT EVIDENCE

- Two non-construction examples highlighted by the Judiciary:
  - In *Wong Meng Cheong v Lin Ai Wah* [2012] 1 SLR 549, which involved a family dispute over the transfer of property, the plaintiff called two experts to testify on the transferor's mental capacity at the time of the transfer. The High Court found that the plaintiff's experts failed to disclose their "fairly close relationship" with the plaintiff, and demonstrated "partiality to the plaintiff's case … by being selective in the presentation of the relevant medical evidence".
  - In *Mehra Radhika v Public Prosecutor* [2014] SGHC 214, a judgment of the Chief Justice, the appellant, who was charged with an offence of arranging a marriage of convenience, sought to adduce a medical report which opined that she had depression. The Chief Justice noted that the medical report was "patently lacking in objectivity with a great portion attempting to set out background facts that were exceedingly favourable to the appellant".

Justice Kannan Ramesh, Keynote Address (APIEx Symposium 2023)

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NEW DEVELOPMENTS – OLD RULES OF COURT 2014

- Under the old Rules of Court 2014, there were tools which were meant to combat this. For example, the court could direct experts to submit a joint report which listed their points of agreement or disagreement in a Scott Schedule.
- In theory, this would improve the efficiency.
- However, in practice, the joint report was often unhelpful as experts just asserted their own positions:

"However, the reality was at times different. Where the experts had fundamental differences in methodology or analysis, ***the expert conference served only to harden positions, and the joint report was nothing more than another piece of paper evidencing their intractable differences****. Where this was the case, the cost advantages associated with expert conferences and joint reports were more apparent than real."*

Justice Kannan Ramesh, Keynote Address (APIEx Symposium 2023)

NEW DEVELOPMENTS – NEW RULES OF COURT 2021

Singapore's new Rules of Court 2021 (ROC 2021) significantly modify the approach to expert evidence:

O 12 r 2(1): "No expert evidence may be used in Court unless the Court approves."
O 12 r 3(1): "Subject to paragraph (5), as far as possible, parties must agree on one common expert."

These reforms are intended to prevent the proliferation of unnecessary expert evidence:

"By requiring the parties to endeavour to agree on a common expert, two issues are addressed. First, the problem of bias or partisanship, and the parties treating their experts as "hired guns". Second, the parties are prevented from treating expert evidence as an "arms race", thereby minimising costs and delays in civil litigation. Importantly, the playing field for less financially capable parties is levelled or at least improved by ensuring that expert testimony is only resorted to if necessary, with the costs associated with it controlled by the court. This undoubtedly promotes access to justice."

Justice Kannan Ramesh, Keynote Address (APIEx Symposium 2023)

NEW DEVELOPMENTS – NEW RULES OF COURT 2021

- Civil Justice Review Committee Report:

"*The default position should be for a single court expert to be appointed in cases where expert evidence is necessary. …Generally, no party expert witnesses will be permitted.*"

https://www.judiciary.gov.sg/docs/default-source/news-docs/annex-b_cjrc-report.pdf

- Difficulties identified:
  - Expert witnesses have irreconcilable differences in opinion
  - Party-appointed experts are presented with the facts of the case framed according to the perspective of the parties engaging them and this influences interpretation of evidence.
  - Disproportionately high costs

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NEW DEVELOPMENTS – NEW RULES OF COURT 2021

- New development for common law jurisdiction like Singapore
- Questions:
  - How is the common expert to be briefed?
  - How is the evidence of the common expert to be presented?
  - Presumably the common expert is available for cross-examination? What if he is shown to be incompetent or to lack the necessary expert knowledge under cross-examination?

"*Anecdotally, [Order 12 r 3(1) of the ROC 2021] has not given rise to any significant issues and common experts are the exception.*"

Justice Chua Lee Ming, The Rules of Court 2021: Perspectives from the Bench

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BY PARTIES AND TRIBUNALS

LEARNING FROM ROC 2021 – APPLICATIONS IN ARBITRATION

- Arbitration operates under different principles
  - Party autonomy
  - Institutional rules are not as prescriptive as ROC 2021
- Tribunals should nevertheless consider encouraging consensus on expert use:
  - Joint-appointed experts
  - Tribunal-appointed experts
  - Both party-appointed and tribunal-appointed experts

CONSIDERATIONS – WHEN TO USE JOINT EXPERTS

- Joint experts / tribunal-appointed experts only may not be appropriate where it is a complex issue with multiple methodologies for assessment.
- Example:
  - **Quantum claims** (valuation of work done, cost overrun), if the underlying methodology is standardised; parties may be able to agree to a neutral expert for valuation.
  - **Delay claims** often involve widely divergent analyses, where experts use different methodologies to examine schedule impacts.
- Having both party-appointed and tribunal-appointed experts may not be appropriate in lower value disputes.

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OTHER CONSIDERATIONS

- Parties should clearly identify the nature of disagreement if disagreeing to a joint-appointed expert.
- Tribunals should conduct early assessment of whether expert evidence is necessary, and which arrangement is most appropriate.

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Thank you for your attention!

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Theme: "*Raising the Bar: Enhancing Quality in Dispute Resolution for Vietnam's Construction Projects — Bridging International Expertise with Domestic Practice"*

Dispute Avoidance – is it realistic?

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Abstract.
Dispute avoidance on major construction projects minimizes costly and time-consuming disputes which are bad for the project and bad for relationships. The main vehicle for facilitating the dispute avoidance concept is via Dispute Boards appointed from commencement of the project. This paper explores the key ingredients for successful dispute avoidance and examines the effectiveness of the approach from international data.

Keywords: Dispute Boards, Dispute Avoidance, FIDIC, DRBF

1.0 Introduction

Dispute avoidance is very much in vogue these days for construction contracts worldwide and for good reason. Construction disputes can be costly, time consuming, bad for relationships and rarely are a positive development for a project. Better it is that resources are focused on project deliverables and milestones and thus a model whereby disputes that typically arise on construction projects (whether typical or of a more bespoke nature) can be taken out of the equation and dealt with offline - or in some other non-adjudicative forum.

The most common vehicle for delivery of dispute avoidance is through the involvement of a Dispute Board (DB) which is appointed at the start of the project – i.e. a Standing Dispute Board. The FIDIC forms of contract have really pioneered the way over the last 10 to 15 years in terms of dispute avoidance and indeed the most recent versions to their FIDIC Red, Yellow and Silver books [1, 2, 3] have seen the terminology evolve from the 1999 version of a Dispute Adjudication Board (DAB) to a Dispute Avoidance and Adjudication Board (DAAB) (See Clause 21.3 FIDIC Red, Yellow and Silver Books [1, 2, 3]). The General Conditions of Dispute Avoidance/Adjudication Agreement at Appendix 1 and the DAAB Procedural Rules at Annex 1 to the Contract govern the arrangement and the powers of the DAAB.

Both the ICC and the CIArb have dispute board rules all of which comprises an element of dispute avoidance procedures and guidelines.

The most common approach towards dispute avoidance is through the provision of informal assistance by the DB upon the request of both parties. Clause 21.3 FIDIC 2017/2022 indicates that "*Such informal assistance may*

take place during any meeting, Site Visit or otherwise" However importantly "*the parties are not bound to act on any advice given during such informal meetings, and the DAAB shall not be bound in any future Dispute resolution process or decision by any views or advice given during the informal assistance process*".

In December 2023 the FIDIC Dispute Avoidance and Adjudication Forum published *Practice Note 1 Dispute Avoidance* which provides valuable guidance as to how a dispute board should address the matter of dispute avoidance as is well worth a read for anyone interested in the topic [4]

2.0 Key Ingredients for Success

As a member of the Engineers Ireland Conciliation Panel and the FIDIC Presidents List of Adjudicators and hence with considerable practical experience of Standing Conciliation under the Public Works Contracts in Ireland and the DAB/DAAB arrangements under FIDIC, I make some general observations as to what I consider the key ingredients for success as follows;

- The DB must be appointed from the start of the project to properly understand the project issues and personnel dynamics ie a Standing DAAB or Standing Conciliator

- The parties must have trust in the DAAB /Standing Conciliator – integrity and impartiality is a given but real "trust" comes with interaction over a period of time – need to know that your Standing Conciliator is a safe pair of hands that can be relied upon

- The parties must have confidence in the DAAB /Standing Conciliator's expertise – technical, legal, financial

- The DAAB/Standing Conciliator must be a good listener

- Once the first four bullet points are established the most important element of all is to ask the right question at the right time and in the right tone – done properly it can be remarkably successful in fostering discussions and moving things along - done poorly then it could be disastrous and all the rapport and confidence built up with the parties could evaporate.

3.0 Does it work?/ Is it realistic?

The Dispute Resolution Board Foundation (DRBF www.drb.org) provides assistance with the worldwide application of DB practices, provides training for DB practitioners and maintains a large data base of publications, articles and webinars on the topic. In particular, the DRBF maintains statistics based on returns from both DB members and contractor/employer representative bodies around the world relating to the use of and success of DB generally. The use of DB worldwide is increasing and for good reason. By way of headline statistics, the DRBF point to data from 2018 which indicates that where a DB was in situ and issued a decision, only 6% of said decisions were rejected and subsequently referred to arbitration for final resolution. Of the 6% referred to arbitration only in 22% was a different decision reached [ref]. So the DB process works and hence the increasing popularity.

Specifically in relation to dispute avoidance a detailed survey and analysis was carried out by the DRBF in 2018. The results are summarised in Figure 1.

The main takeaways from this survey generally are as follows:

- A Standing DB is considerably more effective generally than an Ad-Hoc Board which is only established once a dispute has arisen and is referred. Of the total number of issues that came before an Ad-Hoc board as shown over 14% were subsequently referred to arbitration against an average figure for a Standing DB of 1.75%

- Where a Standing DB engages proactively in dispute avoidance the outcome indicates that a significant number of disputes that may arise can be avoided from engagement around the issues and further that where a decision is ultimately required from the Standing DB that the subsequent referral to arbitration metrics are at 0.5% approximately presumably on the basis that many of the issues have been flushed out at the dispute avoidance phase and hence the decisions do not generally come as a surprise and are therefore broadly accepted.

The key takeaway is that dispute avoidance can only (and by definition) be achieved where a DAAB is appointed at project commencement (ie a Standing DAAB or Standing Conciliator in the Irish Public Works Context) and further where the DAAB or Standing Conciliator proactively engages with the parties on the matters and issues before they crystallise into disputes.

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		Standing Boards								Ad-Hoc Boards			
		Dispute Avoidance Yes				Dispute Avoidance No							
	Tot Projects	Nr. Boards	Opinions	Decisions	⇒ Arbitration	Nr. Boards	Opinions	Decisions	⇒ Arbitration	Nr. Boards	Opinions	Decisions	⇒ Arbitration
MDB	107	59	95	184	3	26	8	75	3	22	5	66	16
Billateral Loan	37	17	76	48	0	3	0	1	0	17	0	20	7
Government	47	30	81	22	0	9	0	7	0	8	5	19	0
Private	11	5	15	15	0	0	0	0	0	6	16	30	1
Other	29	16	13	14	0	6	7	3	0	7	16	8	2
		Issues	280	283		Issues	15			Issues	42	143	
		∑ Issues	563		3	∑ Issues	101		3	∑ Issues	185		26
					0.53%				2.97%				14.05%

Source: Geoffrey Smith and Leo Grutters, DRBF Conference Tokyo 2018. www.drb.org

Fig. 1 The Positive Effect of Dispute Boards

Dispute Avoidance – Is it realistic?

Gerard P. Monaghan
Chartered Engineer, Chartered Arbitrator, Accredited Mediator,
FIDIC Certified Adjudicator, FIDIC President's List of Approved Dispute Adjudicators

FIDIC Dispute Avoidance (FIDIC 2017/22)

21.3 Avoidance of Disputes

If the Parties so agree, they may jointly request (in writing, with a copy to the Engineer) the DAAB to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that may have arisen between them during the performance of the Contract. If the DAAB becomes aware of an issue or disagreement, it may invite the Parties to make such a joint request.

Such joint request may be made at any time, except during the period that the Engineer is carrying out his/her duties under Sub-Clause 3.7 [Agreement or Determination] on the matter at issue or in disagreement unless the Parties agree otherwise.

Such informal assistance may take place during any meeting, Site visit or otherwise. However, unless the Parties agree otherwise, both Parties shall be present at such discussions. The Parties are not bound to act on any advice given during such informal meetings, and the DAAB shall not be bound in any future Dispute resolution process or decision by any views or advice given during the informal assistance process, whether provided orally or in writing.

ICC DB Rules

Article 16: Avoidance of Disagreements

If at any time, in particular during meetings or site visits, ***the DB considers that there may be a potential Disagreement between the parties, the DB may raise this with the Parties with a view to encouraging them to avoid the Disagreement*** *on their own without any further involvement of the DB. In so doing, the DB may assist the Parties in defining the potential Disagreement. The DB may suggest a specific process that the Parties could follow to avoid the Disagreement, while making it clear to the Parties that it stands ready to provide informal assistance or to issue a Conclusion in the event that the Parties are unable to avoid the Disagreement on their own.*

FIDIC Dispute Avoidance and Adjudication Forum Practice Note 1 Dispute Avoidance https://fidic.org/publications/practice-notes

1. How/when does the dispute board make the parties aware of its dispute avoidance role?
2. When should dispute avoidance ideally take place?
3. Where should dispute avoidance take place?
4. What matters most lend themselves to dispute avoidance?
5. What are the most effective techniques for dispute avoidance?

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Raising the Bar: Enhancing Quality in Dispute Resolution for Vietnam's Construction Projects
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Dispute Avoidance – Key Ingredients for success

1. Appointed from commencement of the project – standing DAAB
2. Parties must have confidence in DAAB members, commercial, legal and technical skills and expeirence
3. Real trust
4. Good listening skills

AND assuming ingredients 1 to 4 are present

5. The ability to ask the right question and the right time and in the right tone.

The Positive Effect Of Dispute Boards

		Standing Boards								Ad-Hoc Boards			
		Dispute Avoidance Yes				Dispute Avoidance No							
	Tot Projects	Nr. Boards	Opinions	Decisions	⇒ Arbitration	Nr. Boards	Opinions	Decisions	⇒ Arbitration	Nr. Boards	Opinions	Decisions	⇒ Arbitration
MDB	107	59	95	184	3	26	8	75	3	22	5	66	16
Billateral Loan	37	17	76	48	0	3	0	1	0	17	0	20	7
Government	47	30	81	22	0	9	0	7	0	8	5	19	0
Private	11	5	15	15	0	0	0	0	0	6	16	30	1
Other	29	16	13	14	0	6	7	3	0	7	16	8	2
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Source: G.Smith & L. Grutters, DRBF Conference, Tokyo 2018

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The Positive Effect Of Dispute Boards

https://www.kcl.ac.uk/law/assets/kcl-dpsl-2024-dispute-boards-international-survey-report-digital-aw.pdf

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Thank you for your attention!

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