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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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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

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

SECTION D *(held concurrently with Section C)*

Role of Experts and Evaluation of Damages in Construction Arbitration

8.30 am – 12.00 pm, 11 April 2025 (Fri)
Lotus B Meeting Room, Rex Hotel Saigon

Duration (AM)	Content
	Session D1 – Role of Experts in Construction Arbitration
8.30 – 10.00	**Expert evidence in Vietnam-seated construction arbitrations: a comparative and procedural analysis** **Ms. Dao Linh Chi** – *Arbitral Assistant at ADR Vietnam Chambers LLC*
	Enhancing Expert Evidence in International Construction Arbitrations **Ms. Kua Lay Theng** – *Partner at WongPartnership*
	Expert Evidence in Arbitration: Avoiding Ships Passing in the Night **Mr. Johnny Tan Cheng Hye** – *Independent Expert, Arbitrator/Mediator*
	The Expert's Journey: From Fact-Finding to Decision-Making **Mr. Vivek Malviya** – *Director, Claims & Contracts – Masin*
	Panel Discussion **Moderator: Mr. Bui Truong Minh Loc** – *Contract Manager at SOL E&C, Standing Committee Member of SCLVN*
10.00 – 10.30	**Tea-break**
	Session D2 – Delays and Damages in Construction Arbitration
10.30 – 12.00 PM	**A Critical examination of Liquidated damages: Do the Challenges to their Application justify reform?** **Mr. Yasir G. Kadhim** – *Director at Secretariat Consulting*
	Concurrent delays in the Construction Arbitration and Judicial purview **Mr. Ramasubramanian** – *Lead consultant – Construction Arbitration, ADROIT Claims and ADR Consultants*
	Delay, Disruption and Pacing – a Singapore and English law perspective **Mr. Akshay Kishore** – *Partner at Bird & Bird LLP*
	Panel Discussion **Moderator: Mr. Tran Pham Hoang Tung** – *Senior Associate, CNC Counsel*
12.00 PM	**End of Section D**

Expert Evidence in Vietnam-Seated Construction Arbitrations:

A Comparative and Procedural Analysis

Dao Linh Chi[1]

Abstract

This paper examines the Vietnamese legal framework governing expert evidence in arbitrations seated in Vietnam, focusing on the Law on Commercial Arbitration 2010 (LCA) and the Vietnam International Arbitration Centre's Rules (VIAC Rules). Drawing comparisons with the ICC, SIAC, IBA Rules, and related soft law instruments, the analysis addresses key procedural aspects such as expert appointment, inspection, and the tribunal's discretion in evaluating evidence. Particular attention is paid to the limited role of party-appointed experts and the potential legal implications of inspection practices rooted in Vietnam's civil law tradition. The paper concludes with recommendations for both institutional and legislative reform, aiming to enhance procedural clarity and bring Vietnamese arbitration practice closer in line with international standards.

Keywords: *Expert Evidence, Inspection, Tribunal-Appointed Experts*

I. Introduction

Expert evidence is central to the resolution of technically complex disputes in international arbitration, particularly in sectors such as construction and valuation. As arbitration continues to gain traction in Vietnam, questions arise regarding how the domestic legal framework accommodates expert evidence and how it aligns with international practice.

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[1] Ms. Dao Linh Chi is an Arbitral Assistant at ADR Vietnam Chambers. She holds an LL.M. in International and Comparative Dispute Resolution from the School of International Arbitration, Queen Mary University of London (UK), where she focused her studies and research on international arbitration, mediation, and the resolution of construction disputes. Prior to joining ADR Vietnam Chambers, Ms. Chi interned at the Secretariat of the Vietnam International Arbitration Centre (VIAC) and in the dispute resolution departments of various law firms. She has experience assisting the Secretariat in managing and administering arbitration cases across a range of dispute areas, including construction, mergers and acquisitions, and the sale of goods. She has also supported lawyers in representing clients in both arbitration and court proceedings.

In Vietnam, expert evidence in arbitration is regulated under the Law on Commercial Arbitration 2010 (LCA) and in the VIAC Rules. While these instruments grant arbitral tribunals broad discretion in collecting evidence, including through inspection and expert appointment, they lack the procedural safeguards and role differentiation commonly found in international rules, such as those of the ICC, SIAC, or the IBA.

This paper explores the procedural treatment of expert evidence in Vietnamese-seated arbitrations. It considers the roles of tribunal- and party-appointed experts, the evidentiary weight of inspection, and the tribunal's discretion in assessing expert input. By drawing comparisons with international models, the paper identifies areas for improvement and proposes a path toward greater procedural coherence and harmonisation with global standards.

II. Vietnam's legal framework for the use of expert in arbitration

1. The power of the Tribunal to collect evidence

Under Vietnamese arbitration law, the arbitral tribunal's authority to collect evidence is primarily governed by the Law on Commercial Arbitration 2010 (LCA), and is adopted in the Rules of the Vietnam International Arbitration Centre (VIAC Rules). These instruments reflect a framework that permits the tribunal to adopt a more interventionist role in the evidentiary process than is commonly seen in international arbitration conducted under common law traditions.

"***Article 19. Power of the Arbitral Tribunal to collect evidence***

[...]

2. The Arbitral Tribunal shall have the power, at the request of a party or the parties, to request witnesses to provide information and documents relevant to the dispute.

3. The Arbitral Tribunal shall have the power, on its own initiative or at the request of a party or the parties, to seek inspection or valuation of the assets in dispute [...]

4. The Arbitral Tribunal shall have the power, on its own initiative or at the request of a party or the parties, to seek expert advice. The Arbitral Tribunal shall have the power to request the parties to provide experts with relevant information or access to relevant documents, goods or assets. The experts shall submit a written report to the Arbitral Tribunal."

These provisions establish a broad procedural mandate for tribunals seated in Vietnam, enabling them to play an active role in ensuring that the evidentiary record is complete and reliable. In particular, the tribunal may not only request witnesses to produce information but may also independently seek inspection or valuation of disputed property, or appoint experts to provide technical input. The authority to act *sua sponte* in these respects reflects the influence of civil law principles, where adjudicators are expected to assist actively in the development of the case.

Notably, while Article 19 permits the tribunal to take such steps either upon party request or on its own initiative, it does not prescribe detailed procedural safeguards or consultation mechanisms akin to those found in rules issued by institutions such as the ICC or the SIAC. Nor does it expressly address the status or admissibility of evidence obtained through tribunal-directed measures, leaving such matters largely to the tribunal's discretion.

This approach stands in contrast to international arbitral practice as codified in instruments like the IBA Rules on the Taking of Evidence in International Arbitration. Under the IBA Rules, party autonomy in the presentation of evidence is a core tenet, with the tribunal's role being primarily to supervise and assess rather than to independently procure evidence. Where the tribunal does appoint an expert or order the production of evidence, procedural safeguards – such as consultation with the parties and disclosure obligations – are built into the process to ensure transparency and equal treatment.

In the Vietnamese context, however, tribunals are often influenced by the procedural style of local courts, where judges are tasked with actively developing the factual record. This orientation can result in tribunals adopting a more inquisitorial role, particularly in domestic arbitrations or those seated in Vietnam. In practice, this may be advantageous where the parties are unable or unwilling to produce sufficient evidence on their own, or where technical clarification is needed to support the tribunal's reasoning.

Nonetheless, the broad discretion granted to VIAC tribunals in the collection of evidence also raises questions regarding procedural predictability and the scope of party participation in such processes. As arbitration in Vietnam continues to evolve and integrate into the global arbitration community, a more structured and harmonised approach – drawing upon international best practices – may serve to enhance user confidence and procedural efficiency.

a. Witness and Expert

The distinction between witnesses and experts is expressly recognised under both the Law on Commercial Arbitration 2010 (LCA) and the Rules of the Vietnam International Arbitration Centre (VIAC Rules). Under these instruments, a witness is primarily concerned with providing factual evidence, including contemporaneous documents and information directly related to the dispute[2]. By contrast, the role of an expert is to offer professional or technical insight on matters that require specialist knowledge[3]. This distinction under the VIAC framework appears to exclude the concept of the "expert witness" as commonly understood in other arbitral rules, such as those of the Singapore International Arbitration Centre (SIAC), where experts giving opinion evidence are sometimes categorised alongside witnesses[4].

The practice of distinguishing between witness and expert is by no means unique to VIAC. Several other arbitral regimes maintain a similar dichotomy. For example, Article 25.2 of the 2021 ICC Arbitration Rules states: "*The arbitral tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned*". Similarly, the 2020 IBA Rules on the Taking of Evidence in International Arbitration treat fact witnesses and experts in separate provisions: Article

[2] Article 19.2 of the VIAC Rules

[3] Article 19.4 of the VIAC Rules

[4] Rule 40.1 of the SIAC Rules provides that: "*Prior to any hearing, the Tribunal may direct the parties to give notice of the identity of witnesses, including expert witnesses, whom the parties intend to produce, the subject matter of their testimony, and its relevance to the issues*".

4 addresses the former[5], while Articles 5[6] and Article 6[7] set out rules for party-appointed and tribunal-appointed experts, respectively.

This distinction, however, goes beyond mere terminology. It has practical implications for the parties' role in the arbitral process, particularly in terms of who appoints the witness or expert, and the obligations that follow from that appointment. Under the VIAC Rules, it is not expressly stated whether parties have the right to appoint witnesses. In practice, however, it is common for parties to submit witness statements as annexes to their main submissions, treating them as normal documentary evidence in support of their case. This stands in contrast with the more explicit provisions under the ICC Rules, SIAC Rules and the IBA Rules, where the parties' entitlement to present witness evidence is clearly affirmed.

With regard to experts, the position under VIAC Rules is more nuanced. Article 19.4 provides that the tribunal may, either on its own initiative or at the request of a party, appoint an expert to report on issues relevant to the dispute. While the parties may request the tribunal to appoint an expert, there is no express provision allowing the parties to submit expert evidence of their own volition. Nevertheless, it is not uncommon in practice for parties to engage experts independently and submit their reports as part of the evidentiary record, treating them much like other forms of documentary evidence. This pragmatic approach by practitioners fills the gap left by the silence of the VIAC Rules.

By comparison, the ICC, SIAC and IBA Rules adopt a more flexible and detailed approach. These rules allow both party-appointed and tribunal-appointed experts and provide procedural

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[5] Article 4.1 of the IBA Rules provides that: "Within the time ordered by the Arbitral Tribunal, each Party shall identify the witnesses on whose testimony it intends to rely and the subject matter of that testimony".

[6] Article 5.1 of the IBA Rules provides that: "A Party may rely on a Party-Appointed Expert as a means of evidence on specific issues. Within the time ordered by the Arbitral Tribunal, (i) each Party shall identify any Party-Appointed Expert on whose testimony it intends to rely and the subject-matter of such testimony; and (ii) the Party-Appointed Expert shall submit an Expert Report".

[7] Article 6.1 of the IBA Rules provides that: "The Arbitral Tribunal, after consulting with the Parties, may appoint one or more independent Tribunal-Appointed Experts to report to it on specific issues designated by the Arbitral Tribunal. The Arbitral Tribunal shall establish the terms of reference for any Tribunal-Appointed Expert Report after consulting with the Parties. A copy of the final terms of reference shall be sent by the Arbitral Tribunal to the Parties".

safeguards, such as prior consultation with the parties on the appointment of a tribunal expert. The issues for determination, the scope of the expert's mandate, the format of the expert's report and the timeline for submission are typically discussed in advance with the parties to ensure procedural fairness and transparency.

The divergence between these approaches reflects broader differences in legal culture. Vietnam's arbitral practice, rooted in its civil law tradition, tends to adopt a more inquisitorial posture, with tribunals often taking an active role in managing the case and gathering evidence. This contrasts with the adversarial model predominant in common law jurisdictions, where the responsibility for presenting and testing evidence, including expert evidence, lies squarely with the parties. In such systems, expert testimony is not only a tool to prove the technical aspects of a claim but also a strategic asset deployed to persuade the tribunal.

In sum, while the VIAC Rules and the LCA make provision for tribunal-appointed experts, they do not expressly accommodate party-appointed experts, resulting in a lack of clarity in practice. As international arbitration in Vietnam continues to grow, a more explicit recognition of party-appointed experts may be warranted to align local practice with international expectations and to ensure consistency in the evidentiary process

b. Seeking inspection

While some arbitration rules are silent on the issue of inspection, others address it explicitly, albeit in different forms and with varying levels of procedural guidance. The SIAC Rules, for instance, provide that the tribunal may "*order any party to produce to the Tribunal and to the other parties for inspection, in a manner to be determined by the Tribunal, any document, property, or item in its possession or control which the Tribunal considers relevant to the case and material to its outcome*"[8] and In addition, parties are obliged to provide any tribunal-appointed expert with relevant information and access to documents, goods, or property for inspection purposes[9].

By contrast, the ICC Rules do not specifically provide for an inspection mechanism. Similarly, other institutional rules often remain silent on the procedural aspects of inspection,

[8] Rule 50.2(f) of the SIAC Rules

[9] Rule 41.4 of the SIAC Rules

treating it as a matter to be determined by the tribunal in the exercise of its general procedural powers. It is therefore notable that the Law on Commercial Arbitration (LCA) and the VIAC Rules expressly provide for inspection as a standalone method of evidence collection. Under the VIAC framework, inspection is considered a distinct evidentiary tool, separate from the expert mechanism, and may be initiated by the tribunal either on its own initiative or at the request of a party. According to Article 19.3 of the VIAC Rules, inspection is to be conducted by an expert appointed by the tribunal, although the rule does not require the submission of a formal report following the inspection.

The IBA Rules, by contrast, address inspection in Article 7. This provision states that the tribunal may, on its own motion or at the request of a party, "inspect or require the inspection by a Tribunal-Appointed Expert or a Party-Appointed Expert of any site, property, machinery or any other goods, samples, systems, processes or Documents, as it deems appropriate." However, under the IBA framework, inspection is understood as a component of expert activity rather than a separate procedural tool. In other words, inspection is treated as a function to be carried out by an expert already appointed in the arbitration, whether appointed by a party or the tribunal, rather than as a procedural mechanism in its own right. In this respect, the approach taken by the VIAC Rules is distinct. Inspection and expert opinion are regulated as separate mechanisms, with differing procedural consequences. For example, while Article 19.4 of the VIAC Rules explicitly requires tribunal-appointed experts to produce a written report, Article 19.3, governing inspection, contains no such requirement for the entity conducting the inspection.

In practice, inspection under the VIAC Rules is often approached in a manner closely resembling Court-directed inspections in Vietnamese civil or criminal proceedings. Under the procedural codes governing court litigation in Vietnam, it is the Court – not the parties – that holds the power to order inspection. Parties may only request such a measure, but cannot initiate it independently[10]. This reflects the legal culture of Vietnam as a civil law jurisdiction where where

[10] Article 97.2(c) of the Vietnam's Civil Procedure Code 2015 provides that: "2. In cases prescribed by this Code, the Courts may take one or a number of the following measures to collect materials and evidences: [...] seeking inspection [...]"

Article 252.5 of the Vietnam's Criminal Procedure Code 2015 provides that: "A Court verifies, collects and adds evidences through the following activities: [...] 5. Seeking inspection [...]"

adjudicators are tasked with actively gathering and verifying facts, and experts appointed by the court are treated as independent "assistants" to the judiciary[11]. This civil law orientation has inevitably shaped the way arbitral tribunals under the VIAC Rules approach inspection. In practice, tribunal-directed inspections in arbitration are frequently viewed through the same lens as court-supervised inspections, with parties playing a largely passive role.

This procedural model gives rise to recurring concerns among counsel and parties. In particular, tribunal-appointed experts, whether conducting inspections or providing technical opinions, may come to exert disproportionate influence over the outcome of the case. In some instances, inspection reports issued by professional or state-sanctioned agencies are treated as final and binding, akin to judicial expert conclusions. This dynamic raises the spectre of the "fourth arbitrator," in which the expert's findings effectively shape the tribunal's reasoning, thereby undermining the principle that adjudicative authority must rest solely with the tribunal. Although the tribunal must not delegate decision-making power to any other party, the boundary between technical assistance and undue influence is not always easily drawn.

Compounding the issue is the lack of a clearly defined role for party-appointed experts under Vietnamese arbitration framework. This is particularly problematic in complex construction disputes, where competing expert views are often essential to resolving technical disagreements. In contrast, international arbitral practice tends to rely on a balanced use of both party-appointed and tribunal-appointed experts, whose opinions are subject to adversarial testing through submissions, written comments, and oral examination at the hearing. This model preserves party equality and ensures that expert evidence remains within the scope of procedural fairness.

Vietnamese arbitration, particularly within the VIAC framework, would benefit from recalibrating this balance. The inspection mechanism should be used more sparingly and confined to cases where it is strictly necessary. For disputes involving substantial technical complexity, VIAC could promote greater reliance on expert evidence through mechanisms that recognise and facilitate the role of party-appointed experts. Such a shift would enhance procedural transparency,

[11] Sundra Rajoo, *Expert Evidence in Construction Disputes – An Arbitrator's Perspective*, in: *The Guide to Construction Arbitration*, 5th edn., GAR (2023), https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/fifth-edition/article/expert-evidence-in-construction-disputes-arbitrator-perspective

safeguard party autonomy, and reaffirm the tribunal's responsibility as the ultimate decision-maker.

2. The powers of the Tribunal and the parties' right over the expert evidence

a. Request expert report in written form

A key procedural feature of expert evidence in arbitration is the requirement that the expert produce a written report. Article 19.4 of the VIAC Rules explicitly provides that when the arbitral tribunal seeks expert advice, the expert appointed by the tribunal must submit a written report. Similar requirements are found in the ICC Rules, the SIAC Rules, and the IBA Rules, reflecting a consistent practice across institutional frameworks[12]. In each case, the production of a written report ensures that the expert's opinions are made available to the parties in a transparent and reviewable form. More importantly, the rules typically provide the parties with the opportunity to comment on the expert's findings, thereby preserving their right to be heard and their ability to respond to the conclusions reached by the expert and prepare the questions for examine the expers in the hearing. This procedural safeguard plays an important role in maintaining fairness and balance in the proceedings. It also recognises that while the tribunal may rely on the expertise of a third party, such reliance should not come at the expense of party participation or adversarial testing of the evidence.

However, this safeguard under Article 19.4 of the VIAC Rules appears to apply exclusively in cases where the tribunal appoints an expert to provide a professional opinion. When the tribunal appoints an expert to conduct an inspection pursuant to Article 19.3, the rule is silent as to whether the expert or entity conducting the inspection is obliged to submit a written report elaborating on the results. The absence of an express reporting obligation in such cases creates a degree of legal uncertainty, particularly when the inspection is expected to yield findings central to the resolution of the dispute.

In practice, the entities retained to carry out inspections are often professional organisations with experience in technical assessments. As such, they are typically cooperative and willing to document their findings in the form of a written report. Moreover, where the tribunal has

[12] See Article 25.3 of the ICC Rules, Rule 41.6 of the SIAC Rules, and Article 6.4 of the IBA Rules

determined that an inspection is necessary, it is standard for VIAC to enter into a contract with the inspection entity. This contract usually contains terms regarding the conduct of the inspection, including the requirement to produce a report upon completion. These practical arrangements help address the procedural gap in the Rules and ensure that the results of the inspection can be properly introduced into the arbitral record.

Nonetheless, the lack of a clear rule-based requirement leaves open the possibility that, in an undesirable scenario, the inspection party may decline to produce a written report. In such cases, the tribunal may find itself without a reliable procedural basis to compel the production of the report. This could potentially undermine the evidentiary value of the inspection and, by extension, the tribunal's ability to assess the disputed issues with sufficient clarity.

The contrast with other institutional rules is worth noting. Under the IBA Rules, for example, inspections are treated as part of the expert mechanism, and the requirement to produce a written report would generally flow from the expert's appointment. This approach provides greater procedural certainty and ensures that any technical evaluation – whether based on expert analysis or on-site inspection – forms part of the official record.

In conclusion, while the VIAC Rules do provide for expert reports in certain scenarios, they fall short of imposing a general reporting obligation across all instances of tribunal-appointed technical assistance. As arbitration in Vietnam becomes more international in scope, a clearer alignment with established international practices may help enhance predictability and procedural robustness in the handling of expert evidence.

b. Summon expert to attend a hearing for examination

Article 20.1 of the VIAC Rules, which mirrors Article 47.1 of the Law on Commercial Arbitration 2010 (LCA), provides:

"***Article 20. Power of the Arbitral Tribunal to summon witnesses***

1. The Arbitral Tribunal shall have the power, at the request of a party or the parties and if the Tribunal considers it necessary, to summon witnesses to attend a hearing. The witness expenses shall be paid by the requesting party or allocated by the Arbitral Tribunal.

[...]"

In addition, Article Article 25.3 of the VIAC Rules provides that:

"***Article 25. Hearings***

3. [...] The Arbitral Tribunal, on its own initiative or at the request of a party, shall have the power to invite the organization or individual conducting the inspection or the valuation of assets and the experts as stipulated in Article 19 to attend hearings. The Arbitral Tribunal may permit other persons to attend hearings if the parties so consent.

[...]"

Read together with Article 19, these provisions indicate that the tribunal has the authority to summon not only fact witnesses but also tribunal-appointed experts and inspection entities to attend the hearing. However, the framework remains silent on the treatment of party-appointed experts, whether they may be summoned to the hearing, and on what legal basis.

In practice, parties who wish to present expert evidence often submit expert reports as part of their written submissions. If a party intends to have its expert examined at the hearing, the expert is typically characterised as a "witness" under Article 20.1, or alternatively, as an "other person" whose attendance may be permitted under Article 25.3, subject to party consent. Similarly, if the tribunal wishes to hear a party-appointed expert, it may rely on Article 25.3 to invite such individual to attend the hearing. Despite these practical workarounds, the absence of express provisions on the examination of party-appointed experts creates legal uncertainty

By contrast, rules of other major institutions such as the ICC and SIAC clearly contemplate the possibility of both party-appointed and tribunal-appointed experts being examined at the hearing[13]. Under these rules, not only may the tribunal require the expert to give oral testimony,

[13] Article 25.2 and Article 26.3 of the SIAC Rules provides that: "*25.2 The Tribunal may allow, refuse or limit the appearance of witnesses to give oral evidence at any hearing*"; "*26.3 Unless otherwise agreed by the parties, if the Tribunal considers it necessary or at the request of any party, an expert appointed under Rule 26.1(a) shall, after delivery of his written report, participate in a hearing. At the hearing, the parties shall have the opportunity to examine such expert*".

Article 25.3 of the ICC Rules provides that: "At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert".

but the parties are also entitled to cross-examine the expert. This procedural right forms a critical part of the adversarial process and is widely regarded as an important safeguard to ensure that the expert's evidence is adequately testified and subjected to scrutiny.

In the absence of an express provision in the VIAC Rules, parties and tribunals often resort to a practical workaround. Article 20 may be interpreted as implicitly encompassing both fact and expert witnesses, allowing either the tribunal or the parties to request an expert's attendance at the hearing. In practice, this interpretation is commonly adopted. However, the lack of express guidance creates legal uncertainty and may lead to procedural challenges, particularly in cases where the tribunal-appointed expert's result plays an influential role in the tribunal's resolution of the dispute.

This concern is heightened by the fact that parties frequently retain competing experts who offer conflicting technical opinions. Even when both experts are examined at the hearing, tribunals often face a difficult task in reconciling diverging views and reaching a well-reasoned conclusion. The problem is exacerbated where the expert is not summoned to the hearing, as this deprives the parties of an opportunity to challenge the expert's methodology or conclusions through direct questioning.

The concern is especially acute in the case of tribunal-appointed experts. Although such experts are subject to the same standards of independence and impartiality as arbitrators, they are not selected by the parties and may therefore be perceived as lacking legitimacy. Parties may also worry about the absence of procedural control over how the expert's findings – potentially determinative to the outcome – are introduced and presented. These issues underscore the importance of clear procedural safeguards to preserve party autonomy and procedural fairness in expert evidence.

c. The Tribunal's power to assess the evidence

In the context of evidentiary management, most institutional rules afford tribunals broad procedural discretion but often lack detailed guidance on how that discretion should be exercised in practice. As a result, many tribunals turn to soft law instruments, such as the IBA Rules on the

Taking of Evidence in International Arbitration, to supplement the applicable arbitration rules[14]. The IBA Rules are particularly useful in complex, evidence-heavy disputes, such as international construction arbitrations, where technical issues and voluminous documentation are commonplace.

The IBA Rules set out a comprehensive framework for the handling of evidence, including specific provisions on document production, witness examination, expert evidence, and, notably, the tribunal's power to assess the relevance, materiality, weight, and admissibility of evidence. These provisions empower the tribunal to make determinations regarding the probative value of each piece of evidence and to manage the proceedings efficiently and fairly.

However, neither the LCA nor the VIAC Rules contain an equivalent provision expressly authorising the tribunal to assess the admissibility or weight of evidence. While it is generally accepted that, in principle, tribunals have such discretion as part of their procedural mandate, the absence of an express legal basis can create practical difficulties – especially in jurisdictions like Vietnam, where court intervention remains a possibility at the enforcement stage.

Indeed, in Vietnam-seated arbitrations, the adoption of the IBA Rules by agreement of the parties or through procedural orders is rare. This hesitation may stem from concerns about the risk of award annulment if the tribunal is perceived to have applied soft law in a manner inconsistent with Vietnamese public policy. In *Decision No. 11/2019/QD-PQTT* issued by the Hanoi People's Court on 14 November 2019[15], the tribunal's reliance on the IBA Rules to reject certain evidence submitted by the respondent – despite Vietnamese law being the governing law of the dispute – was found to be a violation of fundamental legal principles, resulting in the annulment of the award.

As a result, Vietnamese tribunals tend to exercise significant caution when dealing with evidence, often refraining from dismissing any evidence outright. This leads to a situation in which the tribunal's ability to control the evidentiary record may be compromised by concerns about

[14] Article 9.1 of the IBA Rules provides that: "The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence".

[15] Decision No. 11/2019/QD-PQTT at https://congbobanan.toaan.gov.vn/2ta428188t1cvn/chi-tiet-ban-an

enforceability. In effect, there is no explicit legal foundation under the LCA or VIAC Rules that provides the tribunal with a secure basis to exclude or disregard evidence without running the risk of being perceived as procedurally unfair by the court.

This gap reinforces the argument that the evidentiary framework under Vietnamese arbitration law could benefit from further development – either through revisions to the LCA and VIAC Rules, or through greater acceptance of international best practices, such as the IBA Rules. Until such developments occur, tribunals and counsel must carefully navigate the delicate balance between procedural efficiency and legal certainty in the handling and assessment of evidence.

III. Recommendations

1. Short-term recommendations

In the short term, while the Law on Commercial Arbitration (LCA) remains under review and institutional arbitration rules are still required to align with this legal framework, meaningful reform may be pursued at the institutional level. Given its prominence in the Vietnamese arbitration landscape, the Vietnam International Arbitration Centre (VIAC) is well-placed to take the lead in initiating such improvements.

First, the VIAC Rules should explicitly grant the arbitral tribunal the authority to summon witnesses to attend hearings and, importantly, allow the parties to examine those witnesses during the hearing. This would bring the Rules into closer alignment with international standards and enhance the procedural balance between tribunal powers and party rights.

Second, the Rules should expressly recognise the parties' right to appoint witnesses. Such a provision would reinforce the principle that parties must be given a reasonable opportunity to present their case before the tribunal, including the ability to introduce testimony that supports their case.

Third, in the case of tribunal-appointed experts, the tribunal should be required to consult with the parties prior to appointment. This consultation should include discussion of the proposed expert's identity as well as the scope of issues on which the expert will be asked to provide an opinion. This procedural safeguard would increase transparency and party confidence in the tribunal's reliance on third-party expertise.

Fourth, the production of a written report should be made mandatory for all experts – whether appointed to provide technical advice or to carry out an inspection. A uniform requirement for written reports would strengthen the evidentiary record, promote consistency, and ensure that the expert's findings are available for scrutiny by both the tribunal and the parties.

2. Amending the LCA

In the longer term, the author supports a more comprehensive reform of the LCA itself. In particular, the law should be revised to clearly distinguish between party-appointed experts and tribunal-appointed experts, thereby encouraging a more active role for parties in the evidence-gathering process. Tribunal-appointed experts, under this revised framework, would cover both expert advice and inspection functions, streamlining the evidentiary process and reducing ambiguity between different types of technical assistance.

Additionally, the LCA should affirm the tribunal's broad discretion to assess all aspects of the evidence, including admissibility, relevance, materiality, and probative value. Such a provision would bring Vietnamese arbitration practice closer in line with international standards and reduce uncertainty regarding the tribunal's authority to manage the evidentiary record.

3. Drawing on soft law and regional practice to develop VIAC's own evidentiary guidelines

The author advocates for greater openness toward the application of soft law instruments, such as the IBA Rules on the Taking of Evidence in International Arbitration. Increased acceptance of such instruments – whether by agreement of the parties or through institutional practice – would contribute to greater procedural efficiency and predictability. As arbitration in Vietnam continues to integrate with the international system, it is also timely to consider the development of evidentiary guidelines tailored to the Vietnamese context. In this respect, the experience of the China International Economic and Trade Arbitration Commission (CIETAC) – an institution operating within a civil law tradition broadly similar to Vietnam's – may serve as a valuable reference point. At the same time, recent developments at the United Nations Commission on International Trade Law (UNCITRAL), particularly its work on the potential use of technical advisors in arbitration, offer additional options for supporting the tribunal in resolving technically complex disputes. These instruments and practices provide useful insights for shaping a more structured and coherent evidentiary framework for VIAC-administered arbitrations.

Learning from CIETAC's Guidelines and the Civil Law Approach

One notable example is the 2015 Guidelines on Evidence issued by the China International Economic and Trade Arbitration Commission (CIETAC)[16]. These guidelines are based on international best practices but adapted to fit the Chinese legal and procedural environment, which, like Vietnam's, is rooted in the civil law tradition. The CIETAC Guidelines incorporate key elements of the IBA Rules while modifying their application to ensure compatibility with local norms. They also reflect procedural values found in the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules)[17], such as tribunal-led evidence gathering, restrained use of oral testimony, and emphasis on efficiency.

For VIAC, this model demonstrates that institutional guidelines can strike a balance between global expectations and domestic procedural culture. By learning from CIETAC and selectively integrating features from both the IBA Rules and the Prague Rules, VIAC can establish its own evidentiary framework. Such guidelines could clarify procedures on expert appointment, inspection, and party access to technical reports, while also reinforcing party equality and transparency.

Exploring the Use of Technical Advisors: Insights from UNCITRAL

A further development worth considering is the recent work of UNCITRAL Working Group II, particularly in Working Paper A/CN.9/WG.II/WP.236 – *Technology-related dispute resolution and adjudication: Model clauses and guidance texts*[18], which explores the potential role of *technical advisors* in international arbitration. Unlike tribunal-appointed or party-appointed experts, technical advisors serve as confidential assistants to the tribunal. Their role is not to issue binding conclusions but to help the tribunal understand technical issues more effectively during the course of the proceedings.

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[16] China International Economic and Trade Arbitration Commission (CIETAC), *Guidelines on Evidence*, available at: https://www.cietac.org/en/articles/25113

[17] rague Rules Drafting Committee, *Inquisitorial Rules of Taking Evidence in International Arbitration (Prague Rules)*, entered into force on 14 December 2018, available at: https://praguerules.com/upload/iblock/a00/a00568c6787a8bc955f4fdfe93db5a10.pdf

[18] UNCITRAL Working Group II, *Settlement of commercial disputes: Use of technology in arbitration*, A/CN.9/WG.II/WP.236, available at: https://docs.un.org/en/A/CN.9/WG.II/WP.236

This mechanism can be especially useful in construction disputes or other technically complex cases, where a neutral consultant may assist the tribunal in navigating highly specialised subject matter without disrupting the balance of party rights. While not yet widely institutionalised, the concept of technical advisors provides an alternative to formal expert appointment and may help address concerns over the perceived dominance of tribunal-appointed experts in Vietnam, particularly in cases involving inspection. If clearly regulated, with disclosure to and consultation with the parties, this model could be adapted within VIAC's procedural framework to enhance efficiency and safeguard procedural fairness.

IV. Conclusion

Expert evidence plays a critical role in ensuring fairness and accuracy in arbitral proceedings involving technical issues. The Vietnamese framework, anchored in the LCA and VIAC Rules, provides tribunals with general powers to appoint experts and seek inspections, but lacks detailed procedural guidance and mechanisms to ensure party equality.

Challenges persist due to the absence of clear provisions on party-appointed experts, inconsistent requirements for expert reporting, and the limited use of adversarial testing through cross-examination. These are further compounded by the cautious attitude toward soft law instruments such as the IBA Rules, stemming from concerns about compatibility with domestic legal standards.

Short-term institutional reforms. particularly through revisions to the VIAC Rules. could introduce greater procedural transparency and encourage more effective use of expert evidence. In the longer term, legislative amendments to the LCA may be necessary to clarify expert roles, empower tribunals in evidentiary assessment, and align more closely with international practice.

As Vietnam's arbitration regime continues to develop, embracing structured and internationally informed approaches to expert evidence will be key to reinforcing user confidence and the credibility of proceedings seated in Vietnam.

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Expert Evidence in Vietnamese-Seated Arbitrations: A Comparative and Procedural Analysis

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INTRODUCTION

- **Expert evidence plays an indispensable role in international arbitration**, particularly in disputes involving complex technical issues, construction claims, or specialised valuation matters.
- **Vietnam's framework:**

  LCA 2010 & **VIAC Rules** vs. **global standards (ICC/SIAC/IBA)**

- **Gaps:** Procedural safeguards, party autonomy, soft law acceptance.

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Vietnam's legal framework for the use of expert in arbitration

- **LCA 2010 & VIAC Rules** grant tribunals broad discretion (Article 19):
  - Tribunal-appointed experts.
  - Inspection/valuation powers.

VIAC vs. **ICC/SIAC**

- **Civil law influence:** Inquisitorial vs. adversarial approaches.

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1. The power of the Tribunal to collect evidence

Under the Law on Commercial Arbitration 2010 and the VIAC Rules, arbitral tribunals in Vietnam have broad authority to collect evidence, including summoning witnesses, ordering inspections or valuations, and appointing experts—either on their own initiative or at party request. This reflects Vietnam's civil law tradition, where adjudicators play an active role in fact-finding. Unlike international rules such as the IBA or ICC, the VIAC framework lacks detailed procedural safeguards or consultation requirements, giving tribunals significant discretion. While this approach can be practical in evidentiary gaps, a more structured system aligned with global best practices could enhance procedural predictability and user confidence.

1. The power of the Tribunal to collect evidence

- **Article 19 of VIAC Rules:**

"Article 19. Power of the Arbitral Tribunal to collect evidence

[...]

2. The Arbitral Tribunal shall have the power, at the request of a party or the parties, to request witnesses to provide information and documents relevant to the dispute.

3. The Arbitral Tribunal shall have the power, on its own initiative or at the request of a party or the parties, to seek inspection or valuation of the assets in dispute [...]

4. The Arbitral Tribunal shall have the power, on its own initiative or at the request of a party or the parties, to seek expert advice. The Arbitral Tribunal shall have the power to request the parties to provide experts with relevant information or access to relevant documents, goods or assets. The experts shall submit a written report to the Arbitral Tribunal."

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a. Witnesses vs. Experts

Under the **LCA 2010** and the **VIAC Rules**, a clear distinction is made between witnesses and experts. **Witnesses** provide factual evidence, while **experts** contribute technical or professional opinions on specialized matters. Unlike other arbitral frameworks such as SIAC or ICC, the VIAC Rules do not explicitly allow for party-appointed experts, although in practice, parties often submit expert reports as part of their evidence. This omission reflects Vietnam's civil law tradition, where tribunals adopt a more inquisitorial role. To align with international standards, a clearer framework recognizing party-appointed experts may be necessary to support procedural fairness and ensure balanced representation of technical issues.

b. Seeking inspection

The **VIAC Rules** treat inspection as a separate evidentiary tool distinct from expert evidence. While the **ICC Rules** are silent and the IBA Rules incorporate inspection as part of expert functions, VIAC expressly allows tribunal-initiated inspections under Article 19.3, without requiring a formal report. Rooted in Vietnam's civil law system, this approach limits party control and reflects court-like procedures. However, this may risk excessive influence by tribunal-appointed experts, raising concerns of the "fourth arbitrator." To mitigate this, VIAC could encourage more balanced use of party-appointed experts in complex disputes, promoting transparency and preserving the tribunal's adjudicative authority.

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2. The powers of the Tribunal and the parties' right over the expert evidence

a. Request expert report in written form

b. Summon expert to attend a hearing for examination

a. Request expert report in written form

Under the **VIAC Rules**, when the tribunal appoints an **expert** to provide professional advice, the expert must submit a **written report**, ensuring **transparency** and allowing parties to **comment** and prepare for **cross-examination**. This procedural safeguard is consistent with other institutional rules, such as the **ICC** and **SIAC**. However, there is no explicit requirement for a written report when the tribunal appoints an **expert** for **inspections**, creating potential **uncertainty**. While practical arrangements, like **contracts** with inspection entities, often ensure written reports, the lack of a clear **reporting obligation** could undermine the **evidentiary value** of such inspections and complicate the arbitral process.

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b. Summon expert to attend a hearing for examination

The **VIAC Rules** grant tribunals the power to **summon witnesses**, **tribunal-appointed experts**, and **inspection entities** to attend hearings. However, the treatment of **party-appointed experts** is not explicitly addressed, leading to **legal uncertainty**. In practice, tribunals often summon experts by interpreting Article 20 as applicable to both **fact and expert witnesses**. This uncertainty is compounded by the **lack of explicit provisions** on the examination of **party-appointed experts**, potentially hindering the ability to challenge **conflicting technical opinions** and raise concerns about **procedural fairness** and **party autonomy**.

- **Article 20.1 of the VIAC Rules:**

*"**Article 20. Power of the Arbitral Tribunal to summon witnesses***

1. *The Arbitral Tribunal shall have the power, at the request of a party or the parties and if the Tribunal considers it necessary, to summon witnesses to attend a hearing. The witness expenses shall be paid by the requesting party or allocated by the Arbitral Tribunal.*

[...]"

- **Article 25.3 of the VIAC Rules**

Article 25. Hearings

3. [...] The Arbitral Tribunal, on its own initiative or at the request of a party, shall have the power to invite the organization or individual conducting the inspection or the valuation of assets and the experts as stipulated in Article 19 to attend hearings. The Arbitral Tribunal may permit other persons to attend hearings if the parties so consent.

[...]"

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c. The Tribunal's power to assess the evidence

The **LCA** and **VIAC Rules** grant tribunals broad discretion over evidentiary matters but lack a clear legal foundation for the **assessment of evidence**. Unlike the **IBA Rules**, which explicitly empower tribunals to assess the **relevance**, **materiality**, **weight**, and **admissibility** of evidence, the VIAC Rules do not provide such detailed guidance. This gap creates **practical difficulties**, particularly regarding **enforceability** in Vietnam, where courts may intervene in the annulment of awards. The **absence of express authority** to exclude evidence limits the tribunal's ability to manage the evidentiary record effectively, calling for greater alignment with **international best practices** to enhance procedural **certainty**.

.II.

RECOMMENDATIONS

1. Short-term recommendations

In the short term, while the Law on Commercial Arbitration (LCA) remains under review and institutional arbitration rules are still required to align with this legal framework, meaningful reform may be pursued at the institutional level. Given its prominence in the Vietnamese arbitration landscape, the Vietnam International Arbitration Centre (VIAC) is well-placed to take the lead in initiating such improvements.

First

VIAC Rules should explicitly authorize tribunals to summon witnesses and grant parties examination rights, aligning with international standards for procedural fairness.

Second

The Rules should formally recognize parties' right to appoint witnesses, ensuring their ability to fully present their case.

Third

Mandate tribunal consultation with parties before appointing experts, covering both expert selection and scope of inquiry to enhance confidence in the process.

Fourth

Require written reports for all expert evidence (both advisory and inspection), creating a consistent, scrutinizable evidentiary record.

2. Amending the LCA

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In the longer term, the author supports a more comprehensive reform of the LCA itself. The law should distinguish between party-appointed and tribunal-appointed experts, promoting a more active role for parties in evidence-gathering. Tribunal-appointed experts would handle both expert advice and inspections, streamlining the process.

Additionally, the LCA should affirm the tribunal's discretion to assess evidence, including admissibility, relevance, materiality, and probative value, aligning with international standards and reducing uncertainty.

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3. Drawing on Soft Law and Regional Practice to Develop VIAC's Evidentiary Guidelines

The author advocates for greater openness towards applying soft law instruments, like the IBA Rules on the Taking of Evidence in International Arbitration, to enhance procedural efficiency and predictability in Vietnam. By adopting such instruments, either through party agreements or institutional practices, VIAC can create a more structured evidentiary framework that aligns with international standards while considering the Vietnamese legal context.

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Learning from CIETAC's Guidelines and the Civil Law Approach

A valuable model for **VIAC** is the **2015 CIETAC Guidelines on Evidence**, which adapt international best practices to the **civil law tradition**. These guidelines integrate the **IBA Rules** and the **Prague Rules**, focusing on **tribunal-led evidence gathering** and **efficiency**. VIAC can draw from CIETAC's approach to establish a balanced framework that addresses **expert appointment**, **inspection**, and **party access to technical reports**, ensuring **party equality** and **transparency**.

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Exploring the Use of Technical Advisors: Insights from UNCITRAL

Another key development is **UNCITRAL's** exploration of **technical advisors** in arbitration. These advisors assist the tribunal with **technical issues** without issuing binding conclusions, ensuring that the tribunal better understands complex topics. This mechanism, particularly useful in **construction disputes**, could help balance the role of **tribunal-appointed experts** in Vietnam's arbitration system. If properly regulated, **technical advisors** can enhance **efficiency** and **procedural fairness**, offering an alternative to formal expert appointments.

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Thank you for your attention!

Navigating the Stages of Expert Evidence in Arbitration: A Comparative Analysis of Practices

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Abstract: Expert evidence is often used as a proxy for advocacy by disputing parties, sometimes serving to strengthen an evidentially weak case. This paper compares the use of expert evidence across Singapore, the United Kingdom and various arbitration guidelines, highlighting the differing approaches and practices that have recently emerged. By examining these different frameworks, the paper underscores key considerations for parties, legal counsel, and arbitral tribunals when selecting appropriate guidelines. Ultimately, it argues that the parties themselves hold the greatest power to control the effectiveness of expert evidence in their dispute.

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

1 Introduction

The introduction of expert evidence is often a necessity when dealing with a dispute with complex technical issues that lawyers themselves are barely equipped to make submissions on. Yet, at the same time, this has led to arbitral tribunals having to grapple with expert reports or opinions that are hardly any simpler than the technical issues which they purport to address. It has been observed that there is a "*need for parties to instruct and rely on expert opinions from an early pre-action stage*",[1] leading to parties incurring the cost of expert evidence early, sometimes prior to the commencement of a dispute. The issue is made more complex by the arbitral tribunal's obligation to observe due process. If an expert report is rejected out of hand by a tribunal, the latter may face claims of breaching natural justice, potentially leading to the award being challenged.

1.1 What Constitutes Expert Evidence

Expert evidence is not a carte blanche to introduce any evidence from a third party. Instead, expert evidence is opinion evidence, which is deemed to be relevant to a dispute because the knowledge expressed in that opinion will be relevant to the courts. In Singapore, Section 5 of the Evidence Act 1893 stipulates that evidence can only be given of facts in issue and relevant facts, with all other evidence to be excluded. Expert evidence is admissible as opinion evidence which is deemed to be a relevant fact under Section 47 of the Evidence Act 1893. A similar provision exists in Section 56 read with Section 79 of the Australian Evidence Act 1995.

[1] United Kingdom Technology and Construction Court Guide (October 2022), paragraph 13.3.1

As can be seen above, for evidence to qualify as expert evidence, it must be an opinion premised on specialised knowledge; if ordinary persons exercising sound judgement can understand a matter, no expert evidence can be admissible in respect of that matter.[2]

Furthermore, expert evidence is evidence of *opinion*, as opposed to a pure analysis. The *CIArb Guideline on Party-appointed and Tribunal-appointed Experts* (the "***CIArb Guideline***") draws a distinction between expert evidence and the work of data assessors appointed by the arbitral tribunal with the parties' approval. A data assessor may be engaged to assist the tribunal evaluate and/or interpret data which evaluation or interpretation is generally not disclosable to parties.[3]

1.2 The Procedure in Introducing Expert Evidence

In arbitration, the admission or exclusion of expert evidence is part of the arbitral procedure which is subject to parties' agreement. In the event that parties cannot reach an agreement on the arbitral procedure, the arbitral tribunal will have the discretion to decide on the admissibility of evidence, including expert evidence. By illustration, Article 19 of the UNCITRAL Model Law on International Commercial Arbitration (as unchanged from the original 1985 version to the Model Law as amended in 2006) provides that:

> *Article 19. Determination of rules of procedure*
>
> *(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*
>
> *(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.*

Parties play an important role in preventing expert evidence from becoming ineffectual. There are two main points in time at which parties may enter into an agreement on arbitral procedure: when parties are entering into the agreement to arbitrate, and when the arbitral tribunal consults parties on the procedural timetable after the tribunal is constituted.

Typically, the counsel representing the parties at these two stages will come from vastly different backgrounds, with one being a transactional lawyer, and the other a disputes lawyer. At the risk of generalisation, most parties - along with transactional lawyers- often overlook evidentiary issues, including the potential need for expert evidence, when drafting arbitration clauses in their contracts.

It is instead at the second point in time, after the initiation of arbitration and in consultation with the arbitral tribunal, that parties are more inclined to direct their attention to the matter of the evidence that is required to prove their case, including whether they would need expert evidence to bolster or substantiate their positions. It is also at this point in time that parties will have an opportunity to prevent future problems from arising with expert evidence, by considering and agreeing on the procedures that they wish to adopt with respect to expert evidence.

Expert evidence begins with the appointment of an expert, followed by the expert's deliberations, and then the presentation of the expert's opinion and finally, the subsequent examination by the arbitral tribunal. In these four stages, the following issues become important:

[2] Reserve Capital v Seascapes Supermarket WA Pty Ltd [2022] WASC 56 at [19]
[3] CIArb Guideline on Party-appointed and Tribunal-appointed Experts, commentary on Article 2

a. How expert(s) are appointed, whether expert(s) are appointed by the arbitral tribunal, jointly by parties or separately by parties, and the extent to which expert(s)' independence and impartiality could be challenged;
b. The issues which expert(s) will be dealing with, and the mechanism by which expert(s) will investigate the said issues;
c. Engagement between expert(s) from both parties, the procedure by which expert(s) would request documents or information from parties, and in the case of multiple experts, whether expert reports are rendered jointly or separately; and
d. How the expert evidence will be tested by the arbitral tribunal, such as by way of hot-tubbing/ joint examination or otherwise.

2 The Process of Appointing an Expert

The preamble to the CIArb Guideline helpfully sets out four permutations of appointment of experts in an arbitration:[4]

> *(1) where each party appoints their own experts;*
> *(2) where parties jointly agree to appoint a single expert;*
> *(3) where tribunals appoint a single expert instead of the parties doing so; and*
> *(4) where tribunals appoint a tribunal-appointed expert in addition to the party-appointed expert(s).*

In the appointment of an expert, whether a party-appointed expert or a tribunal-appointed expert, it is imperative that the expert is seen as providing his or her honest, impartial and independent opinion. An expert who lacks independence or is seen as acting as an advocate for a particular party will almost certainly not be a convincing witness. It is therefore common that expert opinions or statements include a declaration as to the relationship between the expert and the parties, the instructions provided to the expert, and that the expert affirms his or her genuine belief in the opinions expressed in the expert report.[5]

2.1 Impartiality and Independence of Experts

When expert evidence is adduced in a national court, it is subject to the rules of that court regarding the relevancy and admissibility of evidence. In certain jurisdictions, such as the United Kingdom, court approval is required prior to the appointment of any expert.[6]

It should be noted that the impartiality and independence of an expert witness is a duty which arises under the common law and applicable statutes.

For example, Order 12, Rule 1 of the Singapore Rules of Court 2021 prescribes that an expert's duty to the court overrides their duty to their client:

> *Expert (O. 12, r. 1)*
> *1.—(1) An expert is a person with scientific, technical or other specialised knowledge based on training, study or experience.*
> *(2) An expert has the duty to assist the Court in the matters within his or her expertise and on the issues referred to him or her.*

[4] CIArb Guideline on Party-appointed and Tribunal-appointed Experts, Preamble
[5] See for example, Article 5(2)(c) of the IBA Rules on the Taking of Evidence in International Arbitration and Article 4.4(k) of the CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration
[6] United Kingdom Civil Procedure Rules, Practice Directions to Part 35

> *(3) The expert's duty to the Court overrides any obligation to the person from whom the expert receives instructions or by whom the expert is paid.*

When an expert disregards his or her duty to the court and engages in partisan advocacy, the expert's evidence will often be disregarded. Even a mere lack of objectivity can lead a court to disregard an expert's evidence.[7] This also extends to an expert's failure to disclose any prior opinion made to or a prior appointment by one of the disputing parties.[8]

The court can intervene in and control the expert appointment process by either directing that parties appoint a joint expert, or that the court itself makes the appointment of an expert. In addition, it should be noted that courts, as with arbitral tribunals, have the discretion not to award costs incurred by a party in obtaining expert evidence, especially when such costs are incurred unnecessarily or vexatiously.

When to Appoint a Joint Expert Witness

The appointment of a joint expert is provided in a number of common law rules of court or guidelines. For example, Order 12, Rule 3 of the Singapore Rules of Court 2021 stipulates that "*as far as possible, parties must agree on one common expert*." In addition, paragraph 13.4.3 of the United Kingdom *Technology and Construction Court Guide (October 2022)* (the "***TCC Guide***") also sets out examples of when a single joint expert is appropriate:

- *in low value cases, where technical evidence is required but the cost of adversarial expert evidence may be prohibitive;*
- *where the topic with which the single joint expert's report deals is a separate and self-contained part of the case, such as the valuation of particular heads of claim;*
- *where there is a subsidiary issue, which requires particular expertise of a relatively uncontroversial nature to resolve;*
- *where testing or analysis is required, and this can conveniently be done by one laboratory or firm on behalf of all parties.*

While the above would imply that a single joint expert would ordinarily be unsuitable in complex cases with substantial technical issues, such as a construction dispute, the Hong Kong Court of First Instance has made the observation in Perpetual Wealth (HK) Ltd v Be Solutions Co Ltd [2022] HKCFI 2539 at paragraph 8 that "*[s]ingle joint expert evidence is preferred and has been used as the starting point for expert directions by the Construction Court for some time*."

Specific to arbitration, the preamble to the CIArb Guideline observes that *"[t]he appointment of a single joint [expert] is rare as the parties will not have any basis on which to challenge the expert opinion, if it is unfavourable to them*." While the power to appoint is contemplated and provided by the IBA Rules on the Taking of Evidence in International Arbitration (the "**IBA Rules**"), the Rules on the Efficient Conduct of Proceedings in International Arbitration (the "**Prague Rules**"), the CIArb Guideline and other arbitration guidelines, there is a lack of guidance on the types of cases or disputes where a single joint expert or tribunal appointed expert is applicable.

[7] Global Switch (Property) Singapore Pte Ltd v Arup Singapore Pte Ltd [2019] SGHC 122 at [95]

[8] HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v Toshin Development Singapore Pte Ltd [2012] 4 SLR 0738 (CA) at [71]

Experts Appointed by the Courts

It should be noted that the appointment of a joint experts by parties is distinct from the appointment of an expert by the courts. The applicable law may provide that the courts may appoint an expert in addition to, or in replacement of, an expert by the parties. The appointment of an expert by the courts is not based on parties' failing to appoint an expert.

The court's exercise of discretion in an expert appointment is premised on the assessment of prospective *costs and efficiency*, once the time and cost impact of mandatory procedural fairness is included. For example, if an expert will be required to access confidential information in the making of their report, the Singapore Courts have considered that "*where one party has no knowledge of the material underlying the report of a single court expert, it is unreasonable to expect it to accept that report at face value unless, of course, it is wholly favourable to that party's case. ...*".[9] While this case was prior to the revision of the Singapore Rules of Court in 2021 to provide that parties should, as far as possible, agree on a common expert, the case nonetheless illustrates the due process considerations underlying the use of a joint or court appointed expert. If an opposing party needs to satisfy itself as to the fullness and fairness of a report, it is quicker and cheaper for a party to instruct its own expert, compared to the court appointing experts.[10]

2.2 Expert Appointments in Arbitration

Insofar as evidence arises from an expert appointed solely by one party, that evidence would be admissible. However, when evidence arises from an expert jointly appointed by both parties or appointed by the arbitral tribunal, such evidence would naturally be more credible than evidence from an expert appointed by one party.

Party-Appointed Experts

Under the IBA Rules, a party can rely on a party-appointed expert as a means of evidence on specific issues. Article 5.1 states that "*[w]ithin the time ordered by the Arbitral Tribunal, (i) each Party shall identify any Party-Appointed Expert on whose testimony it intends to rely and the subject-matter of such testimony; and (ii) the Party-Appointed Expert shall submit an Expert Report*." The arbitral tribunal takes control of the expert appointment by setting a deadline for parties to give notice as to the experts and subject matter of the experts' testimony.

This is similar to Article 3 of the CIArb Guideline, which states that "[h]aving determined that expert evidence will be adduced, arbitrators should discuss with the parties the precise manner in which such evidence should be adduced, bearing in mind the need to conduct the arbitral proceedings in an efficient and cost-effective manner." However, the IBA Rules and the CIArb Guideline are both silent as to the appointment of an expert outside of this identification by parties. A party's opportunity to present its case includes that party's right to adduce expert evidence.[11] It is worth noting that even if a party in an arbitration has represented that it would not be relying on expert evidence, it is rare for arbitral tribunals to rely on such a representation to reject expert evidence adduced by that party subsequently during the course of arbitration.

Notably, the Prague Rules do not even contemplate that parties would confirm if they will adduce expert evidence. The Prague Rules instead provide that even if an expert is appointed by the arbitral tribunal, a party can still submit an expert report by any expert appointed by that party,[12] further enshrining the consensus within international arbitration that a party has a general right to rely on expert evidence.

[9] *B2C2 v Quoine* [2018] 4 SLR 0067 (HC) at [45]
[10] *B2C2 v Quoine* [2018] 4 SLR 0067 (HC) at [47]
[11] CIArb Guideline on Party-appointed and Tribunal-appointed Experts, Commentary on Article 1
[12] Rules on the Efficient Conduct of Proceedings in International Arbitration, Article 6.5

Challenging the Appointment of an Expert

In factual disputes, the content of expert evidence can often have a far greater impact on the outcome of the dispute than the legal submissions made by parties' counsel. However, unlike counsel, who are subject to the respective legal professional conduct rules and regulations of the jurisdiction(s) they are admitted to, there is no such regulation for experts. Instead, the ethical duties observed by an expert witness are almost entirely controlled by the arbitral tribunal and parties themselves, in determining how an expert is to be appointed, and, after appointment, the subsequent challenging of the expert.

Both the IBA Rules and the *CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration* (the "***CIArb Protocol***") provide that an expert's report will include a statement of the instructions received by the expert,[13] and a declaration of the expert's independence.[14] That said, neither of these guidelines provide for how such independence is to be assessed, beyond requiring experts to disclose past relationships with parties, counsel and the arbitral tribunal.[15]

Article 6.2 of the IBA Rules provides that the parties may object to the appointment of an expert by an arbitral tribunal on grounds of the expert's qualifications and independence. This is buttressed by Article 6.5 of the IBA Rules, which allows a party to request to inspect, *inter alia*, "*any correspondence between the Arbitral Tribunal and the Tribunal-Appointed Expert*." However, the IBA Rules are silent on correspondence between parties and party appointed experts, and correspondence between parties and jointly appointed experts.

In contrast, the CIArb Protocol is silent on challenging experts. Article 5 of the CIArb Protocol states that the arbitral tribunal shall not "*order disclosure of the instructions or appointment [of an expert] or any document relating thereto; or permit any questioning of the expert about such instructions or appointment*", "*unless it is satisfied that there is good cause*." While not expressly set out in the CIArb Protocol, it is arguable that concerns about an expert's independence or impartiality would be sufficient to constitute "*good cause*" for the purpose of ordering disclosure of the instructions or appointment of an expert. In this respect, parties to a dispute should consider if there should be any agreement as to the grounds for inspecting an expert's instructions if the CIArb Protocol is adopted.

Notably, the guidelines referred to above do not consider the expert's remuneration as a reason to suspect lack of independence and impartiality. This is to be contrasted with the draft *Society of Construction Law (Singapore) Protocol For The Use Of Experts' Joint Statements In Arbitration* (the "***SCL(S) Protocol***", which is not currently publicly available), which recommends that experts declare that "*there is no arrangement where the payment of the expert's fees are contingent on the outcome of the case*".[16] This reflects a jurisdiction specific consideration, given that Singapore does not allow contingency fees for legal counsel. Parties in the midst of arbitration should also consider if there are similar jurisdiction specific requirements that they may wish to include or exclude for their own or for the other party's experts.

[13] *IBA Rules on the Taking of Evidence in International Arbitration*, Article 5(2)(b); CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration , Article 4.4(c)

[14] *IBA Rules on the Taking of Evidence in International Arbitration*, Article 5(2)(c); CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, Article 4.4(k) read with Article 8

[15] *IBA Rules on the Taking of Evidence in International Arbitration*, Article 5.2(a); CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, Article 4.4(b)

[16] Society of Construction Law (Singapore) Protocol For The Use Of Experts' Joint Statements In Arbitration, (iv) in Principle 1 (not yet launched)

3 The Expert Report

The procedure by which parties interact or supply information to experts only becomes an issue when the expert is either a joint expert or a tribunal-appointed expert. When an expert is appointed solely by one party, there would not be any practical issue with that party supplying the expert with information. The said expert would also *de facto* not be able to retrieve or request for documents from the other party.

3.1 Providing Information to an Expert Witness

The IBA Rules are robust in setting out the procedure for supplying an expert witness with information, with Article 6.3 stating that:

> *"the Tribunal-Appointed Expert may request a Party to provide any information or to provide access to any Documents, goods, samples, property, machinery, systems, processes or site for inspection, to the extent relevant to the case and material to its outcome. The Parties and their representatives shall have the right to receive any such information and to attend any such inspection. Any disagreement between a Tribunal-Appointed Expert and a Party as to the relevance, materiality or appropriateness of such a request shall be decided by the Arbitral Tribunal, in the manner provided in Articles 3.5 through 3.8. The Tribunal-Appointed Expert shall record in the Expert Report any non-compliance by a Party with an appropriate request or decision by the Arbitral Tribunal and shall describe its effects on the determination of the specific issue."*

In contrast with the approach under the IBA Rules, the Prague Rules only state that an arbitral tribunal may "request the parties to provide the expert appointed by the arbitral tribunal with all the information and documents he or she may require to perform his or her duties in connection with the expert examination", without elaborating on whether the information and documents are to be provided to the other party, or the effects of non-compliance with the expert's requests or directions. It should be noted that in this procedure of providing a tribunal-appointed expert with information, it is best practice that parties should keep each other in copy,[17] as this would minimise any suspicion that parties are attempting to improperly influence the expert.

The CIArb Guideline has noted that "[a]rbitrators should also include clear provisions requiring each party to provide the tribunal-appointed expert with any information and/or to produce any documentation or material which the expert may require in order to prepare their report and/or to provide the expert with access to any relevant goods or other property for inspection or testing." However, if an expert's requests for information may be broad, along the lines of "all diagrams" or "all programme data", this may grant room for parties to conceal or avoid disclosure of information to the expert. The clear provisions which an arbitral tribunal should provide should extend to the mechanisms for dealing with any disagreement between the expert and the parties regarding particular information or documents.

Lawyers' Involvement in Expert Testimony

In general, parties' legal counsel's involvement in the expert's deliberations should be minimal. Lawyers should not be suggesting, intervening, or requesting that experts take a certain position. The TCC Guide provides that "*[w]hilst the parties' legal advisors may assist in identifying issues which the statement should address, those legal advisors must not be involved in either negotiating or drafting the experts' joint statement*."[18] The Academy of Experts Form & Content of Joint Statements Guidance for Experts (the "***AE Guidance***") takes a stronger stance

[17] See, for example, Society of Construction Law (Singapore) Protocol For The Use Of Experts' Joint Statements In Arbitration, Guidance on Principle 4

[18] United Kingdom Technology and Construction Court Guide (October 2022), paragraph 13.6.3

and explicitly states that "*when the Experts meet to produce the Joint Statement or Report of Experts, they do so without lawyers being present*."[19] This is supplemented by the general practice behind expert evidence in the United Kingdom as set out in the United Kingdom *Practice Direction 35 – Experts and Assessors* ("***PD 35***"), that unless ordered by the court or agreed by all parties and the appointed experts, neither parties nor legal counsel are to attend experts' discussions.[20] If legal counsel do attend, "*they should not normally intervene in the discussion, except to answer questions put to them by the experts or to advise on the law*",21 and experts can exclude legal counsel from part of the discussions.[22]

In a recent English case, *Glover v Fluid Structural Engineers and Technical Designers Ltd* [2024] EWHC 1257 (TCC), solicitors for Party A commented to their expert by way of track changes to change the wording in a draft expert report that had been agreed between that Party A's expert and the other party's expert. Unsurprisingly, the TCC revoked that the permission of Party A to rely on the expert. Legal counsel should consistently keep in mind that an expert witness is still a witness of fact, and that his or her credibility is likely to be adversely impacted by any over-involvement or over-instruction by legal counsel. The TCC Guide also stipulates that legal counsel should only invite experts to amend a joint draft statement in exceptional circumstances where there are serious concerns that the court may be misled, and such concerns should be raised with all experts, as opposed to only one party appointed expert.[23]

In Singapore, the upcoming SCL(S) Protocol has adopted a similar stance to the TCC Guide, that legal counsel may identify issues for the experts, but cannot be involved in negotiating or drafting experts' joint statement. Legal counsel may only invite experts to amend in exceptional circumstances where there is a serious concern that the arbitral tribunal may be misled, and these concerns are to be raised to all experts giving the joint statement.[24]

Nonetheless, legal counsel can and should assist experts by pinpointing the factual inquiries which would have a bearing on the issue. While experts are generally qualified to conduct their own investigations and prepare their own reports, not every question of fact which is raised in a case will be important. Legal counsel are best placed to identify which questions of fact will be important and determinative of a case, and highlighting these core inquiries of fact will minimise the overall costs of expert evidence.

Expert Conferencing Prior to Individual Expert Reports

Party-appointed experts should ideally meet and discuss the issues they have been instructed to address *prior* to producing their individual reports, in order to prevent a scenario where they work separately and eventually commit themselves to an inflexible position.[25] This avoids the problem of "*ships passing in the night*", where expert evidence is adduced to wholly different purposes in arbitration.[26]

[19] Academy of Experts Form & Content of Joint Statements Guidance for Experts, paragraph 8
[20] United Kingdom Practice Direction 35 – Experts and Assessors, paragraph 9.4
[21] United Kingdom Practice Direction 35 – Experts and Assessors, paragraph 9.5(i)
[22] United Kingdom Practice Direction 35 – Experts and Assessors, paragraph 9.5(ii)
[23] United Kingdom Technology and Construction Court Guide (October 2022), paragraph 13.6.3
[24] Society of Construction Law (Singapore) Protocol For The Use Of Experts' Joint Statements In Arbitration, Guidance on Principle 3
[25] See for example, Academy of Experts Form & Content of Joint Statements Guidance for Experts, paragraph 6
[26] As an example, the second author was involved in an arbitration where the claimant submitted an expert report from an architect in relation to alleged non-conformities in construction, while the respondent submitted an expert report from a delay expert to substantiate their case on the lack of delay in the works. Neither party's expert had addressed any of the issues in the other party's expert report.

To address this predicament, both the IBA Rules and the Prague Rules prescribe that the arbitral tribunal has the discretion to order party-appointed expert witnesses to meet and attempt to reach an agreement on the issues within the scope of their expert reports.[27]

The IBA Rules contemplate that the expert reports would be released prior to the meeting between experts on the content of their expert reports, explicitly stating that "*[a]t such meeting, the Party-Appointed Experts shall attempt to reach agreement on the issues* ***within the scope of their Expert Reports****, and they shall record in writing any such issues on which they reach agreement, any remaining areas of disagreement and the reasons therefor*."[28]

The Prague Rules are less explicit compared to the IBA Rules, with separate provisions for "party-appointed and/or the tribunal-appointed experts to establish a joint list of questions on the content of their reports, covering the issues that they consider necessary to be reviewed"[29] and for "party-appointed and the tribunal-appointed experts, (if any), to have a conference and to issue a joint report …"[30] Nonetheless, the structure of the Prague Rules still suggests that the experts would have issued reports prior to having a conference on whether any issues within the report should be reviewed.

These approaches contrast heavily with the approach under the CIArb Protocol, the AE Guidance and the up-coming SCL(S) Protocol, which all prescribe that the meeting of the experts should occur early, prior to experts drafting their expert reports.

The CIArb Protocol prescribes a comprehensive procedure for discussion and reply between respective parties' experts in the preparation of their written opinion evidence:

a. The experts are to hold a joint discussion on the issues which they will opine upon and the tests and analyses which they will conduct;[31]
b. The experts will then issue to parties and to the arbitral tribunal a statement of their agreements and disagreements on the issues which they agree, the tests and analyses which need to be conducted and the manner of conduct of the various tests and analyses;[32]
c. Any tests and analyses which experts cannot agree on will be conducted in the presence of the other expert;[33]
d. Experts simultaneously exchange written opinions[34] only on the issues where there is disagreement;[35] and
e. Experts are then entitled to simultaneously exchange further written opinions[36] only on the issues raised by the other expert.[37]

While not as prescriptive in terms of reply opinions on the various subjects of disagreement, both the AE Guidance and the SCL(S) Protocol mirror the CIArb Protocol in recommending that experts meet once prior to exchanging

[27] *IBA Rules on the Taking of Evidence in International Arbitration*, Article 5.4; Rules on the Efficient Conduct of Proceedings in International Arbitration, Articles 6.6 and 6.7
[28] IBA Rules on the Taking of Evidence in International Arbitration, Article 5.4
[29] Rules on the Efficient Conduct of Proceedings in International Arbitration, Article 6.6
[30] Rules on the Efficient Conduct of Proceedings in International Arbitration, Article 6.7
[31] CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, Article 6.1(a)
[32] CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, Article 6.1(b)
[33] CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, Article 6.1(c)(ii) and 6.1(c)(iii)
[34] CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, Article 6.1(e)
[35] CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, Article 6.1(d)
[36] CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, Article 6.1(g)
[37] CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, Article 6.1(f)

reports to reach agreement as much as possible.[38] The AE Guidance and the SCL(S) Protocol additionally recommend that the joint statement of experts to be in the format of a Scott Schedule, where a table is presented with five columns for each issue, describing: the issue; whether there is agreement or disagreement (in terms of Yes or No); the agreement reached and the respective expert's positions in the case of disagreement.[39]

However, the recommendations in the guidelines should be nonetheless used with common sense and only insofar as they actually contribute to an efficient resolution of the dispute. As highlighted above, experts may not be in the best position to determine which issues of fact will be crucial in determining a dispute. In the authors' respectful opinion, the process of rendering an expert report should not be entirely left to the experts, and there should be some amount of input from parties and their legal counsel as to the factual issues which do not need to be investigated. Furthermore, where a case is less complex, it may be more useful to employ the traditional sequence where individual expert reports are exchanged prior to any conference of experts, in order to have a more focused discussion between experts.[40]

Additionally, a Scott Schedule may not be the most efficient method of recording experts' agreements and disagreements insofar as experts have a fundamental disagreement about applicable methodology. In construction cases, for example, delay experts are often called to establish the critical path for construction works, so as to identify which construction activities have delayed the progress of a particular project. Insofar as delay experts agree on the applicable methodology to establish a critical path, disagreements would be generally limited to whether particular individual activities fall within the critical path. However, in the case where the delay experts disagree on the applicable mechanism for determining the critical path for a project to begin with, there will be no agreement on the construction activities forming the critical path, and a Scott Schedule recording said disagreement may be redundant or not as helpful as the respective experts setting out their analysis in separate reports.

3.2 Whether the experts' agreement binds parties

A point that should be considered by parties to a dispute is whether they should agree to be bound by any agreement reached by their respectively appointed expert witnesses on any issue, or conversely, whether they should expressly agree not to be bound by any agreement reached by their experts in the course of meetings or issuing the report.[41]

Among the various protocols considered in this article, only the IBA Rules explicitly provide that parties have a right to submit expert reports in response to the opposing party's expert reports by submitting reports from persons who were not previously appointed as experts.[42] Parties also have the right to respond to the expert report of a tribunal-appointed expert by way of witness statements or expert reports by their own party-appointed expert.[43]

In terms of efficiency, the issues in dispute would be simplified if parties agree to be bound by any agreements or conclusions reached jointly by their party appointed experts. This would lead to reduced costs and the time taken for the arbitral process.

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[38] Academy of Experts Form & Content of Joint Statements Guidance for Experts, paragraph 6; Society of Construction Law (Singapore) Protocol For The Use Of Experts' Joint Statements In Arbitration, Guidance on Principle 5

[39] Academy of Experts Form & Content of Joint Statements Guidance for Experts, paragraph 11; Society of Construction Law (Singapore) Protocol For The Use Of Experts' Joint Statements In Arbitration, Form of Experts' Joint Statement / Experts' Supplementary Joint Statement

[40] Academy of Experts Form & Content of Joint Statements Guidance for Experts, paragraph 7; Society of Construction Law (Singapore) Protocol For The Use Of Experts' Joint Statements In Arbitration, Guidance on Principle 5

[41] Academy of Experts Form & Content of Joint Statements Guidance for Experts, paragraph 18(b)

[42] IBA Rules on the Taking of Evidence in International Arbitration, Article 5.3

[43] IBA Rules on the Taking of Evidence in International Arbitration, Article 6.5

However, at the same time, an expert is not a party representative. While an expert witness is a witness of fact, the generalised duty of independence imposed upon most expert witnesses across jurisdictions would mean that the expert witness has an overriding duty to the arbitral tribunal and not to the party appointing it. To allow an expert to bind the party who appointed them, would be to grant a form of agency upon party-appointed experts, with a result that is by no means legally clear. If a party-appointed expert's main duty is to the arbitral tribunal, then the party-appointed expert would have a conflict of interests if it were allowed to bind the party who appointed it. In the authors' respectful opinion, any stance adopted by party-appointed experts should not, as a matter of legal principle, be allowed to bind the party appointing said experts.

Practically speaking, it would be difficult for a party to substantiate a case that was at odds with the conclusions or methodologies that had been agreed between experts. Nonetheless, as a matter of procedural justice, because a party has the right to be heard and to present its case, it would not be procedurally fair for a party to lose the right to present a case which differs from the conclusions drawn by an independent third party such as an expert witness.

4 Examining Expert Witnesses

After expert reports are issued, parties and the arbitral tribunal are left with the question of how to test the expert evidence. With practical constraints on the duration of an evidentiary hearing and the realistic limits of information which would assist arbitral tribunals, parties will have to consider whether to call expert witnesses to testify in the first place. In addition, the various ways by which expert evidence can be presented at the evidentiary hearing include:[44]

a. One party calling all of its expert evidence, followed by the other party calling all of its expert evidence;
b. One party calling its experts in a particular discipline, followed by other parties calling their experts in that discipline, which is then repeated for experts of all disciplines;
c. One party calling its experts on a particular issue, followed by other parties calling their experts on that issue, which is then repeated for all the expert issues; and
d. All the experts of a particular discipline to be called to give concurrent evidence, colloquially called "*hot-tubbing*" of experts or witness conferencing.

4.1 Whether to Examine an Expert Witness

Some arbitration guidelines do not require that expert witnesses *must* testify before an arbitral tribunal. The Prague Rules are perhaps the most extreme in this regard, with a blanket recommendation that "*the arbitral tribunal and the parties should seek to resolve the dispute on a documents-only basis*"[45] without any express mention as to factors such as the quantum, complexity or issues in dispute, unless one of the parties requests a hearing or the arbitral tribunal finds it appropriate to hold a hearing.[46] The Prague Rules are otherwise silent as to how testimony should be adduced.

On the other extreme, the CIArb Protocol, states that unless the parties to a dispute have agreed otherwise and the arbitral tribunal confirms the said agreement, an expert who has rendered a written opinion is bound to give oral testimony, and if the said expert fails to appear to give testimony without a valid reason, their written opinion will be disregarded.[47]

The IBA Rules have similar provisos to the CIArb Protocol, stating that if a party-appointed expert's attendance has been requested at the evidentiary hearing, then the failure of that expert to appear for testimony will result in

[44] United Kingdom Technology and Construction Court Guide (October 2022), paragraph 13.8.2
[45] Rules on the Efficient Conduct of Proceedings in International Arbitration, Article 8.1
[46] Rules on the Efficient Conduct of Proceedings in International Arbitration, Article 8.2
[47] CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, Article 6.1(h)

the arbitral tribunal disregarding that expert's expert report.[48] However, the IBA Rules have an additional stipulation that if the appearance of a party-appointed expert is *not* requested by the other parties to the dispute, that does not amount to an agreement as to the correctness of the contents of that expert's expert report.[49] This would seem to suggest that the IBA Rules allow for a party to dispute the contents of the opposing party's expert report with the opposing party's appointed expert *in absentia*. Such an explicit provision is not present in the CIArb Protocol.

Realistically, it may be difficult to mount a convincing case against the substantive contents of a party's expert report while the expert witness who made said report was not present to defend the content of the said report. However, it may be expedient and economical to not call an expert witness who is appointed by an opposing party, if the dispute against the said expert's report has to do with the relevance of the report, the reliability of the evidence relied upon in the report, or similar grounds which do not call into question the methodologies and analyses that were set out in said report.

4.2 Examining Expert Witnesses

The suitability of each method by which expert testimony is received by the arbitral tribunal will depend on the number of issues referred to expert evidence, the number of disciplines in which the experts are appointed, and the complexity of the testimony given by each expert. While there is no straightforward way to determine what method to adopt for a particular case, parties may wish to consider:

a. If expert opinions diverge wildly from each other, it might not be helpful to the arbitral tribunal to hot-tub or hear expert testimony on an issue by issue or discipline by discipline basis. It may be more helpful to have experts present their opinions as part of a party's entire cohesive case.
b. If the expert testimony relied upon by parties spans a multitude of divergent issues and / or disciplines, it may be of more assistance to the arbitral tribunal to hear the expert testimony on an issue by issue or discipline by discipline basis.
c. If there are particular issues or inquiries which will be determinative of a disproportionate fraction of a claim compared to other issues, it would likely be of more assistance to the arbitral tribunal to hear the issues separately eg bifurcation.
d. If expert witnesses can otherwise agree on methodology or particular discrete conclusions, it may be beneficial to have hot-tubbing between the experts to render it clear to the arbitral tribunal the source of the experts' disagreements.

5 Key Considerations for Expert Evidence

The reality of expert evidence is that if a case has complex, technical issues of which an independent third party's opinion would be of assistance to courts and arbitral tribunals, the said case will inevitably require expert evidence to be submitted by the parties. Parties should consider, at the outset of a dispute, whether expert evidence would be required, when to involve experts, how expert evidence should be adduced, and how it would be tested.

Even when parties are drafting their dispute resolution clauses, the eventual need for expert evidence or the methodologies to be utilised by the experts should be considered at that point in time. For example, in construction contracts there could be provisions setting out the specific methodology or protocol to be adopted in the analysis of delay. Parties may also wish to consider whether a clause requiring expert determination prior to the initiation of arbitration is appropriate if disputes are likely to be almost entirely factual.

While existing protocols, guidelines or rules relating to evidence guidelines may outline best practices for the use of expert evidence, it is important to remember that the key feature of arbitration is flexibility. Codes and

[48] IBA Rules on the Taking of Evidence in International Arbitration, Article 5.5
[49] IBA Rules on the Taking of Evidence in International Arbitration, Article 5.6

protocols are not meant to replace the oversight of the dispute by parties and the arbitral tribunal. It should be noted that all of the rules, procedural and otherwise, leave discretion, for parties to agree on or for the arbitral tribunal to order departures from the prescribed procedures. Ultimately, it is up to the parties and tribunal to handle expert evidence in a manner that suits the specific facts of the dispute to facilitate its resolution.

Lastly, while the arbitral rules, protocols, and guidelines may stipulate procedures for appointing experts, their meetings, report issuance and testimony, they fail to address the most fundamental practical question: *whom* to appoint as an expert? Parties involved in a dispute often single-minded seek an expert who aligns with their claims, with the risk of the said expert's evidence being disregarded due to perceived bias. There is a constant impetus to select an expert who can appear objective while being partisan. However, such a selection will only delay the resolution of the dispute and increase costs for all parties, especially if both parties appoint such experts.

At the end of the day, the just, efficient and cost-effective resolution of a dispute is best achieved when parties appoint experts (whether jointly or individually) who are not only technically proficient but also objective, honest and possess integrity. This should be the primary consideration for parties when selecting expert evidence, as it is entirely within their control.

Enhancing Expert Evidence in Construction Arbitrations

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OVERVIEW

1. Problems with Expert Evidence
2. Civil Law vs Common Law (Domestic Court Systems)
3. International Arbitration & Trends in Construction Arbitrations
4. Best Practice / Tips for Tribunal, Counsel & Experts

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PROBLEMS WITH EXPERT EVIDENCE

Problems with Expert Evidence

1) **Difficult to understand**
   - Lengthy, incoherent, hard to follow writing style
2) **Does not address critical issues**
   - Issues- with instructions
   - Experts at cross purposes (ships passing in the night)
3) **Lack of independence/ objectivity**
   - Advocate for a party
   - Does not address other side's/ alternative methodologies and assumptions
4) **Inefficient process in handling Expert Evidence**
   - Illogical sequence
   - Insufficient time for Experts

→

- Increased costs & time
- Unhelpful to Tribunal
- Reduced credibility in the Expert witness

CIVIL LAW vs COMMON LAW (DOMESTIC COURTS)

Civil Law vs Common Law

Civil Law : inquisitorial, single-appointed Expert by Court

Common Law : adversarial, party-appointed Experts

- Due to problems with expert evidence, common law Courts devised rules:
  - Singapore
  - UK
  - Hong Kong

Common Law - Singapore

Order 13 of the Rules of Court 2021 :

- Expert evidence may only be used with Court's approval.
- As far as possible, parties must agree on 1 common Expert.
- Except in a special case, parties cannot have more than 1 Expert for any issue.
- In a special case, instead of or in addition to 1 common Expert, the Court may appoint a court Expert.
- Court directs on appointment of Experts, including method of questioning (may be as a panel) and their remuneration.
- List of issues and agreed facts must be approved by Court.
- Re: Expert joint statement process, Court may order parties, solicitors and Experts to meet before, during or after Expert reports to agree (discussions at meeting are inadmissible).

Common Law - UK

Civil Procedure Rules Practice Directions to Part 35:

- Expert evidence is restricted to what is reasonably required to resolve proceedings.
- Court's permission needed to call an Expert.
- Court may direct that evidence on a particular issue be given by a single joint Expert.
- Re: Expert joint statement process, legal representatives' role is limited to agreeing on agenda of the joint discussion. May attend but must not intervene and may only answer questions on the law.
- Joint statement should be signed by Experts at conclusion of discussion or within 7 days of discussion.

Common Law - UK

Technology & Construction Court (TCC) Guide:

- Court's consideration of joint appointment may be long after parties' have engaged their respective experts.
- Single joint experts appropriate for:
  - Low value cases
  - Self-contained topics e.g. valuation of particular heads of claim
  - Issues which require a particular expertise
  - Testing / analysis
- Re: Expert joint statement process, legal advisers may assist but must not negotiate or draft joint statement.
- Legal advisors should only invite Experts to amend any draft joint statement in exceptional circumstances where there are serious concerns that Court may be misled. Such concerns should be raised with all Experts.

Common Law – UK

Glover v Fluid Structural Engineers and Technical Designers Ltd [2024] EWHC 1257 (TCC)

Facts:

- C's solicitors commented to their Expert on draft joint statement by way of track changes, including changes to wording which had been agreed between structural engineering Experts.
- D raised concerns that C's Expert had changed views between drafts due to C's solicitors' interference and applied to revoke C's permission to rely on their Expert evidence.
- C's solicitors admitted to non-compliance, apologised to Court and conceded to D's application.

TCC:

- Permission to rely on C's Expert was revoked.
- C's solicitors' conduct was "misguided" but not deliberate interference.
- C given permission to appoint a new Expert.
- C had to pay all costs thrown away.

Common Law – Hong Kong

Order 38 rule 4A of the Rules of the High Court:

- Court may order appointment of a single joint expert witness.
- Said order can be made even when one party disagrees.

Perpetual Wealth (HK) Ltd v Be Solutions Co Ltd [2022] HKCFI 2539 at [8]:

"*Single joint expert evidence is preferred and has been used as the starting point for expert directions by the Construction Court for some time.*"

INTERNATIONAL ARBITRATION

International Arbitration

Methods of adducing Expert evidence :

1) Each party appoints its own Expert (the most common).

2) Parties appoint a single joint Expert (more cost-effective, for simpler, smaller cases)

3) Tribunal appoints a single Expert.

4) Tribunal appoints a single Expert + party-appointed Experts (more costs + delay).

International Arbitration

Various Guidelines /Soft law instruments:

- International Bar Association Rules on Taking of Evidence in International Arbitration 2020 ("**IBA Rules**")
- Chartered Institute of Arbitrators' International Arbitration Practice Guideline on Party-Appointed and Tribunal-Appointed Experts ("**CIArb Guideline**")
- CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration 2007 ("**CIArb Protocol**")
- The Academy of Experts (UK) Guidance for Experts on Form & Content of Joint Statements
- *[UPCOMING]* Society of Construction Law (Singapore) ("**SCL(S)**") Protocol for the Use of Experts' Joint Statements in Arbitration

IBA Rules of Evidence

- Best practice for gathering and presenting evidence (not just Expert evidence) in international arbitration.
- Designed to be used in conjunction with other rules governing international arbitrations. Reflects procedures used in different legal systems.
- **Article 5 on Party-Appointed Experts**
  - Allows written reply to Expert Reports (including by persons not previously identified as Party-Appointed Experts).
  - Tribunal may order Experts to meet and confer on issues – meeting is normally after Expert Reports (traditional sequence) *cf. CIArb Guideline*.
- **Article 6 on Tribunal-Appointed Experts**
  - After consulting with parties, Tribunal may appoint Tribunal-Appointed Expert/s.
  - Tribunal-Appointed Expert may request party to provide info or access for inspection and parties have the right to receive such info and attend inspection.
  - Parties may examine any info, docs, property that Tribunal-Appointed Expert has examined and the correspondence between Tribunal and Tribunal-Appointed Expert.
  - Tribunal-Appointed Expert may be questioned by Tribunal, parties or Party-Appointed Experts.

CIArb Guideline on Party-Appointed & Tribunal-Appointed Experts

- To be read in conjunction with CIArb Protocol (Appendix I to CIArb Guideline).
- Guidance to arbitrators on:
  - **Article 1: appointment of Experts**
  - **Article 2: assessing the need for Expert evidence** (at outset of arbitration in consultation with parties)
  - **Article 3: methods of adducing Expert evidence** (party-appointed, single joint, Tribunal-appointed)
  - **Article 4: procedural directions for Experts** (set out procedure for collection, giving and testing of Expert evidence in PO)
  - **Article 5: testing of Experts' opinions** (after Experts' report submitted, direct Experts to meet followed by Joint report or Experts' replies to each other's reports, order attendance at hearing to present report and answer questions, witness-conferencing)
- In certain jurisdictions (eg England, HK), arbitrators may appoint assessor to assist with review and assessment of detailed data (eg QS, engineer/ programmer). Work of appointed assessor is not disclosable to the parties *cf. Tribunal- appointed Expert*.

CIArb Protocol for the Use of Party-Appointed Expert Witness in International Arbitration

- Structured along the lines of IBA Rules but more detailed on what should be in Expert's report and deals with independence and privilege.
- Experts' meeting to agree on issues, opinions, tests, analyses and produce agreed statement before Experts' Reports (*cf. IBA Rules)*.
- Drafts, working papers are privileged.
- Expert report only on issues where there is disagreement, to be exchanged simultaneously.
- Each Expert entitled to produce a further written opinion to be exchanged simultaneously.
- Tribunal may at any time hold preliminary meetings with Experts.
- Tribunal may at any time direct Experts to confer and provide further written reports either jointly or separately.
- Declaration too prescriptive?
  - *"Article 8 d) : I confirm that I have referred to **all** matters which I regard as relevant to the opinions I have expressed and have drawn to the attention of the arbitral tribunal **all** matters, of which I am aware, which **might** adversely affect my opinion."*

CIArb 2025 Global Survey on *Maximising the Effectiveness of Party-Appointed Expert Witness Evidence in ADR*

Open invitation to any member of the ADR community to share thoughts and experiences on:

- Communication between Experts, Tribunal & counsel;
- Timetables and timing of involvement of Experts;
- Ensuring the Tribunal understands the Expert input; and
- The hearing & post-hearing process.

Survey closes on 28 April 2025.

Report on findings will be out in summer.

Findings will help develop CIArb resources and training of arbitrators.

The Academy of Experts (UK)

1) **Guidance for Expert Witnesses in England & Wales** from 1 Dec 2014 (for Part 35 of PD)

2) **Guidance on Joint Statements**

- Intended primarily for adversarial Common Law Civil Litigation (Court-Ordered Meetings) but applicable to Tribunal-directed Meetings too.
- Desirable for Experts to meet without lawyers being present *cf. IBA Rules/ CIArb Guidelines*.
- Suggests a Scott Schedule format for Joint Statement with columns for:
  - Questions or issues to be answered
  - Areas of agreement
  - Parties' opinion on areas of disagreement
  - Judge/Tribunal's own notes.
- Tribunal to order, or parties to agree whether i) discussions during Experts' meeting is without prejudice, and ii) if Experts agree, agreement does not bind parties.

[Upcoming] SCL(S) Protocol for the Use of Experts' Joint Statements in Arbitration

- Initiative by SCL(S) following survey where an overwhelming 95% of participants supported having such a protocol.
- Status: still collecting feedback, not launched yet.
- In the context of Singapore domestic arbitrations and Singapore-seated international arbitrations.
- Structure:
  1) Core Principles (7)
  2) Guidance & Commentary on Core Principles
  3) Form of Experts' Joint Statement/ Experts' Supplementary Joint Statement (like a Scott Schedule) *[also other forms: orders within PO relating to Expert Joint Statement, Annexure for Instructions (from Tribunal & each appointing Party) to Experts]*

[Upcoming] SCL(S) Protocol for the Use of Experts' Joint Statements in Arbitration

CORE PRINCIPLES

1. Experts' declaration of competence & independence
2. Communication between Experts for preparation of Experts' Joint Statement
3. Communication between Parties, Counsel and Experts
4. Communication between Tribunal and Experts
5. Consultation of Experts / methodology of Experts' review
6. Content of Experts' Joint Statement
7. Post-hearing issues

SCL(S) Protocol – Core Principles

1. **Experts' declaration of competence & independence**
   - Includes declaration that there is no contingency arrangement for Expert's fees.

2. **Communication between Experts for preparation of Experts' Joint Statement**
   - Experts should be able to communicate freely without parties and counsel. If counsel attend discussion, they should not intervene and should only advise on the law.
   - Communications are confidential and not disclosable in arbitration.

3. **Communication between Parties, Counsel and Experts**
   - Parties and Counsel must not influence Experts on contents of Experts' Joint Statement.
   - Counsel may identify issues but cannot negotiate or draft Experts' Joint Statement.
   - Counsel may only invite Experts to amend in exceptional circumstances where there is a serious concern that Tribunal may be misled. Counsel to raise concerns to all Experts giving Joint Statement.

SCL(S) Protocol – Core Principles

4. Communication between Tribunal & Experts

- No unilateral communications between an Expert and Tribunal - must include all Experts.
- Tribunal at liberty to intervene to facilitate Experts' Joint Statement and Experts' Reports.
- Tribunal to consider having conferences with Experts, the stage of conferences (prior to hearing), whether "on the record" or "off the record", whether parties/ Counsel to attend.
- Matters to discuss include Tribunal's expectations of Experts and Joint Statement, info/ docs required from parties, agreed set of documents, agreed methodology to be used or if not agreed, alternative methodologies.

5. Consultation of the Experts / methodology of the Experts' review

- Not fixed to the traditional sequence of individual reports ⇨ conference ⇨ Joint Statement (eg IBA Rules). Sensible for Experts to meet before exchanging reports but for simpler cases, traditional sequence is useful.
- Experts may have "without prejudice" meetings before hearing.

7. Post-hearing issues

- Tribunal may pose further questions and ask Experts to confer further to reach an agreed outcome on issue yet to be determined.

TRENDS IN CONSTRUCTION ARBITRATIONS

Trends in Construction Arbitrations

- Expert witness conferencing/ hot-tubbing
- Single-jointly appointed Expert
- Early Joint Meeting and Joint Report before individual reports *[CIArb Protocol, SCL(S) Protocol]*
- Limiting/ excluding Counsel's role in Experts' Joint Meeting *[The Academy of Experts, UK]*
- Tribunal's conferences with Experts relating to Joint Report *[SCL(S) Protocol]*
- Post-hearing Joint Meeting and Joint Supplementary Report *[SCL(S) Protocol]*
- Post-hearing private meeting between Tribunal and Expert. *[Prof Doug Jones' article, Party Appointed Experts in International Arbitration – Asset or Liability? 2020]*

BEST PRACTICE / TIPS FOR TRIBUNAL, COUNSEL & EXPERTS

Best Practice / Practical Tips for Counsel

- ✓ Engage Experts early when technical dispute arises.
- ✓ Involve Experts in strategy decisions including analysing the other side's Expert evidence.
- ✓ For Memorial style, Experts have to be engaged very early as Expert reports are normally to be included in the Memorial.
- ✓ For Pleadings style, involve Experts when drafting pleadings (to avoid amendments later).
- ✓ Do not tell Experts what they can or cannot say. Send your instructions to Experts in draft form and have a round of discussion to amend wording of your instructions to match what Experts are going to say.
- ✓ Provide Experts with documents and factual witness statements relevant to their reports.
- ✓ Do not 'over-instruct' experts especially for joint meetings and joint report.
- ✓ Limit your input in Experts' report especially legal jargon/ language. Offer suggestions on

Best Practice / Practical Tips for Tribunal

- ✓ Settle experts issues early and schedule directions accordingly.
- ✓ Engage with Counsel and Experts early to establish common database and common questions/ issues to be answered.
- ✓ Include Experts in Case Management Conferences (can have a few) but avoid asking Experts technical questions at CMCs.
- ✓ Be mindful of imbalance between Expert evidence being heard. (eg *Lucy Letby* case)
- ✓ Give directions on reports, joint meetings, joint reports (on form/ format but not content).
- ✓ In scheduling timelines, ensure Experts are given sufficient time.
- ✓ Consider bifurcation especially for Quantum.
- ✓ Remind Experts of their duty from time to time: at the outset, at CMCs, at hearing.
- ✓ Before hearing/ hot-tubbing of Experts, allow each Expert to give a short presentation but impose rules eg time limit (30-45 mins), number of slides, presentation should not be a substitute for Executive Summary nor to adduce new evidence.

Best Practice / Practical Tips for Experts

- ✓Produce a balanced report: make concessions where appropriate, acknowledge position of other side, use other side's or alternative methodology or assumptions to analyse the same evidence and offer your opinion.
- ✓Report should be concise.
- ✓Report should contain an Executive Summary, cross-referencing, definition of technical terms, Declaration.
- ✓Report should be your own report, not your assistants.
- ✓Use visual aids eg bookmarks, graphics, photographs, drone footage, videos.
- ✓Be professional. Avoid exaggerated language and criticising other side's Expert.
- ✓Don't opine on areas outside your expertise/ scope eg interpretation of contract, responsibility of delay, entitlement and liability.
- ✓Be independent. Don't be (or appear to be) an advocate for the party who hired you.

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Ho Chi Minh City International Construction Arbitration Conference 2025 (HICAC2025)

Avoiding Ships Passing in the Night: Enhancing the Effectiveness of Expert Evidence in Arbitration

Johnny Tan Cheng Hye[1]

Abstract

In many arbitration cases, parties appoint experts to assist the tribunal in understanding and analysing specialist technical evidence. Experts are engaged for their subject-matter expertise and are instructed by their respective counsel to address specific issues in their reports and during hearings. Their objective is to provide independent expert opinions and analysis of factual evidence to aid the tribunal's decision-making.

However, experts are often instructed separately by opposing counsel, leading to reports that fail to engage with each other and instead support their appointing party's case theory. This phenomenon has been likened to "ships passing in the night"—experts starting from different assumptions and facts, taking different analytical routes, and arriving at disparate conclusions. Such an approach is unhelpful to tribunals.

This paper explores strategies to prevent experts from working in isolation and instead ensure meaningful engagement between them. It discusses procedural mechanisms that tribunals and counsel can employ to enhance expert evidence, facilitating a more effective and structured exchange of opinions that truly assists tribunals in their deliberations.

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1. Introduction

In Henry Wadsworth Longfellow's 1863 poem, *Tales of a Wayside Inn – The Theologian's Tale: Torquemada*,[2] he wrote:

> *"Ships that pass in the night, and speak each other in passing,*
> *Only a signal shown and a distant voice in the darkness;*
> *So on the ocean of life we pass and speak one another,*
> *Only a look and a voice, then darkness again and a silence."*

This metaphor aptly describes expert evidence in many arbitration cases. Experts, engaged to provide impartial technical analysis, are expected to assist the tribunal rather than advocate for the party that appointed them. The primary duty of an expert is to the tribunal, not the appointing party. However,

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[1] Johnny Tan Cheng Hye, Independent Arbitrator, Adjudicator, Mediator and Dispute Board Member, https://www.linkedin.com/in/johnny-tan-jp-bbm-pbm-baa6587

[2] Longfellow, Henry Wadsworth, *Tales of a Wayside Inn.* Boston: Ticknor and Fields, 1863

experts are frequently instructed in ways that align their opinions with the case theories of the appointing party, limiting engagement with opposing experts and reducing the effectiveness of their testimony. In extreme cases, they base their opinions on different sets of facts and assumptions, further exacerbating the disconnect.

Concerns have been raised that expert evidence is increasingly becoming a form of advocacy by credentialed witnesses rather than objective analysis.[3] The adversarial nature of arbitration often incentivises experts to meet their appointing lawyers' expectations to secure future engagements.[4] Furthermore, the legal teams control the examination process, sometimes avoiding or shaping expert testimony to fit their arguments rather than seeking an objective resolution of disputed technical issues.[5]

This paper suggests measures to ensure experts meaningfully engage with one another, challenge opposing views constructively, and provide independent analyses based on common facts and assumptions. Such steps will help arbitral tribunals derive greater value from expert evidence and reduce instances where expert reports merely pass by each other without real engagement.

2. Avoiding Ships Passing in the Night

To mitigate this issue, it is essential to focus on the key stages of expert involvement: identifying relevant issues, selecting experts, briefing them appropriately, and structuring their engagement. The adversarial nature of arbitration often leads to parties taking separate approaches to these steps, reinforcing the risk of experts working in silos. However, tribunals and counsel can implement the following strategies to foster constructive expert engagement.

2.1 Tribunal's Directions and Procedural Orders

a. Identify and Exchange List of Experts, Disciplines, and Topics

Counsel should assess the need for expert evidence early, preferably before the first procedural conference. As soon as case statements are exchanged and disputed issues crystallised, parties should confer and exchange a list of issues requiring expert evidence, along with the relevant disciplines and topics.

Early identification of expert evidence ensures that only relevant, reliable, and admissible testimony is presented. This approach prevents unnecessary expert investigations and controls costs, making the arbitration process more efficient. Most importantly, it enhances expert engagement, ensuring experts

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[3] Markoff, John, *A Boom in Expert-Witness Firms,* The New York times, August 12, 2005

[4] Kao, Frances P., Justin L. Heather, Ryan A. Horning, and Martin V. Sinclair Jr., *Into the Hot Tub: A Practical Guide to Alternative Expert Witness Procedures in International Arbitration,* The International Lawyer 44, no. 3 (2010): 1035–1044

[5] *Glen Wright v. Nationwide Building Society* [1998] C.L.C. 512 (UK); *Re RBS Rights Issue Litigation* [2015] EWHC 3433 (Ch)

operate within the same framework and analyse common issues rather than working on isolated aspects of the case.

b. Joint Instructions and Agreed List of Issues

Once experts are identified, counsel should collaborate to draft joint instructions and an agreed list of issues for the experts to address. A joint list clarifies expectations, ensures both sides align on the scope of expert analysis, and prevents unnecessary duplication of effort. It also helps experts focus on critical disputed issues rather than producing overly broad reports.

In cases where parties cannot agree on joint instructions, tribunals can assist in drafting neutral instructions, minimizing the perception that experts are merely advocates for their appointing party.

c. Exchange of Common Set of Facts and Documents

Experts should be provided with a shared set of facts and documents to ensure their analyses are based on the same evidentiary foundation. Differences in expert opinions should stem from analytical reasoning rather than discrepancies in the facts considered. Where an expert requires additional information, it should be shared with the opposing expert to allow for a balanced assessment.

d. Meeting of Experts

Experts should meet early in the arbitration process—either with or without legal representatives—before commencing their analyses. These meetings should aim to:

- Define the scope of expert evidence.
- Identify agreed and disputed issues.
- Avoid procedural delays by planning information requests early.
- Establish a consistent format and structure for expert reports.
- Enhance professional and collaborative engagement between experts.

2.2 Joint Expert Statement Before Expert Reports

To encourage agreement where possible, experts should issue a Joint Expert Statement before submitting individual reports. This document should outline agreed and disputed issues, set out the reasons for disagreement, and define the methodology used.

Reaching consensus at this stage is more feasible than after individual reports are finalised, as experts may be reluctant to concede once they have committed to their written opinions. A Joint Expert Statement streamlines the subsequent reporting and rebuttal process, reducing the risk of experts working in isolation and presenting fundamentally incompatible analyses.

3. Hot Tubbing: Enhancing Expert Engagement

Many arbitral rules permit witness conferencing, commonly referred to as "hot tubbing," where experts engage in a structured dialogue rather than testifying separately.[6] Some rules like ICC Arbitration Rules, SIAC Arbitration Rules, and VIAC Rules, while they do not explicitly mention witness conferencing, they grant tribunals broad discretion in conducting proceedings. This process enables:

- Real-time engagement between experts, encouraging direct responses to opposing views.
- Tribunal-led questioning that focuses on key areas of disagreement.
- A more efficient and cost-effective resolution of technical disputes.

A well-structured hot tubbing session, guided by the Joint Expert Statement, helps tribunals assess expert credibility, test methodologies, and gain deeper insights into the contested issues. By fostering interactive discussions, this approach mitigates the adversarial nature of expert testimony and ensures a more balanced presentation of technical evidence.

4. Conclusion

The effectiveness of expert evidence in arbitration depends on meaningful engagement between experts rather than isolated, adversarial analyses. The current approach, where experts often work separately and fail to engage with each other's views, undermines their role in assisting tribunals.

To address this issue, tribunals and counsel must take proactive steps, including early identification of expert issues, joint instructions, common factual foundations, structured expert meetings, and the use of Joint Expert Statements. Additionally, mechanisms such as hot tubbing can facilitate real-time expert dialogue, ensuring that technical disagreements are fully explored and understood.

By implementing these strategies, arbitration can move away from the phenomenon of expert evidence resembling "ships passing in the night" and instead ensure that expert testimony genuinely aids tribunals in reaching well-informed and fair decisions.

[6] CIArb Guidelines for Witness Conferencing in International Arbitration and IBA Rules on Taking of Evidence in International Arbitration

EXPERT EVIDENCE IN ARBITRATION: AVOIDING SHIPS PASSING IN THE NIGHT

JOHNNY TAN CHENG HYE
Independent Arbitrator, Adjudicator, Mediator and Dispute Board Member

Introduction

"Ships that pass in the night, and speak each other in passing,
Only a signal shown and a distant voice in the darkness;
So on the ocean of life we pass and speak one another,
Only a look and a voice, then darkness again and a silence."

Tales of a Wayside Inn – The Theologian's Tale: Torquemada,
Henry Wadsworth Longfellow, 1863

Metaphorically describes brief & non-interactive encounters.

Primary Role of Experts in Arbitration

- Provide impartial technical analysis.
- Assist tribunals.

Unfortunately, expert evidence has increasingly become –

- A form of advocacy by credentialed witnesses instead of objective analysis.
- Likened to *"ships passing in the night"*.

What are causes -

- Adversarial nature of arbitration –
- Incentivises experts to meet appointing lawyer's/client's expectations; hoping to secure future engagements.
- Legal teams control the examination process enable them to shape expert testimony to fit their legal arguments rather than seek an objective resolution of disputed technical issues.

Measures to ensure meaningful and constructive engagement of experts and provide independent analyses based on common facts and assumptions -

- Active involvement by tribunal helps parties to focus on key stages of expert involvement and avoid experts working in silos –
  - Early Identification of relevant issues to be addressed by experts.
  - Joint briefings to experts.
  - Structuring their engagement.

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Early Identification of relevant issues to be addressed by experts.

- Identify and Exchange List of Experts, Disciplines and Topics
  - Counsel to assess need for expert evidence early; preferably before first procedural conference.
  - As soon as disputed issues are crystallised – parties should confer and exchange list of issues requiring expert evidence, their disciplines and topics to be addressed.

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Early Identification of Expert Evidence

- Ensures only relevant, reliable and admissible testimony is presented.
- Avoids unnecessary expert investigations and controls costs; making arbitration more efficient and cost effective.
- Enhances expert engagement; ensuring experts operate within the same framework and analyse common issues.
- Avoids experts working on isolated aspects of the case.

Joint Instructions and Agreed List of Issues

- Counsel to collaborate to draft joint instructions and an agreed list of issues for experts to address.
- Joint list clarifies expectations.
- Ensures both sides align on the scope of expert analysis.
- Prevents unnecessary duplication.
- Helps experts focus on critical disputed issues rather than producing overly broad reports.
- Tribunal to assist if parties unable to agree – minimises the perception that experts are mere advocates for their appointing party.

Exchange of Common Set of Facts and Documents

- Experts provided with shared set of facts and documents – ensures that analyses are based on the same evidentiary foundation.
- Differences in expert opinions should stem from analytical reasoning rather than discrepancies in the facts considered.
- Where experts require additional information, it should be shared with the opposing expert to allow for a balanced assessment.

Meeting of Experts

- Experts should meet early in the arbitration process (with or without counsel) before commencing their analyses.
- Aim -
- Define the scope of expert evidence.
- Identify agreed and disputed issues.
- Avoid procedural delays by planning information requests early.
- Establish a consistent format and structure for expert reports.
- Enhance professional and collaborative engagement between experts.

Joint Expert Statement

- Experts to issue Joint Expert Statement before Individual Reports; encourage agreement where possible.
- Joint Statement to outline agreed and disputed issues, set out reasons for disagreement and define methodology used and assumptions made in the analyses.
- Reaching consensus more feasible before filing Individual Reports. Reluctant to concede once committed to written opinions.
- Streamlines subsequent reporting and rebuttal process, reducing risk of experts working in isolation and presenting fundamentally incompatible analyses.

Hot Tubbing: Enhancing Expert Engagement

- Many arbitral rules permit witness conferencing (e.g. CIArb Guidelines for Witness Conferencing; IBA Rules on Taking Evidence in Int'l Arbitration; even when not expressly mentioned, most rules grant tribunal broad discretion).
- Process enables –
- Real-time engagement between experts, encouraging direct responses to opposing views.
- Tribunal-led questioning focuses on key areas of disagreement.
- More efficient and cost-effective resolution of technical disputes – avoiding ships passing in the night.

Hot Tubbing: Enhancing Expert Engagement

- Well-structured hot tubbing, guided by Joint Expert Statements, helps tribunals assess expert credibility, test methodologies and gain deeper insights into the contested issues.
- Fosters interactive discussions, mitigates adversarial nature of expert testimony and ensures balanced presentation of technical evidence.

Conclusion

- Effectiveness of expert evidence depends on meaningful engagement between experts rather than isolated adversarial analyses.
- Tribunal and counsel should take proactive steps – early identification of expert issues, joint instructions, common factual foundations, structured expert meeting and use of Joint Expert Statements.
- Hot Tubbing can facilitate real-time expert dialogue ensuring technical disagreements are fully explored and understood.
- Avoiding “ships passing in the night” and ensures expert testimony aids tribunals in reaching well-informed decision making.

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Thank you for your attention!

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VIAC
HICAC 2025
The Expert's Journey: From Fact-Finding to Decision-Making
VIVEK MALVIYA
Director, Masin


VIAC
MASIN
The Expert's Journey
From Fact-Finding to Decision-Making
Vivek Malviya
Masin

ISSUES/CONTENTS

1. Overview of Construction Arbitration
2. Importance of Expert roles in technical dispute resolution
3. Key phases: Fact-finding, analysis, ethical duties, strategic decision-making
4. Strategic Management of Expert Involvement

Why Experts Matter ?

- Clarifying & resolving technical complexities
- Objective and impartial advisory role
- Assisting arbitrators in comprehending intricate construction methodologies and contractual nuances
- Common issues addressed include delays, cost overruns, construction defects, scope changes, and other technical matters.

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Key Contributions of Experts in Construction Arbitration:

Technical Analysis: Experts evaluate project delays, cost overruns, design defects, and compliance with industry standards, offering objective assessments that form the foundation of the arbitration process.

Report Preparation: Experts compile comprehensive reports detailing their analyses, methodologies, and conclusions, serving as critical evidence in arbitration proceedings.

Expert Testimony: They present their findings during hearings, elucidating complex technical matters for the tribunal, which is essential for accurate fact-finding and resolution.

Assisting in Cross-Examination: Their presence allows for effective cross-examination, enabling the tribunal to gauge the reliability and credibility of the technical evidence presented.

Phase 1 - Selecting and Appointing the Right Expert

•Early engagement for delay experts

•Late engagement for technical experts after issue identification

•Advantages of early expert involvement:

- Enhanced case strategy
- Early issue resolution
- Objective assessment aiding settlement

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Phase 1 - Selecting and Appointing the Right Expert

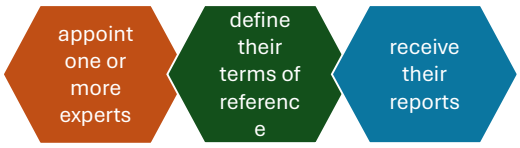
Key Considerations:

- Technical expertise: Essential for effective task execution.
- Communication skills: Simplifying complexities for tribunal comprehension.
- Confidence and resilience in cross-examinations.
- Team size and capabilities to meet tight deadlines.
- Reputation and prior testimony experience.
- Fees: Prioritize value and quality over lowest cost.

Engagement of Experts in Arbitration Proceedings

ICC Arbitration Rules, 2021:

The arbitral tribunal, after consulting the parties, may:



At the request of a party, the parties shall be given the opportunity to question any such expert at a hearing .

Apart from the ICC Arbitration Rules, reliance is placed upon:

- ICC Rules for Expertise;
- Article 5 of the Rules on the Taking of Evidence in International Arbitration by International Bar Association (IBA);
- Guidelines on Conflicts of Interest in International Arbitration by International Bar Association (IBA);
- Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration by the Chartered Institute of Arbitrators (CIArb); and
- Guideline 7 of International Arbitration Practice by the Chartered Institute of Arbitrators (CIArb).

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Evaluating Conflicts of Interest

- Personal, institutional, financial interest assessment
- Historical relationship reviews
- Adherence to IBA guidelines
- Implementation of ethical walls

Phase 2 - Comprehensive Fact-Finding

- Document Review: Contracts, correspondence, reports, site logs
- Site Inspections for firsthand assessments
- Stakeholder Interviews to capture insights

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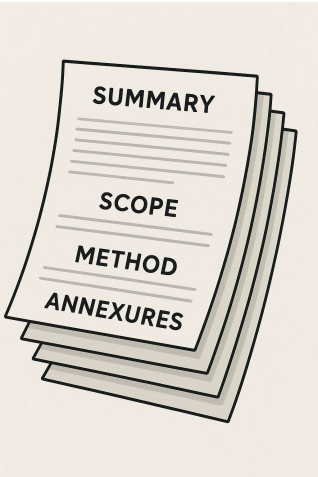
Efficient Management of Fact-Finding

- Define expert scope clearly
- Systematic indexing and early evidence disclosure
- Focused instructions and staged reporting
- Avoid last-minute data dumps; clear instructions and preparation

Phase 3 - Detailed Analysis and Reporting

Expert Report Best Practices

- Make the Technical Understandable
- Methodology justification
- Objective, impartial conclusions
- Use of visual aids: timelines, charts, diagrams
- As experts, we must speak the language of logic, not jargon



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The Expert Report – Crafting the Evidence

It must be logically structured, clearly written, and fully supported. Key ingredients include:

- A concise executive summary
- Transparent scope and assumptions
- Justified methodology
- Referenced analysis
- Appendices with clean calculations

If a tribunal member can follow your report without needing a glossary or a degree in engineering — you're doing it right.

Phase 4 - Decision-Making Influence

•Robust evidence provision
•Facilitation of tribunal deliberations
•Interpretation of technical data into understandable insights

Avoiding Advocacy Pitfalls

•Neutrality maintenance
•Objective evidence evaluation
•Flexible outcome consideration based on tribunal findings

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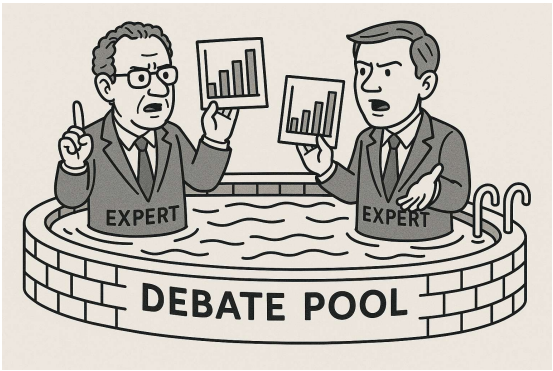
Bridging Gaps Between Expert Findings

- Joint expert instructions
- Structured joint statements and comparative Scotts Schedules
- Strategies tailored to common law jurisdictions
- Hot tubbing : Not as relaxing as it sounds



Ethical Duties and Responsibilities

- Upholding impartiality, competence, confidentiality, and effective communication
- Relevant International Guidelines (ICC, IBA, CIArb)
- Transparency to avoid bias and ensure independence

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Professional and ethical duties of an expert in arbitration proceedings

Disclosure of potential conflicts of interest

- The duty of an expert includes full disclosure in cases of uncertainty. Despite 'grey areas' where conflicts may be unclear, experts must disclose any potential conflicts. Once disclosed, unless objections arise, the expert's integrity is upheld.

- Factors that could compromise your independence or require disclosure include:
  - *A close personal relationship with one of the parties (e.g., being married to the CEO of a party or a company belonging to the same organization or group as a party, or current or former status as an employee or consultant of that party). Depending on their character and duration, even certain past relationships of this kind may continue to be relevant.*
  - *A material financial interest (e.g., owning a stake in one of the parties, or past or present contractual relationships with a party or a member of the group of companies to which a party belongs).*
  - *Prior and non-trivial services to a party or prior services related to the disputed subject matter.*
  - *A similarly close relationship with a third party that has an interest in the outcome of the dispute may also need to be taken into account.*

Independence and impartiality

- Experts need to disclose any circumstances that could compromise their independence in the eyes of the party or parties requesting the proposal; and should remain impartial which essentially conveys neutrality. They must assume that the standards applicable to their impartiality and independence are the same as those applied to arbitrators under the ICC Rules of Arbitration.

- As per the ICC Rules for Expertise:
  - ***Article 3(3)*** requires that experts who are being proposed by the Centre need to disclose any circumstances that could compromise their independence in the eyes of the party or parties requesting the proposal.
  - ***Article 7(3)*** *and* ***7(4)*** require that any expert appointed by the Centre must provide a written declaration confirming independence and disclosing relevant facts, and the expert must be and remain independent of the parties.
  - ***Article 11(1)*** requires that in administered proceedings, regardless of whether the expert was appointed or agreed by the parties, the expert must remain independent throughout these proceedings, although the parties may expressly waive this requirement.

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Experience to serve

An expert should obtain the information needed to understand the nature and scope of the issues for which its subject matter expertise is requested, and must ask questions regarding the purpose of the expertise proceedings.

This will allow the expert to evaluate whether it has the necessary 'procedural' skills to contribute to the proceedings.

Time to serve

The expert's duty includes promptly understanding the parties' schedules and the urgency of deadlines. The expert must gather all relevant information to accurately gauge the project's scope, including possible site visits or experiments.

This ensures setting a realistic completion timeline while considering unforeseen challenges.

POTENTIAL CONSEQUENCES OF NON-ADHERENCE TO SUCH DUTIES

- Full disclosure by an expert boosts their credibility and honesty. Failure to disclose can ***damage the expert's credibility*** and the authoritative nature of their work, breaching legal and ethical duties.
- Although there are no successful disqualifications of expert witnesses in the public record, tribunals have given particular attention to unusual circumstances and have:
  - given ***little weight to evidence*** given by an expert who was found to be lacking in independence; and
  - suggested to the party whose expert is requested to be ***removed to appoint a different one*** instead.
- Parties can apply to ***disqualify an opposing expert witness***:
  - applications for disqualification can be made via written communication to the tribunal or during a hearing; and
  - moving party may request the tribunal to remove or recuse the expert witness or ***strike (or exclude) the witness' evidence*** from the record.
- Decisions on disqualification can be part of a separate ruling or the final award, with the burden of proof on the party requesting dismissal.

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Closing Reflections – How to Make It Count

1. **Start Early** – The value of expert evidence multiplies when integrated early.
2. **Be Clear** – Your job is not to win, but to explain.
3. **Stay Independent** – Your integrity is your influence

Conclusion

- Expert contributions fundamentally shape arbitration outcomes
- Precise data collection, rigorous analysis, ethical adherence, strategic collaboration is important
- Alignment of international best practices with local arbitration standards for optimal outcomes

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Liquidated Damages: Do the Challenges to Their Application Justify Reform

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Keywords: Liquidated Damages, Construction, Dispute Resolution, Project Delay.

1 Introduction

Liquidated damages are ubiquitous in construction contracts. They are typically defined as pre-determined sums of money which are to be paid by one party to the other in the event of breach by the former. In the context of construction contracts, the relevant breach is most often delay to completion.[2] Liquidated damages clauses offer a number of advantages including party autonomy, certainty, and simplicity. This is evident when compared to general damages, which the parties have less control over and where there is less clarity as to what the amount of damages would be in case of a breach.

Fig. 1. The simple yet highly consequential liquidated damages formula.

The concept of liquidated damages has been the subject of scrutiny and criticism. Some of the debate revolves around the concept of penalty (i.e. when the pre-determined liquidated damages amount appears to be disproportionate when compared to the genuine estimate of the loss arising from the breach). This is the "penalty test" applied to liquidated damages clauses in common law jurisdictions, in which a penalty clause is unenforceable.[3]

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[2] It is noted that some construction contracts include provisions for liquidated damages associated with other types of breaches. For example, the failure to achieve a certain production capacity for an industrial facility. The focus of this paper is on liquidated damages that apply to delay to completion.

[3] For more information in relation to the penalty test, see *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1914] UKHL 1, and *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67.

In contrast, penalty clauses are generally enforceable in civil law jurisdictions, albeit still subject to review and potential adjustment if deemed unreasonably high.

Another area in which the effects of liquidated damages on the behavior of the parties was examined is "efficient breach" theory. This is the argument that certain liquidated damages clauses that are designed to be stringent "deterrents" may prevent a party from acting rationally. This is because they force the party to continue to perform in fear of being subjected to the application of liquidated damages (especially if they are perceived to be high), even if continued performance is otherwise not the commercially rational course of action. It is noted, however, that arguments relating to efficient breach have been made in favor and against such clauses.[4]

This paper presents a number scenarios based on real-life examples of projects in which the application of liquidated damages was fraught with challenges, sometimes resulting in them being completely disregarded and replaced with a general approach to the assessment of damages arising from delay to completion. The existence of such challenges raises the question of whether the conventional liquidated damages clause found in construction contracts is due for a change.

2 Common Challenges in Construction Contracts

2.1 The Dichotomy between Simple Liquidated Damages Clauses & Complex Construction Projects

Liquidated damages clauses in construction contracts are frequently simple, especially when compared to other clauses that relate, for example, to the valuation of changes. Whilst acknowledging that there are some variations to liquidated damages clauses, they generally remain a one-size-fits-all approach as shown in the example below:

> *"If the Contractor fails to achieve an LD Milestone by the relevant LD Milestone Date, the Contractor must pay liquidated damages to the Owner, calculated at the rate set out in Schedule 1 for every calendar day (or part thereof) after the LD Milestone Date up to and including the date that the LD Milestone is achieved."*

On the other hand, construction projects are rather complex endeavors. This dichotomy, between the simplicity of liquidated damages clauses and complexity of construction projects, is the root cause of many of the real-life challenges that are faced by practitioners.

2.2 Assessment of Causes of Delay

The first, and one of the most commonly encountered challenges, can be traced to the process of assessment of the causes of delays to construction projects. Liquidated damages apply to inexcusable delay (i.e. delay that is the contractor's liability under the contract). In other words, delay for which the contractor is not entitled to an extension of time. In order to identify the extent to which the contractor is responsible for the delay incurred, the parties engage in protracted back-and-forth submissions and responses to extension of time applications. This process of claim submission, reviews, rejections and resubmissions often continues well beyond the original or extended completion date of the project. This means that the owner is confronted with a situation where it is entitled to start to apply liquidated damages, whilst at the same time acknowledging that the contractor may potentially be entitled to an extension of time that, at the very least, would partially absolve the contractor from liability.

The challenge described above results in a situation where, driven by the desire to maintain some sort of cordial relationship, the owner decides to suspend the application of liquidated damages until further review of the contractor's claims. This state of affairs may continue for a long duration, with one potential additional complication

[4] See *A Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, Larry A. DiMatteo, University of Florida [2000], for arguments for and against justifications based on "efficient breach".

being that the extension of time review process starts to become part of an overall commercial settlement dialogue. By then, there may be many disagreements between the two sides. The often-unavoidable entanglement of the various sources of disagreement between the parties makes the resolution of the extension of time question more challenging the longer it is left unanswered. All of this may eventually come to a head, either with the owner deciding to abruptly demand a rather large sum of liquidated damages, or a line-in-the-sand type of interim settlement in which the parties agree on apportioning liability up to a certain point in time, only for the same to repeat itself once more down the road.

Even if the owner decides not to apply liquidated damages in a project that has overrun its contractual completion date pending an extension of time assessment, this does not mean that the contractor can continue to work business-as-usual. The threat of ever-increasing liquidated damages exposure day-by-day has consequences over the morale and level of cooperation. For example, tension may grow between the contractor and the engineer or architect, who is often tasked with assessing the contractor's extension of time submissions. Furthermore, borrowing money may become more difficult or expensive for a contractor who is perceived by lenders to be under a significant threat of liquidated damages being applied at any moment.

With contractor's extensions of time submissions sometimes being perceived as inflated, and with contracts sometimes allowing for increasing but not decreasing any extension of time awarded, the owners are faced with a situation that encourages a wait-and-see approach. Placed in the context of the complex and often time-consuming process of analyzing the causes of delay to construction projects, it is readily apparent why the situation described above is endemic in construction projects.

2.3 Partial Handing Over

Here is another scenario that should be familiar for many construction practitioners: An owner and a contractor enter into a construction contract with a planned completion date, or at best a few completion milestones to which liquidated damages for delay are applicable. As the project is nearing completion, certain parts of the project are more delayed than others, for one reasons or another, and the owner considers that it would be beneficial to take over parts of the project. The parts of the project being handed over to the owner do not align with the completion dates or milestones as originally envisaged in the contract. In this situation, the application of the liquidated damages clause will likely need to be amended, since the owner would acquire control and beneficial use of certain parts of the works.

On the face of it, a simple solution may be that the contractor's exposure to liquidated damages should be reduced in proportion (i.e. "pro-rata") to the amount of works being taken over by the owner. This can work effectively, but there are a number of challenges. First, dividing a project into many parts is no simple feat and requires diligent logistical planning which is then taken into consideration when demarcating the zones to be handed over. Therefore, the corresponding impact on the calculation of liquidated damages is not straightforward.

Second, it is not always simple to determine what the proportion being taken over amounts to in terms of reduction to the liquidated damages rate. In a simple residential development, this may be equal to the built-up area being taken over as a proportion of the overall built-up area of the project. Yet, the question of whether, and the extent to which, the area being taken over can be utilized as it would have been had the entire project been completed is debatable. In infrastructure or industrial projects, the calculus can be much more challenging given the potential interdependencies between the various parts of the project.

This bifurcation introduces yet another uncertainty which would also need to be taken into consideration in the extension of time assessment. Many projects face this challenge. Imagine an assessment that needs to ascertain what delayed each of these sperate areas in order to apportion delay liability between the parties.

2.4 Liquidated Damages Rate & Cap

Another challenge that may be faced in practice relates to the liquidated damages rate and whether there is a cap on liability. In some projects, the liquidated damages rate for each day of delay may be unusually high or low. Sometimes there is a good reason for what may be perceived prima facie to be an unusually high or low rate. For example, a minor facility may be crucial to the operation of a much larger oil and gas project, and hence any delay to the completion of this facility has considerable financial implications to the owner and this may be reflected in a high liquidated damages rate. However, the unusually high or low rate of liquidated damages may sometimes be difficult to explain.

Typically, liquidated damages clauses in construction contracts have a cap. A commonly used figure for the cap is 10% of the contract price, but the cap may be higher or lower. In some projects, the contract does not stipulate any cap on the liquidated damages the contractor may be exposed to.

The liquidated damages rate and cap can have a significant impact on the contractor's exposure. For example, if projects with no cap incur a very significant amount of delay, then the amounting liquidated damages may become untenable or difficult to justify (e.g. a liquidated damages sum amounting to most of the value of the entire project). This again brings into question the proportionality of the compensation the owner is entitled to given the contractor's breach of failing to complete on time. In this scenario, the owner may no longer be able to rely on the liquidated damages clause. This then requires the owner to undertake a much more complex and uncertain exercise of attempting to quantify its losses, and may require the owner to reluctantly expose financial data to support its claim of general damages.

Another potential consequence is when the effect of a liquidated damages clause is lost. Liquidated damages clauses are, arguably, tools to encourage performance and discourage breach (i.e. late completion). However, contractor faced with high risk with regards to liquidated damages (for example, where the maximum amount of liquidated damages is reached with minimal delay due to a very high rate, coupled with a very aggressive target completion date) may simply "price-in" the liquidated damages amount in their bid. A contractor may assume that it is highly likely that it would end up paying the maximum liquidated damages amount, and this undermines the owner's ability to put pressure on the contractor to achieve timely performance.

3 Conclusion

There are various issues that have been debated in relation to the enforceability and efficacy of liquidated damages clauses. These range from legal arguments (relating to principles of unconscionability, reasonableness, legitimate interests and just compensation), to socioeconomic arguments relating to the commercial pressures that liquidated damages exert on the contracting parties.

This article examined certain challenges faced in practice when enforcing liquidated damages clauses in construction projects. The scenarios and examples provided show how the contrast between the relative simplicity of liquidated damages clauses on the one hand, and the complexity of construction projects on the other, often result in considerable challenges. Said challenges may render the implementation or enforcement of a liquidated damages clause unnecessarily complex or outright not possible.

Acknowledging the existence of these challenges naturally raises the question of whether some sort of reform is called for, and if so, what form it should take. This reform is unlikely to be achieved by the abolition or replacement of liquidated damages clauses. There is no viable alternative that has been utilized and tested for as long as liquidated damages clauses. But a better balance may be possible to achieve, between maintaining as much of the certainty and simplicity that liquidated damages clauses offer, and adding the flexibility needed to meet the needs of complex construction projects.

Liquidated Damages: Do the Challenges to Their Application Justify Reform

YASIR G. KADHIM
Director, Secretariat

Secretariat

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1. Definition & Advantages
2. Background & Key Issues
3. Challenges in Construction Projects
4. Way Forward

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1. Definition & Advantages

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Liquidated Damages – Definition & Example

Liquidated damages are defined as:

- **a provision that specifies a predetermined amount of money that one party must pay if the terms of the contract are breached.**

In the context of construction contracts, the relevant breach is most often delay to completion.

For example:

"If the Contractor fails to achieve an LD Milestone by the relevant LD Milestone Date, the Contractor must pay liquidated damages to the Owner, calculated at the rate set out in Schedule 1 for every calendar day (or part thereof) after the LD Milestone Date up to and including the date that the LD Milestone is achieved".

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Liquidated Damages – Advantages

Liquidated damages offer certain advantages over the general damages approach:

- **Party autonomy: by offering the contracting parties the ability to pre-determine the consequences of a breach.**
- **Simplicity:** Delay to Completion (days) × LD Rate Per Day = Sum of Liquidated Damages
- **Certainty: the damages associated with the claimed breach are well-defined before entering into a dispute resolution process.**

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Liquidated Damages – The Penalty Test

Common law approach: If a liquidated damages clause is found to be a penalty, it is unenforceable by the party seeking to impose it.

What makes liquidated damages a penalty:

- **Disproportionate, not a genuine pre-estimate of loss, intended to punish or deter, extravagant or unreasonable, does not serve a legitimate commercial purpose. (Dunlop, Cavendish)**

Treatment of penalty clauses: Unenforcable (common law) vs. Adjustment (civil law).

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Liquidated Damages – Theory of Efficient Breach

A criticism of liquidated damages from a commercial/economic perspective.

This is the argument that certain liquidated damages clauses that are designed to be disproportionate "deterrents" would prevent a party from acting rationally.

This is because they force the party to continue to perform in fear of being subjected to the application of liquidated damages (especially if they are perceived to be particularly high), even if continued performance is not the commercially rational course of action.

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Liquidated Damages & Efficient Breach

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Project A	Project B
Low-value / Non-critical	High-value / Critical
High LDs	**Low LDs**

Faced with limited resources, the contractor prioritises Project A.

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1. Definition & Advantages
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3. Challenges in Construction Projects

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Construction – The EOT Process

The assessment of the causes of delays to construction projects is complex.

- **In order to identify the extent to which the contractor is responsible for the delay incurred, the parties engage in protracted back-and-forth submissions and responses to extension of time applications.**

A situation often arises where the owner is entitled to apply liquidated damages, whilst at the same time acknowledging that the contractor may potentially be entitled to an extension of time.

The owner may decide to suspend the application of liquidated damages until further review.

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Assessment of Causes of Delay & EOT Process

Project Start

Delay Starts to be Incurred

Contractor submits notice of delay or EOT claim.

EOT claim under review.

Partial or no EOT award.

Completion Date Passes

Additional notices of delay or EOT claims submitted.

Further review and responses to claims.

LDs can be applied.

Max LDs Reached

Ongoing negotiations.

Disagreements become multi-faceted.

Potential breakdown and dispute.

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Construction – Partial Handover

Partial handover scenario:

- **An owner and a contractor enter into a contract with a planned completion date, or at best a few LD milestones.**
- **Certain parts of the project are more delayed than others, and the owner is of the view that it would be beneficial to take over parts of the project.**
- **In this situation, the application of the liquidated damages clause may need to be amended, since the owner would acquire control and beneficial use of portions of the works.**

Logistically complex, makes the assessment of extension of time even more challenging, and the "pro-rata" approach is not always straightforward.

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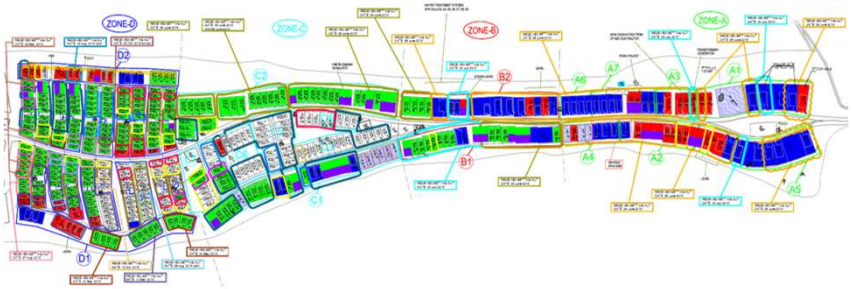
Construction – Partial Handover



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Construction – Rate & Cap

In some projects, the liquidated damages rate for each day of delay may be unusually high or low.

A commonly used figure for the liquidated damages cap is 10% of the contract price. Some projects have a lower cap (e.g. 3%) whilst others have no cap at all.

A high liquidated damages rate, coupled with an aggressive target completion date, may result in the liquidated damages amount simply being "priced-in" the bid.

In instances where there is no cap, the liquidated damages may be set aside.

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Balance – Certainty, Efficacy & Flexibility

Liquidated damages clauses in construction contracts are ubiquitously simple. On the other hand, many construction projects are complex.

This contrast is the root cause of many of the challenges encountered in practice.

There is no viable alternative that has been as widely adopted and tested for as long as liquidated damages.

A better balance may be possible to achieve, between ensuring the continuity of the certainty and efficacy that liquidated damages clauses offer, and introducing flexibility to meet the needs of complex construction projects.

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CONCURRENT DELAY IN THE CONSTRUCTION ARBITRATION

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Abstract: Concurrent delays are one of the contentious issues in the Construction Arbitration. This paper analyses how it is addressed in various contract forms and various jurisdictions. It also attempts to share drafting notes for the concurrent delays.

Keywords: Concurrent delay, SCL protocol, Malmaison

1. CONCURRENT DELAYS

1.1 What are Concurrent Delays?

Concurrent delays occur when two or more delays happen simultaneously, affecting the same project timeline. These delays can be caused by different parties, such as the contractor, the owner, or external factors like weather or regulatory changes. The complexity arises because it's often difficult to apportion responsibility and determine the impact of each delay on the project's completion date.

1.2 Types of Concurrent Delays

True Concurrent Delays: These occur when two delays happen at the same time and independently affect the project's critical path. For example, if a contractor's delay in procuring materials coincides with a design change delay by the owner, both affecting the critical path, they are considered true concurrent delays.

Concurrent Delays on Different Paths: These occur when delays impact different but concurrent paths in the project schedule. Although they don’t affect the same critical path, they happen simultaneously and can still complicate the delay analysis.

1.3 Handling Concurrent Delays in Delay Analysis

Managing concurrent delays requires a meticulous and methodical approach to ensure fair and accurate apportionment of responsibility and impact. Here are some key steps and methodologies used in delay analysis:

Identify the Critical Path: The first step is to establish the project's critical path using scheduling techniques like the Critical Path Method (CPM). Understanding which activities are critical helps in determining which delays have the most significant impact on the project completion date.

Document Each Delay: Detailed documentation of each delay, including its cause, duration, and impact on the schedule, is crucial. This involves maintaining accurate project records, daily reports, and communication logs.

Determine the Timing and Impact: Analyze the timing of each delay to understand if and how they overlap. Use scheduling software to simulate different scenarios and assess the impact of each delay on the critical path.

Apportion Responsibility: Apportioning responsibility for concurrent delays can be complex. It often requires expert judgment and may involve principles from FIDIC contracts. For example, under FIDIC contracts, the responsibility for delays is typically shared based on the cause and contractual terms.

2. LEGAL AND CONTRACTUAL CONSIDERATIONS UNDER FIDIC

Concurrent delays often lead to disputes between parties, making legal and contractual considerations critical. FIDIC contracts usually have provisions that address delays, such as liquidated damages, extension of time (EOT) clauses, and force majeure clauses. Here are some key points to consider:

2.1 Extension of Time (EOT): FIDIC contracts allow for an EOT if delays are beyond the contractor's control. In the case of concurrent delays, determining the entitlement to an EOT requires careful analysis of the delays' causes and impacts.

2.2 Liquidated Damages: If delays are the contractor's fault, they may be liable for liquidated damages. However, in concurrent delay scenarios, proving exclusive fault can be challenging.

2.3 Claims and Disputes: Concurrent delays often lead to claims and disputes. Effective documentation, clear communication, and expert testimony are essential in resolving these disputes. Dispute resolution methods such as arbitration or mediation can also play a role.

2.4 Real-Life Examples from Tower Projects

To illustrate the complexity of concurrent delays, consider the following examples from tower construction projects:

High-Rise Residential Tower: In a major high-rise residential project, the contractor experienced delays in the delivery of structural steel due to supplier issues (contractor-caused delay). Simultaneously, the owner requested changes to the building's facade design (owner-caused delay). Both delays affected the project's critical path. The delay analysis involved identifying the overlap period, assessing the impact of each delay, and apportioning responsibility based on FIDIC contractual terms.

Commercial Office Tower: A commercial office tower project faced concurrent delays due to unexpected regulatory changes (external delay) and a subcontractor's failure to complete electrical installations on time (contractor-caused delay). The delay analysis required a detailed examination of the project schedule to determine how each delay impacted the timeline and which party was responsible for the critical path delay.

3. MANAGING CONCURRENT DELAYS

• Effective management of concurrent delays involves proactive strategies and best practices, including:

• Robust Planning and Scheduling: Develop comprehensive project schedules with clear milestones and critical paths. Regularly update the schedule to reflect changes and potential delays.

• Effective Communication: Maintain open and transparent communication between all stakeholders. Document all decisions, changes, and delays promptly and accurately.

• Risk Management: Implement a risk management plan that identifies potential delays and develops mitigation strategies. Regularly review and update the risk register.

• Expert Analysis: Engage delay analysis experts to provide an objective assessment of concurrent delays. Their expertise can help in apportioning responsibility and resolving disputes.

4. COMMON LAW APPROACH ON CONCURRENT DELAYS:

Under common law several different approaches exist. Keating on Building Contracts outlines the following four approaches:

4.1. Devlin's approach

''If a breach of contract is one of two causes of a loss, both causes co-operating and both of approximately equal efficacy, the breach is sufficient to carry judgment for the loss.''9 Thus, for example, the employer's late handover of the site area to the contractor would entitle the contractor to an extension of time and compensation for overrun costs incurred. However, if one considers the obverse problem, one obtains an opposite solution: the contractor's late deployment of excavation equipment would entitle the employer to recover the additional costs incurred through the payment of liquidated damages by the contractor. This is an obvious contradiction as the two parties cannot both be an

outright winner at the same time. This obvious contradiction leads Keating to consider this approach as inadequate in solving concurrent delay problems.

Under common law there are only a few cases where this approach has been applied and many of them have been overturned at a later date by higher courts.

4.2. Burden of proof approach

‘‘If part of a damage is shown to be due to a breach of contract by the claimant, the claimant must show how much of the damage is caused otherwise than by his breach of contract, failing which he can recover nominal damages only.’’11 Thus, for example, the contractor would be entitled to compensation for the overrun costs incurred if, and only if, he is able to prove that the damages claimed result solely from the employer. However, if one considers the obverse problem, the employer would be entitled to claim liquidated damages if, and only if, he is able to prove that the delay (and the associated damages) results solely from the contractor. In the example in question (employer’s delay in site area handover and contractor’s delay in excavation equipment deployment) neither party would be in a position to prove that the delay incurred was caused solely by the counterparty. Thus, one reaches the contradiction that both parties fail at the same time. For this obvious contradiction, as before, Keating considers this approach inadequate in solving concurrent delay problems.12 Under common law there are only a few cases where this approach has been applied and many of then have been overturned at a later date by higher courts.

4.3. Dominant cause approach

‘‘If there are two causes, one the contractual responsibility of the defendant and the other the contractual responsibility of the claimant, the claimant succeeds if he establishes that the cause for which the defendant is responsible is the effective, dominant cause.’’ This approach is preferred by Keating, however, other authors disagree with this viewpoint. In reality, this approach has rarely been applied by common law courts.16

4.4. Tortious solution

The claimant would be entitled to recover damages if he proves that the defendant is responsible for causing or materially contributing to the damage incurred. The compensation would be reduced if the claimant is found to have also contributed to the damage (in Part VI it will be shown that this is the approach which applies under civil law).

However, it is worth noting that in several common law jurisdictions (e.g. in Canada and New Zealand) the apportionment of responsibilities between the parties in case of concurrent delays may be considered a well established practice.

Besides the four approaches outlined by Keating, two other approaches should be considered:

4.5. ‘‘But for’’ approach

This approach states that a series of consequences would not have taken place, were it not for certain events within the responsibility of the counterparty.20 The contractor often uses this reasoning (whether consciously or not) in situations where the employer requires modifications or additional works and the contractor, due to his own fault, completes the agreed modifications or additional works after the agreed date. In such a case, the contractor states that, were it not for the employer’s request for modifications or additional works, he would have completed the works on time (this is where the term ‘‘but for’’ originates). Despite this approach often being invoked by contractors, it does not seem to have found any support under common law.

4.6. Malmaison approach

This approach,21 which is in line with the principles and criteria stated by the Society of Construction Law Protocol, is named after the case Henry Boot Construction (UK) Ltd v. Malmaison Hotel. The Technology and Construction Court in London accepted that a delay, or a part of a delay, may be attributed to two or more concurrent causes, and stated that the non excusable delay does not prejudice the contractor’s entitlement to the extension of time caused by the excusable delay.

MALMAISON APPROACH:

In the context of an appeal against an interim arbitration award, the Technology and Construction Court (TCC), United Kingdom (UK) in Henry Boot case [1]adopted this approach. This approach holds that if there are two concurrent causes of delay, one of which is a relevant event beyond the control of the contractor (say extremely inclement weather), and the other is not (say the shortage of labour of the contractor), then the contractor is entitled to an extension of time for the period of delay caused by the relevant event, notwithstanding the concurrent effect of the other event; but is not entitled to recover any time-related costs. According to Mr. Brynmore, this principle is also followed under Swiss law and is reflected in Article 44 of the Code of Obligations of the Swiss Civil Code.

The Malmaison Approach was adopted by HHJ Stephen Davies in
Steria v. Sigma, and it has been endorsed in the first instance decisions of
Motherwell Bridge Construction Ltd (t/a Motherwell Storage Tanks) v. Micafil Vakuumtechnik,
Royal Brompton Hospital,
Adyard,
De Beers,
Walter Lilly v. Mackay and, most recently, in
Thomas Barnes & Sons (another decision by HHJ Stephen Davies).

In the Walter Lilly decision, Mr Justice Akenhead explained the logic (in part) behind the Malmaison Approach:

> *I am clearly of the view that, where there is an extension of time clause such as that agreed upon in this case and where delay is caused by two or more effective causes, one of which entitles the Contractor to an extension of time as being a Relevant Event, the Contractor is entitled to a full extension of time.*

[1] Henry Boot Construction Ltd. v. Malmaison Hotel, [1999] [70 Con LR 32]

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Part of the logic of this is that many of the Relevant Events would otherwise amount to acts of prevention and that it would be wrong in principle to construe Clause 25 on the basis that the Contractor should be denied a full extension of time in those circumstances. More importantly however, there is a straight contractual interpretation of Clause 25 which points very strongly in favour of the view that, provided the Relevant Events can be shown to have delayed the Works, the Contractor is entitled to an extension of time for the whole period of delay caused by the Relevant Events in question.

4.7 APPORTIONMENT APPROACH:

The Scottish Courts in City Inn [2] case declined to follow the Malmaison approach, and laid down the apportionment approach. Under this approach, where there are two competing causes of delay, neither of which is dominant, the delay should be apportioned between the contractor and the employer, based on the relative culpability of each of the factors in causing delays.

This approach is also followed in other jurisdictions, such as in Hong Kong and the United Arab Emirates ("UAE").

In Hong Kong, the High Court in Hing Construction [3] case expressly approved and followed the City Inn judgment of the Scottish Courts.

Similarly, Articles 287, 290 and 291 of the UAE Civil Code embody the principle that the liability for the delay ought to be apportioned between the parties in accordance with their respective degrees of fault.

5. SCL PROTOCOL

The Society of Construction Law's 'Delay and Disruption Protocol' advocates a definition of 'true concurrent delay' that is aligned with the HHJ Richard Seymour KC definition in Royal Brompton Hospital.

The Protocol [4]defines 'true concurrent delay' as follows:

[2] City Inn v. Shepherd Construction Ltd., [2010] [CSIH 68]
[3] Hing Construction Co Ltd v Boost Investments Ltd., [2009] BLR 339
[4] SCL Delay and Disruption Protocol 2nd Edition: February 2017, page 6

True concurrent delay is the occurrence of two or more delay events at the same time, one an Employer Risk Event, the other a Contractor Risk Event, and the effects of which are felt at the same time. True concurrent delay will be a rare occurrence. A time when it can occur is at the commencement date (where for example, the Employer fails to give access to the site, but the Contractor has no resources mobilised to carry out any work), but it can arise at any time.

In contrast, a more common use of the term 'concurrent delay' concerns the situation where two or more delay events arise at different times, but the effects of them are felt at the same time.
In both cases, concurrent delay does not become an issue unless both an employer risk event and a contractor risk event lead, or will lead, to delay to completion. Hence, for concurrent delay to exist, both the employer-risk event and the contractor-risk event must be an effective cause of delay to completion (not merely incidental to the delay to completion).

6. KEATING ON CONSTRUCTION CONTRACTS (11TH EDITION)

Ir stipulates that an 'effective cause of delay' is sufficient to establish concurrency. The relevant passage from Keating is quoted – and described as representing the 'settled' position - in His Honour Judge Stephen Davies' judgment in Thomas Barnes & Sons Plc (In Administration) v. Blackburn with Darwen BC:

In respect of claims under the contract:

depending upon the precise wording of the contract a contractor is probably entitled to an extension of time if the event relied upon was an effective cause of delay even if there was another concurrent cause of the same delay in respect of which the contractor was contractually responsible; and

depending upon the precise wording of the contract a contractor is only entitled to recover loss and expense where it satisfies the "but for" test.

Thus, even if the event relied upon was the dominant cause of the loss, the contractor will fail if there was another cause of that loss for which the contractor was contractually responsible.

Now let us explore how various jurisdictions approach on the concurrent delays.

7. UNITED ARAB EMIRATES

If the contract is silent or ambiguous on the issue of concurrent delay, the position under United Arab Emirates (UAE) law is not clear, as the issue of competing causes of delay and concurrency are not expressly addressed in the UAE Civil Code.

It is generally understood, however, that various principles of UAE law favour an apportionment approach, where liability for delay is apportioned between the parties in accordance with their respective degrees of fault.

This approach is consistent with Articles 246, 290 and 291 of the UAE Civil Code, which emphasise 'good faith' and the principle that persons should take responsibility for any harm they have caused. Article 390 of the Code is also relevant because it allows a tribunal full discretion to ensure that compensation reflects the actual loss and could be argued to allow downwards adjustment of liquidated damages where there is concurrency.

8. FRANCE

Concurrent causation or delay is not well developed in French law. Apportionment appears to be favoured by the courts.[57] Put simply, apportionment is premised on the requirements of good faith in the performance of contracts, as set out in Article 1104 of the French Civil Code, and the principle of full compensation, as set out in Article 1231-2 of the French Civil Code, whereby a party is compensated for the loss 'he has suffered – or for the gain of which he has been deprived'

9. SWITZERLAND

Generally, where there are two (or more) independent causes of delay that at least partially overlap, and one is a contractor-related delay and one is an employer-related delay, the general rule is that the contractor is entitled to an extension of time, notwithstanding his or her own delay, but not to additional costs due to the employer's delay (i.e., the Malmaison 'time-not-money' Approach).

10. THE INDIAN SCENARIO.

Section 55 of the Indian Contract Act, 1872 (the Act) provides for law relating to the delay in performance of any obligation of parties to an Agreement.

The said Section is effectively divided into 3 (three) parts,

(i) when time is of the essence of the contract renders the contract voidable if a party fails to perform its obligation on or before stipulated;

(ii) in cases where time is not of the essence, then the party becomes entitle to compensation from the breaching party; and

(iii) when one party accepts performance of any obligation after the stipulated time, the party cannot claim compensation, unless, at the time of such acceptance the party gives notice to the breaching party of its intention to do so.

Vide aforesaid provision, it can be rightly inferred that under certain circumstances, the contractor can still be entitled to damages even though the contractor has agreed not to claim damages.

The Hon'ble Supreme Court of India in the matter of General Manager, Northern Railways vs. Sarvesh Chopra[5] case, while interpreting the provision of Section 55 of the Act had observed as follows:

"Thus, it appears that under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations:

(i) if the contractor repudiates the contract exercising his right to do so under Section 55 of the Contract Act,

(ii) the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible,

(iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms."

[5] General Manager, Northern Railways vs. Sarvesh Chopra [Civil Appeal No. 1791 of 2002],

The Hon'ble High Court of Delhi in the matter of Rawla Construction [6] case, wherein the Hon'ble Court was deciding whether the contractor was entitled for compensation in a case where the delay in the execution of the contract was caused by the reason of default on the part of the employer, ultimately delaying the entire project.

The Hon'ble Court had observed that 'where the cause of delay is due to the breach of contract by the employer, and there is also an applicable power to extend the time, the exercise of that power will not, in the absence of clearest possible language, deprive the contractor of his right to claim damages for the breach'.

Further, the Hon'ble Court was of the opinion that such provisions as attempt to deprive the contractor of the right to claim damages will be strictly construed against the employer. Because such a clause will have calamitous consequences for the Contractor. He will have not remedy anywhere, however outrageous the conduct or behavior of the employer maybe, however interminable the delay.

The Hon'ble High Court of Delhi has in the case of Simplex Concrete [7] case, was of the view that if an agreement contains any clause which takes away the right of the Contractor to claim damages under Section 73 or Section 55, the said clause would be in violation of public policy as envisaged under Section 23 of the Act.

However, in contradiction to its earlier view in Simplex case, the Hon'ble High Court in the matter of PWD vs. M/s Navayuga [8] case, had held clauses barring the contractors to claim damages to be in consonance with the public policy of the country. Further, the Hon'ble Court distinguished the Simplex case by pointing out, that the contractor in the Simplex case did not have the right to sue for breach, whereas in the instant case, the Contractor had an option to sue for damages by not agreeing to the time extension provided under the Agreement.

[6] Rawla Construction Co. vs. Union of India [ILR 1982 Delhi 44]
[7] Simplex Concrete Piles (India) Ltd. vs. Union of India [(2010) 115 DRJ 616]
[8] PWD vs. M/s Navayuga Engineering Co. Ltd. [(2014) SCC Online Del 1343]

11. CONCLUDING NOTES:

Absent any express definitions of concurrent delay to completion, tribunals are likely to treat the term ‘concurrent delay’ to mean the occurrence of delay to the completion of work caused by two or more delay events, one of which is the responsibility of the employer and the other the responsibility of the contractor.

Parties are free to define concurrent delay and address how concurrent delay ought to be evaluated (including apportionment if that is the agreed preferred option).

Parties ought to bear in mind that the prevention principle is not an absolute rule of law and can be circumvented by express wording; tribunals will not readily ignore the allocation of risk in the construction contract.

Given that it is entirely possible that an English court may depart from the Malmaison ‘time-not-money’ Approach, contracts are increasingly being drafted to include a provision to reflect the commercial deal in respect of concurrent delay.

This is sensible and to be commended, the EWCA - England and Wales Court of Appeal having made clear that such clauses are enforceable and do not offend against the prevention principle.

References

1. SCL Delay and Disruption Protocol 2nd Edition: February 2017
2. KEATING ON CONSTRUCTION CONTRACTS (11TH EDITION)
3. Manupatra – legal research portal www.manupatrafast.com
4. GAR Articles on concurrent delays.

CONCURRENT DELAYS IN THE CONSTRUCTION ARBITRATION AND JUDICIAL PURVIEW.

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Concurrency of delays

Concurrent delay is a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency.

Concurrency of delays

..a situation in which, work already being delayed, let it be supposed, because the contractor has had difficulty in obtaining sufficient labour, an event occurs which is a Relevant Event and which, had the contractor not been delayed, would have caused him to be delayed, but which in fact, by reason of the existing delay, made no difference. In such a situation, although there is a Relevant Event, "the completion of the Works is [not] likely to be delayed thereby beyond the Completion Date."

- *Royal Brompton Hospital v. Hammond (No. 6) [2000] EWHC Technology, 39. His Honour Judge Richard Seymour KC*

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Concurrency of delays

Society of Construction Law's 'Delay and Disruption Protocol'

True concurrent delay is the occurrence of two or more delay events at the same time, one an Employer Risk Event, the other a Contractor Risk Event, and the effects of which are felt at the same time. True concurrent delay will be a rare occurrence. A time when it can occur is at the commencement date (where for example, the Employer fails to give access to the site, but the Contractor has no resources mobilised to carry out any work), but it can arise at any time.

Concurrency of delays - USA

Concurrency in the occurrence of the delay events is not a prerequisite for concurrent delay.

When used in the context of construction delay, the term can refer to both delays occurring at the same time as well as delays that occur at different times provided there is a common effect on the critical path and a delay to completion.

Another category is 'offsetting delays' that may not occur simultaneously or even affect the same activities, but may interact over the project as a whole to affect the completion date

Concurrency of delays - USA

George Sollitt Construction Co v. United States *- The Court of Federal Claims*

The exact definition of concurrent delay is not readily apparent from its use in contract law, although it is a term which has both temporal and causation aspects. Concurrent delays affect the same 'delay period.' A concurrent delay is also independently sufficient to cause the delay days attributed to that source of delay.

COMPARATIVE APPROACHES TO CONCURRENT DELAY

If there is concurrent delay, then the question becomes how to allocate responsibility for the consequences.

'The headline position is that where there is concurrent delay, jurisdictions tend either to

(1) provide the contractor with an extension of time for the entire period of concurrent delay but no time-related costs, or

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COMPARATIVE APPROACHES TO CONCURRENT DELAY

If there is concurrent delay, then the question becomes how to allocate responsibility for the consequences.

2. apportion responsibility for the delay based on a culpability assessment, such that the contractor receives an extension of time and time-related costs for a portion of the period of concurrent delay and the employer obtains liquidated damages for the rest of the period, or

(3) take a hybrid approach, effectively a mixture of points (1) and (2).

COMPARATIVE APPROACHES- ENGLAND

The Malmaison Approach

It is agreed that if there are two concurrent causes of delay, one of which is a relevant event and the other is not, then the contractor is entitled to an extension of time for the period of delay caused by the relevant event notwithstanding the concurrent effect of the other event.

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COMPARATIVE APPROACHES- ENGLAND

The Malmaison Approach

Thus, to take a simple example, if no work is possible on a site for a week not only because of exceptionally inclement weather (a relevant event), but also because the

contractor has a shortage of labour (not a relevant event), and if the failure to work during that week is likely to delay the works beyond the completion date by one week, then if he considers it fair and reasonable to do so, the architect is required to grant an extension of time of one week. He cannot refuse to do so on the grounds that the delay would have occurred in any event by reason of the shortage of labour.

COMPARATIVE APPROACHES- ENGLAND

North Midland Building Ltd. vs. Cyden Homes Ltd. [(2017) EHC 2414 (TCC)], the TCC upheld a clause in the agreement which disallowed the contractor's claim fir extension of time. The Agreement executed and entered into between parties, provided that any delay caused by a relevant even (which is an employer's risk event) which is concurrent with another delay for which the contractor is responsible, shall not be taken into account while assessing the contractor's claim for extension of time.

The TCC was of the opinion that the Agreement unequivocally disallowed contractor's claim for extension of time, in case of any event of delay which can be attributable to the contractor.

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COMPARATIVE APPROACHES- ENGLAND

De Beers UK Ltd. (formerly Diamond Trading Co. Ltd.) vs. Atos Origin IT Services UK Ltd. [(2010) EWHC 3276 (TCC),

the TCC although allowed the contractor an extension of time due to occurring of concurrent delay, however, held that the contractor can not recover damages for delay in circumstances where is also responsible of any delaying event.

COMPARATIVE APPROACHES- ENGLAND

Walter Lilly v. Mackay , Mr Justice Akenhead explained the logic (in part) behind the Malmaison Approach:

I am clearly of the view that, where there is an extension of time clause such as that agreed upon in this case and where delay is caused by two or more effective causes, one of which entitles the Contractor to an extension of time as being a Relevant Event, the Contractor is entitled to a full extension of time.

Part of the logic of this is that many of the Relevant Events would otherwise amount to acts of prevention and that it would be wrong in principle to construe Clause 25 on the basis that the Contractor should be denied a full extension of time in those circumstances. More importantly however, there is a straight contractual interpretation of Clause 25 which points very strongly in favour of the view that, provided the Relevant Events can be shown to have delayed the Works, the Contractor is entitled to an extension of time for the whole period of delay caused by the Relevant Events in question

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COMPARATIVE APPROACHES- UAE

If the contract is silent or ambiguous on the issue of concurrent delay, the position under United Arab Emirates (UAE) law is not clear, as the issue of competing causes of delay and concurrency are not expressly addressed in the UAE Civil Code.

It is generally understood, however, that various principles of UAE law favour an apportionment approach, where liability for delay is apportioned between the parties in accordance with their respective degrees of fault.

This approach is consistent with Articles 246, 290 and 291 of the UAE Civil Code, which emphasise 'good faith' and the principle that persons should take responsibility for any harm they have caused. Article 390 of the Code is also relevant because it allows a tribunal full discretion to ensure that compensation reflects the actual loss and could be argued to allow downwards adjustment of liquidated damages where there is concurrency.

COMPARATIVE APPROACHES- FRANCE

Concurrent causation or delay is not well developed in French law. Apportionment appears to be favoured by the courts.[57] Put simply, apportionment is premised on the requirements of good faith in the performance of contracts, as set out in Article 1104 of the French Civil Code, and the principle of full compensation, as set out in Article 1231-2 of the French Civil Code, whereby a party is compensated for the loss 'he has suffered – or for the gain of which he has been deprived'

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COMPARATIVE APPROACHES- Switzerland

Generally, where there are two (or more) independent causes of delay that at least partially overlap, and one is a contractor-related delay and one is an employer-related delay, the general rule is that the contractor is entitled to an extension of time, notwithstanding his or her own delay, but not to additional costs due to the employer's delay (i.e., the Malmaison 'time-not-money' Approach).

COMPARATIVE APPROACHES- INDIA

Section 55 of the Indian Contract Act, 1872 (the Act) provides for law relating to the delay in performance of any obligation of parties to an Agreement. The said Section is effectively divided into 3 (three) parts,

(i) When time is of the essence of the contract, renders the contract voidable if a party fails to perform its obligation on or before stipulated;

(ii) in cases where time is not of the essence, then the party becomes entitled to compensation from the breaching party; and

(iii) when one party accepts performance of any obligation after the stipulated time, the party cannot claim compensation, unless, at the time of such acceptance the party gives notice to the breaching party of its intention to do so.

COMPARATIVE APPROACHES- INDIA

The Hon'ble Supreme Court of India in the matter of General Manager, Northern Railways vs. Sarvesh Chopra [Civil Appeal No. 1791 of 2002],

"Thus, it appears that under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations: (i) if the contractor repudiates the contract exercising his right to do so under Section 55 of the Contract Act,

(ii) the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible,

(iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms."

COMPARATIVE APPROACHES- INDIA

The Hon'ble High Court of Delhi in the matter of Rawla Construction Co. vs. Union of India [ILR 1982 Delhi 44],

whether the contractor was entitled for compensation in a case where the delay in the execution of the contract was caused by the reason of default on the part of the employer, ultimately delaying the entire project. The Hon'ble Court had observed that 'where the cause of delay is due to the breach of contract by the employer, and there is also an applicable power to extend the time, the exercise of that power will not, in the absence of clearest possible language, deprive the contractor of his right to claim damages for the breach'. Further, the Hon'ble Court thought that such provisions as an attempt to deprive the contractor of the right to claim damages will be strictly construed against the employer.

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COMPARATIVE APPROACHES- INDIA

The Hon'ble High Court of Delhi has in the case of Simplex Concrete Piles (India) Ltd. vs. Union of India [(2010) 115 DRJ 616],
if an agreement contains any clause which takes away the right of the Contractor to claim damages under Section 73 or Section 55, the said clause would be in violation of public policy as envisaged under Section 23 of the Act. However, in contradiction to its earlier view in Simplex case, the Hon'ble High Court in the matter of PWD vs. M/s Navayuga Engineering Co. Ltd. [(2014) SCC Online Del 1343], had held clauses barring the contractors to claim damages to be in consonance with the public policy of the country.

Further, the Hon'ble Court distinguished the Simplex case by pointing out, that the contractor in the Simplex case did not have the right to sue for breach, whereas in the instant case, the Contractor had an option to sue for damages by not agreeing to the time extension provided under the Agreement.

COMPARATIVE APPROACHES- INDIA

The Hon'ble High Court of Delhi has in the case of **Delhi Metro Rail Corporation Ltd vs. Voestalpine Schienen GMBH, Austria (03.02.2025 -DELHC), MANU/DE/0576/2025**

When there is a concurrent delay, levying of liquidated damages is barred.

Citing Clause 26.1 of the GCC and SCC, Petitioner has argued that LD at 0.5% per week of the total contract value (capped at 10%) applies to any delay in delivery and should be imposed on the Respondent's overall performance, including timely delivery at DDP Delhi, without being divided between different stages of delivery.

However, this court is of the opinion that the objections raised by the Petitioner lack substance. Learned AT has returned a finding of the fact that delays were caused by shared inefficiencies. It has rightly been held that while the Respondent bore responsibility for certain logistical lapses, delays were also attributed to the Petitioner's administrative inefficiencies and force majeure conditions.

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COMPARATIVE APPROACHES- INDIA & UK

A distinction can be drawn between the judicial precedents prevailing in the United Kingdom and the judicial precedents relevant in India.

Notably, the Indian Courts have allowed and held the contractor to be entitled for compensation in case of breaches that are solely attributable to the employer along with the extension of time to complete the project.

Unlike the Indian Court, the Courts of the United Kingdom have only granted an extension of time to the contractor. However, there are certain cases as well where Indian Courts have not only granted an extension of time to the contractor and no damages thereof.

Concurrency of delays - Summary

The delay events (effective causes of delay) do not need to take place at the same time but the effect of each delay event must affect the critical path and cause delay to completion at the same time.

'True concurrent delay' is extremely rare as it requires the employer-delay event and the contractor-delay event to

(1) occur at the same time and

(2) cause delay to the completion of the work at the same time.

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INFERENCES FROM JUDICIAL PURVIEWS

- **Absent any express definitions of concurrent delay to completion, tribunals are likely to treat the term 'concurrent delay' to mean the occurrence of delay to the completion of work caused by two or more delay events, one of which is the responsibility of the employer and the other the responsibility of the contractor.**
- **Parties are free to define concurrent delay and address how concurrent delay ought to be evaluated (including apportionment if that is the agreed preferred option).**

INFERENCES FROM JUDICIAL PURVIEWS

- **Parties ought to bear in mind that the prevention principle is not an absolute rule of law and can be circumvented by express wording; tribunals will not readily ignore the allocation of risk in the construction contract.**
- **English court may depart from the Malmaison 'time-not-money' Approach, contracts are increasingly being drafted to include a provision to reflect the commercial deal in respect of concurrent delay.**
- **EWCA - England and Wales Court of Appeal having made clear that such clauses are enforceable and do not offend against the prevention principle**

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Thank you for your attention!

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Delay, Disruption and Pacing: What you need to be aware of

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Delay and Disruption - Meaning

Delay and Disruption

Two sides of the same coin…but with a distinction…

- Keating on Construction Contracts:

  "…Claims for "delay and disruption" represent a common feature of construction disputes…"

Hudson's Building and Engineering Construction Contracts:

"…Delay is usually used to mean a delay to the completion date, which presupposes that the activity which was delayed was on the critical path. Disruption to progress may or may not cause a delay to overall completion… but will result in additional cost where labour or plant is under-utilised as a consequence of the event."

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Delay and Disruption

... often involve complex claim assessment...

- Keating on Construction Contracts:

  "...Claims based on either delay or disruption are often difficult for a party to present and for contract administrators and tribunals to assess given the factual complexity of major construction projects. ..."

... to right different wrongs..

- **Delay Claims** relate to **indirect** resources, those which are required for the extended project period. In addition, the contractor will generally be entitled to an Extension of Time (EOT) to complete the project.
- **Disruption Claims** deals with **direct** resources which worked in a disrupted manner. Effectively, disrupted works relate to sub-critical delays which are not part of a critical path analysis (i.e., not part of critical delay)
- ***Therefore,*** Delay claims and Disruption claims *complement* each other by seeking to compensate the Contractor for wrongs of different natures (prolonged deployment vs inefficient working). However, ***both*** need to be specifically claimed.

Delay and Disruption

What is the difference?

Delay Event:	Disruption event:
*An event or cause of **delay**, which may be either an Employer Risk Event or a Contractor Risk Event.*	*The Contractor's actual **productivity** in carrying out work activities is lower than reasonably expected or planned.*
Non-Critical Delay and/ or Critical Delay	Productivity = Production Output/Resource Input Productivity Ratio = Actual / Planned Productivity
A delay event could also cause disruption	A disruption event may or may not cause delay

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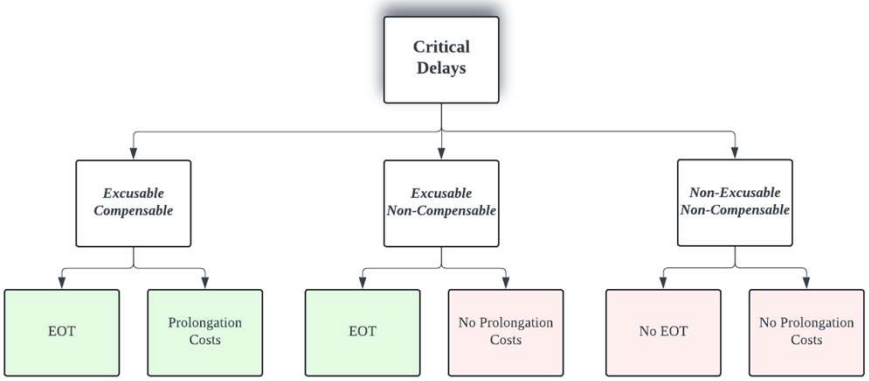
Delay and Disruption

Concepts in delay analysis: categories of critical delays



Assessing Delay and Disruption

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Assessing Delay – Prolongation Costs

- The recovery of additional time related costs that have been incurred due to compensable critical delay(s) to the completion of the works.
- Different types of delay:
  - **Excusable delay** – Events that give rise to an EOT entitlement to the project completion date (and therefore relief to liquidated damages) but not necessarily an entitlement to the recovery of prolongation costs.
  - **Compensable delay –** Events that give rise to an EOT entitlement to the project completion date and an entitlement to recovery of prolongation costs.

Assessing Delay – Prolongation Costs

1. Establish a **cost profile** for indirect, time-related resources over the full project duration .
   - Identify and review the **cost pool** (detailed analysis of account records, cost reports, payroll, invoices etc.)
   - **Strip out all the direct costs** and any other one-off costs / fixed charges that are not time-related
   - **Identify indirect time-related costs** that should be **linked to the activities and project duration**;
   - To add a % profit mark-up, as profit is not a "cost" incurred by the contractor as a direct consequence of a compensable delay. Whether the Contractor is entitled to profit depends on the Contract.
   - Avoid double-dipping. Where applicable, calculate the **adjustments and/or abatements for any indirect time-related costs** that have already been recovered elsewhere (e.g., under dayworks, variations or other claims).
2. Calculate the cost when it is felt:
   average daily cost (or rate) per month/window ***x*** *days of critical delay in that period.*
3. **Demonstrate that the costs being claimed could not have been mitigated** *(e.g, lowering of resources or redeployment of resources to unaffected activities)*

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Assessing Delay

Essentially, assessing disruption is an exercise of comparison.

Contractor to demonstrate that:

- an event occurred that gave rise to an entitlement to claim;
- the event identified has caused disruption; and
- the disruption has actually resulted in the increased costs being claimed.

Contractor to demonstrate entitlement and to consider the following in respect of the relevant contract:

- the event causing disruption is compensable (either under the contract or at law);
- the event gives rise to an increase in actual cost; and
- compliance with the contract's requirements relating to notices and timings has occurred.

Contractor to demonstrate Loss Productivity:

- how the event causing disruption resulted in a loss of productivity – that is, demonstrating 'cause-and-effect'; and
- how the loss of productivity has been measured, including the method and basis of calculation.

Methodologies for assessment

The construction industry has developed and employed a few methodologies for estimating lost labour productivity.

- Project practice based;
- Industry based; and
- Cost based methods.

Data availability typically determines the most appropriate method of analysis to adopt.

- the availability/quality of project documentation;
- the result/outcome uncertainty; and
- the effort required to prepare the claim.

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Disruption Analysis

- Measured Mile (MM) analysis is widely-accepted and reliable method to calculate lost productivity.
  - Comparing identical activities on **impacted** and **non-impacted** section of the project to ascertain loss of productivity resulting from the impact.
- Heavily relies upon accurate contemporaneous records.
  - Quality and provenance of records will often dictate the methodology adopted. Progress and Manpower records should have similar level of detail.
  - Progress and Manpower records could be used to identify idleness which is easier to demonstrate.

Challenges in establishing Claims

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Challenges with Construction Claims

To prevail in a construction claim, the Contractor must establish:

1. **Breach and/or entitlement to a claim;**
2. **Causation; and**
3. **Actual loss.**

Challenges with Construction Claims

1. Establishing breach / entitlement to a claim

- The Contractor has to establish (a) fault of the Employer (b) in context and by reference to the contractual terms.
  - "**Employer Fault**": i.e., that the delay / disruption is due to the Employer's acts/omissions and not merely due to the Contractor's own poor project management.
  - "**In context and by reference to the contractual terms**":
    - "*access to and possession of the site... in proper time for the execution of the work'"*
    - *"Neither Party shall be liable to the other Party ... for any indirect or consequential loss..."* (FIDIC Yellow Book, Clause 17.6)
    - Are there any conditions precedents (e.g., notification requirements)? Those must be strictly complied with (*Diamond Glass Enterprise v Zhong Kai Construction Co and another appeal* [2023] 1 SLR 1451)

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Challenges with Construction Claims

1. Establishing breach / entitlement to a claim (cont'd)

Claims notification under Clause 20.2 of the FIDIC Yellow Book 2017

1. **Step 1: Submit Notice of Claim to Engineer**
   a. Submit within 28 days of becoming aware, or should have become aware, of event
   b. Notice of Claim must describe the event
   c. Keep contemporaneous records as may be necessary to substantiate the claim
2. **Step 2: Submit Fully Detailed Claim to Engineer**
   a. Submit within 84 days of becoming aware, or should have become aware, of event
   b. Must include: (i) detailed description of the claim; (ii) **statement of contractual / legal basis (claim will be time-barred if this is not provided)**; (iii) all contemporaneous supporting documents; (iv) detailed supporting particulars of the amount / EOT claimed
   c. If Notice of Claim was not submitted timely, then must also explain why late submission is justified

Challenges with Construction Claims

2. Establishing loss

- The Contractor needs to prove that it has suffered monetary loss.
- Contractor must place before the Engineer/ DAB/ Court / Tribunal sufficient evidence of the loss that it has suffered.
- However, the ***law does not demand complete certainty*** as to the exact amount of loss suffered. Where precise evidence was obtainable, the court naturally expected to have it, but where it was not, the court must do the best it can.The law recognizes that where it is shown that some substantial loss has occurred, the fact that an assessment of loss is difficult because of its nature is not a justification for refusing to award damages or only awarding a nominal sum (*Robertson Quay Investment v Steen Consultants and another* [2008] 2 SLR(R) 623)

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Challenges with Construction Claims

3. Establishing causation

- The Contractor has to prove a ***causal link*** between entitlement and the loss suffered.
- ***Robertson Quay Investment v Steen Consultants and another*** [2008] 2 SLR(R) 623
  - **Facts**: RQI entered into loan agreements with its shareholders and UOB. RQI argued that if the project had been completed on time, it would have generated income which would then permit RQI to pay off the loans.
  - **Holding**:
    - UOB loan: RQI needed to *go further* and prove that had the project been completed on time, the loan would have been repaid using income generated from the project. Such proof would establish the necessary link between the breach of contract and the loss alleged.
    - Shareholder loans: Court not satisfied that the shareholder loans were for the project

Challenges with Construction Claims

3. Establishing causation (cont'd)

- The surest way to obtain relief is to adopt an itemised approach of proving the causal nexus between each head of loss to each delay event. But difficult where there are multiple concurrent delay / disruption events, and it is difficult to disentangle the combined effect attributable to each event – a "**global" claim or "total loss" claim** seeks to allay this difficulty.
- But caution must be exercised: *ICOP Construction (SG) v Tiong Seng Civil Engineering* [2022] SGHC 257

  *"Advancing a claim for loss and expense in global form is therefore a **risky enterprise**. ... **proof that an event played a material part in causing the global loss, combined with failure to prove that that event was one for which the defender was responsible, will undermine the logic of the global claim**. **Moreover, the defender may set out to prove** that, in addition to the factors for which he is liable founded on by the pursuer, **a material contribution to the causation of the global loss has been made by another factor or other factors for which he has no liability**. If he succeeds in proving that, again the global claim will be undermined."*

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PACING WHEN FACED WITH DELAYS

PACING WHEN FACED WITH DELAYS

What is Pacing?

- Pacing occurs when the slow down of an activity or a series of activities is the result of a **conscious**, **voluntary** and **contemporaneous decision** to pace progress against the critical delay.
- Work can be:
  - slowed down;
  - temporarily deferred to commence later; or
  - performed on an intermittent basis.

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PACING WHEN FACED WITH DELAYS

Components of Pacing

- In practice, a pacing delay need to comprise the following components:

1. **Pacing cannot exist by itself.**
2. **The Employer's critical delay occurs chronologically earlier than the pacing delay.**
3. **Notice has been given to the Employer on both the Employer's critical delay and the pacing delay.**
4. The Employer's critical delay has the effect of creating free float.
5. The pacing delay does not by itself cause further delay to the progress.
6. The Contractor has available resources and could have been able to complete the paced activity on time.

PACING WHEN FACED WITH DELAYS

What are the risks of pacing?

- Improper assessment of the impact of the parent delay, leading to unrealistic pacing.
- In complex projects, it is unclear who is pacing whom.
- Employer-caused delay resolved ahead of time and the contractor cannot recover in time. For e.g.,
- Unable to re-mobilise manpower and/or equipment promptly.
- Unable to speed up material deliveries for work to resume on site.
- A pacing delay may then become a critical path delay, if the Contractor is unable to recover the planned progress when the parent delay has ceased.

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PACING WHEN FACED WITH DELAYS

Practical problems in pacing

- **Lack of timely notice**.
  - Since pacing is not recognised in contracts, contractors may mistakenly believe that no notice is required.
- **Lack of Contractual Definition.**
  - Contracts do not include a definition of "pacing". Likewise, contracts rarely define "concurrent delay."
  - When pacing delay asserted, Employers construe it to be a defense against concurrent delay
- **No contractual mechanism.**
  - Notice requirement? Format of notice?
  - How will the activities be paced?
  - What kind of activities can be paced?
  - What is the estimated cost of pacing?

MARSHALLING YOUR EVIDENCE

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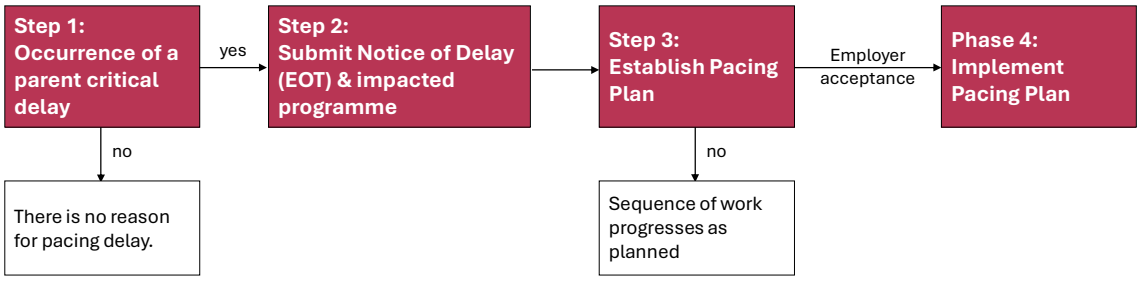
MARSHALLING YOUR EVIDENCE FOR PACING CLAIMS

Does the Contractor have the right to claim for pacing delay?

- Provided that pacing is not precluded by contract or local law, **the contractor's right to pace its work in reaction to a critical path delay is a generally accepted concept**.
- Therefore, the contractor should not be penalised for pacing its work.
- This is consistent with the majority view that **float, a shared commodity, is available for consumption on a "first come, first served" basis**

MARSHALLING YOUR EVIDENCE FOR PACING CLAIMS

Flowchart



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MARSHALLING YOUR EVIDENCE FOR PACING CLAIMS

Step 1 & 2: Extension of Time Claim

- As pacing delay is a response to the effects of a parent delay, it is necessary that the Contractor provides a written notice under the Contract, notifying the Employer of the parent delay and its right to entitlement.
- Components to include in the first instance notice:
  - Notice requirement
  - Basis of Entitlement.
  - Details of the incident that caused the delay.
  - **Impact caused by the Employer's delay event**.
  - **Intention to pace,** stating that because of the parent delay to progress, the Contractor intends to reallocate its resources and slow productivity in mitigation of its losses.
  - Is it a continuing delay event? If yes, send regular updates until the delay event has ceased.

MARSHALLING YOUR EVIDENCE FOR PACING CLAIMS

Step 3: Establish Pacing Plan

- The Contractor should prepare and submit a detailed pacing plan. It is necessary to ensure that the discussion and acceptance of the pacing plan is done in a timely manner.
- Prepare pacing plan
- Identify activities delayed by Employer.
- Identify activities that the contractor plans to pace.
- Identify the revised construction sequence and updated programme.
- Estimate the pacing cost
- Estimate delay cost i.e., cost to Employer if contractor maintains original schedule.
- Plan must demonstrate pacing will mitigate Employer damages: Employer-caused Delay vs Pacing.
- Establish contingencies i.e., time required to remobilise manpower and resources.

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MARSHALLING YOUR EVIDENCE FOR PACING CLAIMS

Step 3: Establish Pacing Plan

- Documentation to be submitted includes:
- **Analysis of the Employer delay to determine whether pacing is logical and cost effective.**
- **An updated schedule showing the paced activities.**
- **Comparative analysis of the estimated pacing costs versus the delay costs.**
- The pacing plan should also demonstrate the work the contractor plans to pace was, until the advent of the Employer delay, being performed as planned in the current schedule.
- Contingencies required by the Contractor, i.e., time required to remobilise manpower and resources.
- How the risks are managed in the pacing plan.
- **In this case, it is recommended that the Employer's written acceptance of the pacing plan and estimated costs be obtained before the Contractor commences pacing.**

MARSHALLING YOUR EVIDENCE FOR PACING CLAIMS

Step 4: Implement Pacing Plan

- When the pacing plan is implemented, carefully track which activities were slowed down, how they were slowed, and what cost impacts were incurred.
- Monitor the progress of the parent delay event (i.e., services diversion) and the estimated date of completion.
- Communicate the progress of the works.
- Once the parent delay event ceased, communicate the resumption of the works according to the pacing plan. If there is an agreed buffer time to resume works, provide an updated working schedule.
- Submit an updated revised programme, if needed.

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MARSHALLING YOUR EVIDENCE FOR PACING CLAIMS

Damages Recovery

- In general, Contractors assert pacing delay to seek recovery of cost incurred (if any) arising from pacing.

Preparing a comparative cost analysis. Effectively, the cost of pacing delay must be less than the parent delay.

- Estimate pacing cost - The cost to the owner depends on the pacing option adopted.
- Estimate parent delay cost – cost to the owner if the contractor maintains the original schedule
- Plan must demonstrate that the pacing will reduce the damages incurred by the Employer.
- May be able to negotiate compensation for impact costs.
- Examples of costs which may be recoverable:
  - Idling costs for manpower, machineries, plants
  - Idling cost for management and supervision of the works
  - Demobilisation and re-mobilisation of machineries and plants
  - Typical extended project overhead costs

MARSHALLING YOUR EVIDENCE FOR PACING CLAIMS

Records for cost claims

Good records are critical for contractors and subcontractors to justify cost claims:

- Ledger and accounting data
- Timesheets
- Plant allocation sheets
- Salary and employee cost records
- Payment records to suppliers and subcontractors
- Subcontract agreements
- Supplier agreements
- Cost statements
- Purchase orders
- Invoices

Claims preparation should not start only after the delay / disruption event occurs – it should start *before*! Contemporaneous records that are both detailed and accurate are therefore of utmost importance.

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MITIGATING LOSSES v/s MITIGATING DELAYS

MITIGATING LOSSES v/s MITIGATING DELAYS

The Duty to Mitigate

Mitigate what?

- A Contractor has a duty to mitigate its **losses** – it does not have a *general common law* duty to mitigate the **delay**
- Thus, and subject to the express terms of the contract, there is no requirement to add extra resources or work outside of planned hours (See SCL Delay and Disruption Protocol, 2nd Ed)

How to mitigate?

- A Contractor must:
  - take reasonable steps to **minimise** its losses (e.g., redeploy to some other profitable activity unaffected by the delay or to some other project)
  - **NOT** take unreasonable steps to **increase** its losses (e.g., unreasonably increase idle resources on site)

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MITIGATING LOSSES v/s MITIGATING DELAYS

The Duty to Mitigate – Contractor's perspective

Scenario A: Employer delay event

- Employer causes delay to the contractor's works
- Contractor submits EOT application
- Employer unreasonably refuses to grant EOT
- **Question**: Can the Contractor claim that this is a "constructive" instruction to accelerate?
- **Answer**: It depends on the governing law
  - USA
  - UK and Singapore
  - Australia

MITIGATING LOSSES v/s MITIGATING DELAYS

The Duty to Mitigate – Employer's perspective

Scenario B: Contractor delay event

Question: Is Employer obliged to mitigate the *extent* of the delay caused by Contractor?

- **Answer**: No. In fact, Employer might be able to claim on the LD clause

Question: What if the "Employer" is actually the Main Contractor and there is an even larger LD provision in the Main Contract? One can readily see that it would be in the Main Contractor's interest to mitigate the *extent* of the delay caused by the Subcontractor. Can the Main Contractor recover for mitigation measures it implements?

- **Answer**: Yes. *Cleveland Bridge UK Limited v Severfield-Rowen Structures Limited*
  - **Facts**: Sub-subcontractor's (CB's) works were delayed (anticipated 6 wks). Subcontractor' (SRS') contract with Main Contractor had an LD clause of GBP 500,000 p/w. Fearing LDs under the Main Contract, SRS implemented extensive acceleration measures (extended working hours etc). Mitigation measures were ultimately **not** successful in recovering any delays.
  - **Holding**: "*sensible and reasonable for SRS to institute its recovery programme … because SRS was faced with a very substantial liquidated damages liability*"
    - Not sufficient for breaching party to say that there were other measures less burdensome / more effective that could have been taken – the breaching party must establish that the mitigatory action was not reasonable in the circumstances

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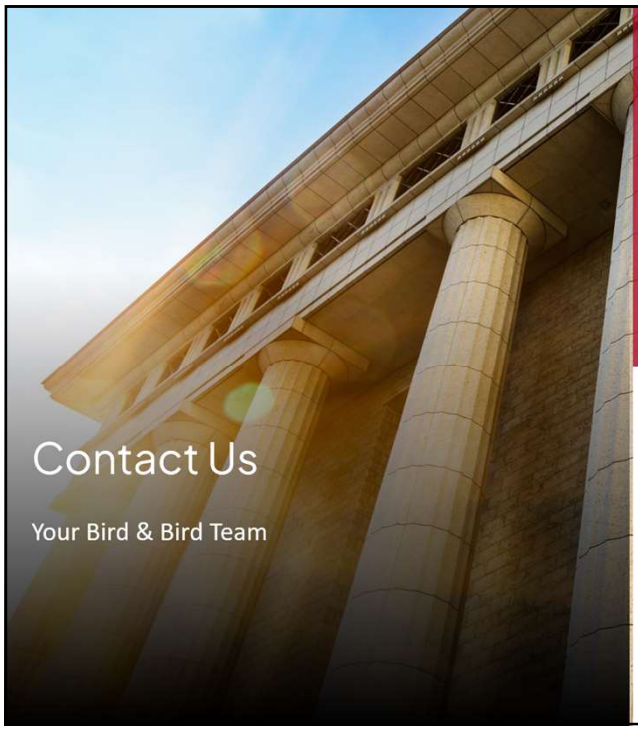

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Akshay is a Partner in Bird & Bird's Singapore office, focussing on international commercial arbitration, adjudication, and mediation, work. Akshay is dual qualified in UK and India, and he brings over 15 years of experience in the ADR and Dispute Management/ Resolution space.
Akshay has been involved in multiple disputes across India, ASEAN, China, Japan, Korea, and the Middle East, including arbitrations relating to construction and infrastructure projects, traditional and renewable energy, oil & gas projects and pipelines, development of mining concessions, commodity trade, shipping, life-sciences and technology. Akshay often acts as the lead and arguing counsel in arbitration, adjudication and mediation matters and has the experience in advising on arbitration matters under many international arbitration rules.
***"Akshay Kishore**, you have been our go-to disputes lawyer in Singapore for more than three years now. We are very pleased with your commercial approach to resolving our disputes and your astute ability to comprehend and tackle technical engineering issues."*
– Legal 500 Asia Pacific 2024

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Mark is a senior associate in our Dispute Resolution Group in Singapore, and have represented clients in various high-value, cross-border, commercial litigation and international arbitrations.
He has advised and acted for local, foreign and multinational clients on multiple cross-border contentious matters. With his background in aeronautical engineering, he has advised and acted for a reputable Asian airline in an arbitration under the SIAC Rules against one of the largest Maintenance, Repair and Overhaul (MRO) organisations in the world, involving claims and counterclaims in excess of S$90 million. He has also represented clients in relation to their disputes on various infrastructure projects including the construction of a 5-star resort in the Maldives, public utilities pipelines in Singapore, tunnel ventilation systems in Singapore, and oil pipelines in the UAE. These matters range from simple non-payment to multi-million-dollar disputes involving complex technical issues with hundreds of thousands of pages of evidence.
Mark has been recommended for Dispute Resolution by Legal 500 Asia Pacific 2023, 2024

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Thank you!

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