



# Ineffective Use of Expert Evidence in Construction Arbitration

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DUBAI ARBITRATION WEEK







What is the role of experts in construction arbitration?



What are the challenges involved?



What are the solutions?





# The role of the expert witness



Provide opinions based on witness evidence and documents



Assist Tribunals in a field of unique complexity





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## What are the challenges?

'Hired gun' partiality

Use of conflicting facts, data, methodologies

Asymmetric use of expert witnesses

- Reduced utility of evidence
- Inefficiency
- Delay
- Cost
- Lack of confidence in the process

## **Existing solutions in international arbitration**

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Institutional

 IBA Rules on Taking of Evidence 2010

Guidelines

- ClArb Protocol 2007
- Expert Codes of Conduct

Expert Witness
Conferencing

- Also known as 'hot-tubbing'
- Experts engage in a simultaneous forum-like discussion about differences in their conclusions

Tribunal
Appointed
Experts

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- Prague Rules
- Less perceived bias from parties
- Nevertheless disadvantages



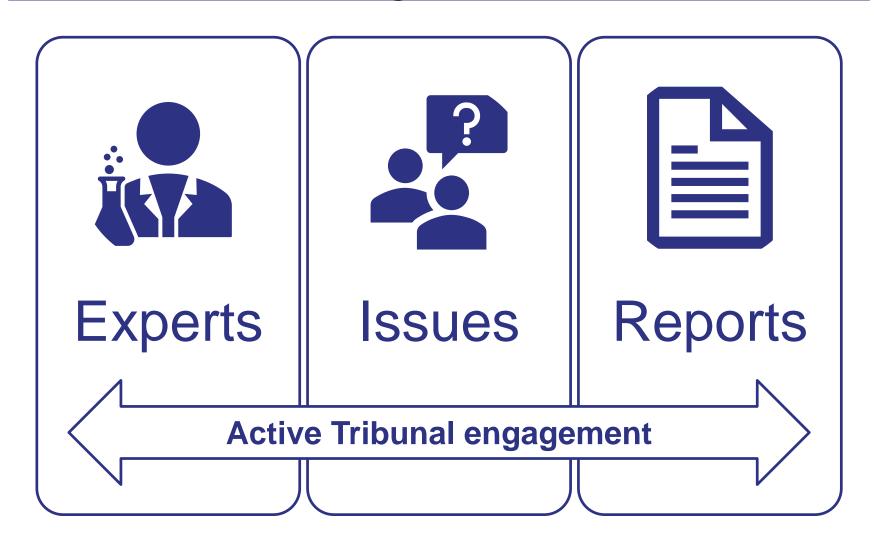
#### What can be done better?

- 1. Early identification of disciplines and experts
- 2. Common list of questions
- 3. Deferral of expert reports until factual evidence is available
- 4. Common data set
- First joint expert reports identifying areas of agreement and disagreement
- 6. Then individual expert reports on areas on disagreement only
- 7. Experts providing alternative views on the other's assumptions and methodologies





#### **Proactive case management**







## Use of experts for calculations

**Experts** 

**Expert Access Protocol** 

Tribunal

#### Delivering the experts to the Tribunal after the hearing

Experts can be valuable to the tribunal's calculations in the final award

Tripartite
agreement
between the
parties, the
tribunal and the
experts

Confidential communication between tribunal and experts posthearing





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