



EXPERT EVALUATION- THE UNEXPECTED ALTERNATIVE?

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Abstract

This paper seeks to examine whether an expert evaluation is an alternative dispute resolution that is worth considering. Based on the author's experience in preparing expert evaluation for parties' negotiations, the author is of the view that expert evaluation serves to give an indication as to the likely outcome of a dispute resolution if disputed construction claims were referred to arbitration, adjudication or litigation. Such outcome helps the parties make informed decisions in the process of negotiations. However, such outcome is only effective if the expert is well-versed in construction law and has present or prior experience as an arbitration/litigation counsel, claims expert witness, adjudicator or arbitrator. For this purpose, the parties may either mutually or unilaterally select a suitable candidate to carry out the expert evaluation.

Introduction

There are various forms of alternative dispute resolution that are implemented in Malaysia, such as, adjudication and mediation. However, expert determination is almost rarity, if not an endangered species. Nevertheless, a variant of expert determination has been flourishing in Malaysia and it is called expert evaluation. Though expert evaluation has yet to gain recognition in most textbooks as an alternative method of dispute resolution, the author seeks to examine the effectiveness thereof.

What is expert evaluation?

Unlike an expert determination which is binding upon the parties who have agreed to appoint an expert to make a determination of the disputes, an expert evaluation is essentially an expert determination that is non-binding but is merely advisory in nature. According to Andrew Burr in *Delay and Disruption in Construction Contracts* (Burr, 2016), in an expert determination forum, “the expert is appointed for his (or her) knowledge and understanding of the particular issues in dispute in the field in which he is an acknowledged expert. The essence of expert determination is that the expert should act inquisitorially, to ascertain for itself the relevant facts and law, in relation to the issues in dispute, to make its own inquiries, tests and calculations, form its own opinion and decide upon the merits of the parties’ position.”

What added value does expert evaluation bring?

In expert evaluation, the expert is often a person who is already an expert in construction claims and disputes. Thus the expert is familiar with the disputes and is able to not only carry out an evaluation of the merits of the parties’ claims and counter-claims but also apply both the applicable law of contract and construction

law to the disputes. Because expert evaluation is inquisitorial in nature, more often than not, the expert will interview the relevant staff of the parties in order to sieve and arrive at a factual matrix of the disputes. In other words, the expert is able to set out clearly the parties' rights and liabilities from a bird's eye view.

Such a bird's eye view is integral to resolving disputes because, more often than not, negotiations break down due to each party's perception of its own rights and liabilities in respect of the dispute. Such a perception is often fuelled by the party's own staff who only sees the dispute from a fixed angle as opposed to a bird's eye view. A lack of preparedness on the part of a party in ascertaining a realistic bottom-line offer will invariably spell doom to the negotiation even before it begins. If the gap between two disputing parties' bottom-line offers is too wide, a settlement is, without a doubt, unattainable. It is in this event that some parties seek an external assistance in the form of an expert evaluation.

Based on the author's experience in preparing expert evaluation for parties' negotiations or mediation, the author is of the view that expert evaluation serves to give an indication as to the likely outcome of a dispute resolution if disputed construction claims were referred to arbitration, adjudication or litigation.. It follows that the report helps the parties to attain a better-informed perception of the parties' positions in terms of their rights and liabilities so that the parties are enabled to ascertain a realistic bottom-line offer prior to beginning a negotiation.

However, the expert's report will only be as good and accurate as the information provided by the parties. Accordingly, where the expert finds that the documents provided so far by the parties are inadequate in that there are gaps in the factual matrix, the expert may interview key staff of the parties who are involved in the claims. If the dispute were to be referred to arbitration, such key staff would

essentially be factual witnesses in an arbitration proceeding. In this respect, the expert is minded to evaluate verbal statements given by the key staff applying the same standard of proof in a civil proceeding, that is, on the balance of probabilities. The skill in applying the standard of proof is part and parcel of an expert's forte if the expert is well-versed in construction law and has present or prior experience as an arbitration/litigation counsel, claims expert witness and either an adjudicator or arbitrator. The expert must be able to assess and ascertain not only monetary claims but also delay claims in a credible and independent manner. If the expert has no expertise in the claims, then the expert is not an expert.

How effective is expert evaluation?

The parties may either mutually or unilaterally select a suitable candidate to carry out the expert evaluation. In the author's experience, a majority of expert appointments are carried out unilaterally by one party as mutual appointments are rare. The degree of success in a negotiation will depend on the willingness and openness of the parties to settle. In recounting his experience, the author states that a project owner was willing to pay for an expert evaluation report where the author interviewed the contractor in the presence of the project owner regarding the contractor's claim for extension of time and loss and expense arising from delays caused by the project owner. Because the interview and assessment of the contractor's claims was done in a transparent manner and in the presence of both parties, the author's report together with its findings was accepted by both parties that eventually led to the parties' execution of a settlement agreement.

Nonetheless, there are also other instances where the expert evaluation report was unsuccessful in contributing to a settlement between the parties. No doubt the expert's report may have assisted the parties to arrive at a more realistic bottom-line offer, thereby narrowing the gap between the parties' respective bottom-line

offers, however it still may not be enough to bring about a settlement. Because the expert evaluation report is non-binding and is of an advisory role, there is still a gap between the parties' respective bottom-line offers. If neither party is willing to compromise in a negotiation, then the gap still remains a hindrance to a settlement. After all, a negotiation requires a give and take. Any miscommunication or lack of communication can cause mistrust or end one party's interest in working with another. Negotiating requires more than simply one party telling the opposing party what the former wants.

There are also other instances where the expert evaluation report is commissioned by one party for its own internal reference and is not disclosed to the opposing party. The reason being that the party that commissioned the report uses the report as a basis for determining its bottom-line offer before it enters into any negotiation with the opposing party. This type of negotiation rarely succeeds as the opposing party does not have the benefit of the expert evaluation report's findings. Even if the opposing party commissions its own expert evaluation, the chances of the findings in two opposing expert evaluation reports being more or less the same are slim unless both experts are not only provided with the same documents and opportunities to interview key staff of the parties but also possess the same values of professionalism, independence, experience and expertise.

Conclusion

Expert evaluation is effective to enable parties in dispute to draw up a realistic bottom-line offer for the purpose of negotiation. This would narrow the gap between the parties' positions. However, the chances of expert evaluation being successful in aiding negotiations will increase if both parties are willing to negotiate in good faith and have the benefit of a joint expert evaluation report.



John Wong's profile.

In year 1996, John begun his career in quantity surveying and since year 1999, John has specialised in construction contract claims and dispute resolution. In his past employment from 1999-2007, John was trained by a seasoned construction lawyer in arbitration counsel work involving construction disputes, and interpreting contracts pursuant to canons of construction. John read Law (LLB) part-time in 2003-2005. John's all-round experience as a Quantity Surveyor, Claims Specialist, and Arbitration Counsel gives him an added perspective in excelling as an Adjudicator, Arbitrator and Expert Witness.