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Suggested Policies for Tribunal-Appointed Experts in Construction Disputes

Elina Mereminskaya[1] and Fernando Landeros[2]

Abstract

The experience generated within Chilean legal order shows that the involvement of a tribunal-appointed expert could put under pressure the general principle that assigns the burden of proof to the parties. The fact-finding powers of the arbitral tribunal, and thus, the powers of the tribunal-appointed expert, should be balanced with the parties' prerogative and burden to frame their cases the way they deem fit. In this paper, we rely on our professional experience within the area of construction disputes and offer some practical tips on how the work of the tribunal-appointed expert should be structured in order to observe parties' burden of proof, principle of due process and the tribunal's authority to assess admissibility and value of the evidence. More specifically, we suggest that: i) the parties as well as the tribunal should play an active role when defining the terms of reference for the expert; ii) the tribunal-appointed expert should follow formal channels of communication with the parties, under the supervision of the tribunal; iii) the tribunal-appointed expert should receive additional documents only if sanctioned by the tribunal and only those produced through the formal communication channels; iv) the tribunal-appointed expert should identify whether his or her report is based on the documents originally produced by the parties or whether they were produced upon expert's request; v) in line with the expert's auxiliary role, he or she should clearly inform the tribunal whether the conclusions have been reached based on theoretical estimations or assessment of real damages.

I. Introduction

This article analyzes the role of experts appointed by arbitral tribunals in construction disputes, using as a framework the experience of the Chilean legal system.

In construction disputes, the outcome often depends almost entirely on the technical assessment of the facts. However, at least in Chile, it is rare to find an arbitrator in possession of a technical degree. In addition, as in many other Civil Law jurisdictions, previous mandatory or voluntary adjudication is virtually unknown or not in use. Therefore, due to the complexity of the issues traditionally raised in construction cases the arbitral tribunal is often prompted to rely on the expert opinion.

Chilean procedural law does not expressly recognize the figure of a party-appointed expert. The use of party-appointed experts has been an incipient and still rare trend emerging due to progressive internationalization of arbitral proceedings. The tribunals rely almost entirely on experts they appoint. Thus, the Chilean legal system could be seen as a laboratory to test how the tribunal-appointed experts operate and to determine the challenges presented by their

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participation in proceedings, drawing lessons for the international commercial arbitration arena.

The first section presents the regulatory framework for arbitration in Chile (II). The following section analyzes the figure of experts in Chilean law. In particular, what we wish to establish in this context is whether the expert is designated as an assistant to the tribunal or is rather in charge with producing independent evidence (III). Next, we will analyze the tribunals' inquisitorial powers that are extended to experts if their work is seen as assistance (IV). In the next section, we discuss the way in which this subject matter is regulated in the realm of international arbitration (V). The fifth section analyzes the problems that we have observed in practice as a result of how tribunal-appointed experts operate (VI). In the final section, we offer some suggestions that we believe may improve the interaction between the parties, the tribunal, and the tribunal-appointed experts valid for national as well as international realm (VII).

II. Regulation of Arbitration in Chile

Arbitration in Chile is conceived as an analogous jurisdiction to that of the ordinary courts.[3] The Organic Code of Tribunals (COT) and the Code of Civil Procedure (CPC) refer to the figure of "*jueces árbitros*" (arbitrator judges), who are incorporated into the state's justice administration system.[4] Case law has stated that, "arbitrators are responsible for administering justice and therefore perform a public function, since jurisdiction is an exclusive power of the State and only the bodies authorized by it can exercise it."[5] Certain matters are even subject to mandatory arbitration, demonstrating once again that Chilean law follows the jurisdictional notion for domestic arbitration.[6]

This means that there is the possibility of challenging arbitral awards through appeals and cassation recourses, which are waived by the overwhelming majority of the parties.[7] In addition, Chilean arbitrators are subject to the judicial and disciplinary supervision of the higher courts, such as the Courts of Appeals and the Supreme Court, through a recourse of complaint, which cannot be waived.[8]

In 1992, the Chamber of Commerce of Santiago created the Arbitration and Mediation Center (CAM Santiago), which ended up positioning arbitration as the most appropriate option for complex contracts across several areas of the country's economic activity. Currently, the

[3] Patricio Aylwin, *El juicio arbitral*, Ed. Jurídica, Santiago, 2005, page 49.
[4] Article 222 of the COT: "Se llaman árbitros los jueces nombrados por las partes, o por la autoridad judicial en subsidio, para la resolución de un asunto litigioso".
[5] Santiago Appeals Court, "*Urrutia con de la Maza*", August 29, 1986, pages 80-82. Santiago Appeals Court, "*De Bonis, Domingo con Zugadi, María Nieves*", November 30 1983, pages *77-79*, at Santiago Chamber of Commerce, *El arbitraje en la jurisprudencia chilena*, 2005.
[6] Article 227 of the COT: "Deben resolverse por árbitros los asuntos siguientes: 1° La liquidación de una sociedad conyugal o de una sociedad colectiva o en comandita civil, y la de las comunidades; 2° La partición de bienes; 3° Las cuestiones a que diere lugar la presentación de la cuenta del gerente o del liquidador de las sociedades comerciales y los demás juicios sobre cuentas; 4° Las diferencias que ocurrieren entre los socios de una sociedad anónima, o de una sociedad colectiva o en comandita comercial, o entre los asociados de una participación, en el caso del artículo 415 del Código de Comercio; 5° Los demás que determinen las leyes."
[7] Only cassation appeals lodged for formal, administrative reasons due to lack of jurisdiction or *ultra petita* are considered unwaivable (Article 768, No. 1 and 4 of the CPC).
[8] Complaint-recourse regulated in Article 545 of the COT, whose first line states: "El recurso de queja tiene por exclusiva finalidad corregir las faltas o abusos graves cometidos en la dictación de resoluciones de carácter jurisdiccional."

Center receives around 270 cases annually. In particular, the construction industry and the real estate sector have been active users of the Center's services, and these types of disputes correspond to 21% and 20% of the cases filed, respectively.[9]

The conceptual proximity between the ordinary trial and domestic arbitration has meant that many of the judicial practices are reproduced in arbitration. Therefore, experiences with experts in judicial disputes are also valid for what occurs in arbitrations.

In 2004, Law No. 19.971 was approved, which embedded the UNCITRAL Model Law on International Commercial Arbitration into Chilean law. This created a dual system, in which domestic and international dimensions of arbitration have each their own regulation. International commercial arbitration has had a positive development, although there are not many known cases. To date, the Santiago Court of Appeals has rejected all petitions for annulments of awards, and local legal remedies attempted against these decisions have been declared inadmissible.[10] Anyway, in Chile, the domestic arbitration has major prominence for the day-to-day legal practice.

III. Role of the Tribunal-Appointed Expert in Chilean Law

Following the trend observed in many civil law countries, the figure of the party-appointed expert is not provided for in Chilean law.[11] The law only refers to the expert to describe the person appointed by the tribunal. Indeed, those who intervene on behalf of the parties are often referred to as "*expertos*" to distinguish them from those who are the true experts in a legal sense, called "*peritos*".

Despite the relevance of the expert's opinion as evidence, its regulation is very succinct.[12] Especially the law does not establish the expert's powers while performing his or her task, and gives just a limited guidance on how to interact with the parties and with the tribunal. It is not clear from the law whether the expert's opinion should be considered as an autonomous means of evidence, or as an auxiliary tool for the judge or arbitrator to understand the technical aspects of the case.[13]

On the one hand, Article 341 of the CPC names the "expert report" among other means of evidence that can be used in a trial showing that it is as an independent means of evidence.[14] As we will discuss below, the tribunal should not replace the parties in furnishing the evidence. This would mean that the need for the report and its scope should be controlled by the parties rather than by the tribunal.

At the same time, Article 412 of the CPC states: "Reports from experts may also be heard: 1. In connection with factual points whose assessment requires special knowledge of science or

[9] http://www.camsantiago.cl/informativo-online/2016/06/docs/graficos%20estadisticas.pdf
[10] *See* Elina Mereminskaya, *Arbitraje comercial internacional en Chile: Desafíos y desarrollo*, Thomson Reuters, Santiago, 2014, pages 113-124.
[11] Sebastiano Nessi, "Expert Witness: Role and Independence", in Christoph Müller, Sébastien Besson, Antonio Rigozzi (eds.), *New Developments in International Commercial Arbitration 2016*, CMAJ, pages 71-105, pages 74-78.
[12] Articles 411-425 of the CPC.
[13] Diego Valdés Quinteros, "El perito y el dictamen pericial en el Proyecto del Nuevo Código Procesal Civil Chileno", *Revista Estudios Jurídicos Democracia y Justicia*, No. 1, 2012, pages 63-78, page 67.
[14] Mario Casarino Viterbo, Manual de Derecho Procesal, Tomo IV, 6th edition, Editorial Jurídica, 2009, ¶451.

arts." The same provision assigns the expenses and fees originating from the expert's report to the party who requested it, unless the court deems the appointment of the expert "necessary in order to clarify an issue", notwithstanding any decision made regarding legal costs.

In addition to the foregoing, Article 159 of the CPC regulates the so-called "*medidas para mejor resolver*", that is, measures for better fact-finding. These are evidentiary measures that can be ordered *ex officio* by the court or tribunal, after the closure of the proceedings and before issuance of the decision. Paragraph 4 of that precept expressly sets forth the tribunal's authority to order "the expert report".

The powers to order the expert opinion at any stage of the case justify the conclusion that the expert is more of an assistant to the tribunal whom he or she delivers special knowledge it lacks.[15]

In light of these contradictions, it seems correct to conclude, as Chilean scholar does, that "the current CPC does not give us a clear answer to the legal nature of the expert, as it includes provisions that support both theories; it seems that 'the expert report has a dual nature.'"[16]

The National Rules of Arbitration of CAM Santiago, in its Article 32, also reproduces this duality. The provision states that "expert evidence may be ordered at the request of a party or *ex officio* by the Arbitral Tribunal to inform it in writing on matters requiring a special knowledge of a science or art."[17] It follows from its literal wording that the expert opinion is one of the means of evidence, the purpose of which would be to specifically clarify a technical matter to the arbitral tribunal.

Indeed, it is conceivable to assume that the expert generates independent evidence, interpreting the facts in the light of his or her technical knowledge. But the generation of this evidence depends ultimately on the requirements of the tribunal, which needs to be aided by the expert in order to be able to issue the award.

Considering that the expert is, in one way or another, assisting the tribunal, it is worth asking whether the latter performs an inquisitorial activity or if the expert only may assist it by assessing the evidence previously submitted by the parties. Our experience shows that this question, if unresolved, is the source of many of the conflicts that arise in practice.

IV. Principle of Burden of Evidence Production vs. Inquisitorial Principle

In general, there are two extreme principles to determine factual basis for an award or decision: the inquisitorial principle that attributes a fact-finding responsibility to the tribunal, and the principle of the parties' burden to produce evidence.[18] The former used to be characteristic of civil law countries, and the second has marked the legal tradition of common law. However, these differing systems "started from more polarised positions but tend to

[15] Diego Valdés Quinteros, "El perito y el dictamen pericial en el Proyecto del Nuevo Código Procesal Civil Chileno", *op.cit.* page 67.
[16] *Id.*
[17] http://www.camsantiago.cl/reglamento_arbitraje_nacional2.html: "la prueba pericial podrá ser decretada a solicitud de parte o de oficio por el Tribunal Arbitral para que se informe por escrito sobre materias que requieran de un conocimiento especial de una ciencia o arte."
[18] Burkhard Hess and Othmar Jauering, *Manual de Derecho Procesal*, Marcial Pons, 2015, page 166.

gravitate to more common approaches over time."[19] Today, some differences remain, but it is observed that, on the one hand, judges in many Spanish-speaking jurisdictions intervene little in the production of evidence.[20] On the other hand, U.S. judges have powers to produce evidence.[21]

It is worth noting that, while within the pure inquisitorial system the court has an obligation to conduct the investigation of the facts, in the mixed schemes that prevail today, the procedural burden of producing the facts falls upon the parties, and the tribunal's power to act *ex officio* is merely discretionary.[22]

In the case of Chile, the regulation of the civil process in principle has a strong bias in favor of the principle of the parties' burden of producing evidence. The burden of proof lies with the parties making certain claims or formulating certain defenses,[23] while the dynamic burden of proof is not in use in the civil process.[24]

Thus, the parties should seek the best strategies to strengthen their positions, where the logical choice would be to submit their own expert reports. However, as is customary in the legal tradition of Civil Law, parties' experts bring about a number of concerns such as their lack of impartiality, as well as an absence of coordination between reports that ultimately encumbers the work of the tribunal.[25]

Thus, in practice, in an open contradiction with the principle of the parties' burden of producing evidence, the tribunal usually forms its own opinion through the expert report ordered by it. Moreover, parties often explicitly wish to afford the tribunal such an opportunity and request the tribunal-appointed expert as the most efficient and transparent option to establish the facts of the case.

At the same time, in spite of the gain in efficiency obtained with a tribunal-appointed expert, if the latter performs his or her functions excessively proactively, parties could perceive a

[19] Jeff Waincymer, *Procedure and Evidence in International Arbitration*, Kluwer Law International, 2012, page 478.
[20] S.I. Strong, Katia Fach Gómez and Laura Carballo Piñeiro, *Comparative Law for Spanish–English Speaking Lawyers*, Edward Elgar Publishing, 2016, page 58.
[21] Andrés Bordalí Salamanca, "Los poderes del juez civil", in Andrés De La Oliva, Diego Palomo (eds), *Proceso civil: Hacia una nueva justicia civil*, Editorial Jurídica, Santiago, 2007, pages 186-187. S.I. Strong, Katia Fach Gómez and Laura Carballo Piñeiro, *Comparative Law for Spanish–English Speaking Lawyers*, Chapter 8.
[22] Burkhard Hess y Othmar Jauering, *Manual de Derecho Procesal*, *op.cit.*, page 167.
[23] Article 1698 of the Civil Code: "Incumbe probar las obligaciones o su extinción al que alega aquéllas o ésta. Las pruebas consisten en instrumentos públicos o privados, testigos, presunciones, confesión de parte, juramento deferido, e inspección personal del juez." It is interesting to note that expert evidence is not mentioned in this context.
[24] Article 294.2 of the Draft Code of Civil Procedure: "El tribunal podrá distribuir la carga de la prueba conforme a la disponibilidad y facilidad probatoria que posea cada una de las partes en el litigio lo que comunicará a ellas, con la debida antelación, para que asuman las consecuencias que les pueda generar la ausencia o insuficiencia de material probatorio que hayan debido aportar o no rendir la prueba correspondiente de que dispongan en su poder".
[25] Klaus Sachs and Nils Schmidt-Ahrendts, "Protocol on Expert Teaming: A New Approach to Expert Evidence" in Albert Jan van den Berg (ed), *Arbitration Advocacy in Changing Times*, ICCA Congress Series, 2010 Rio Volume 15, Kluwer Law International 2011, pages 135-148, page 139.

certain loss of control over the case, as well as sparking a fear that the expert will assume the decision-making process, replacing the arbitral tribunal.[26]

To avoid this, and before setting the scope of the expert's work, it is useful to keep in mind the extent of the tribunal's inquisitorial powers.

Traditional Chilean doctrine has understood that the proactive role of the judge must be limited, since the search for material truth is not an objective of the civil process:[27] "Generally, the subject of proof is always a statement of fact and its strict purpose is to attain the conviction of the judge. Consequently, it is not always going to be the truth that, ultimately, will reveal the process, regardless of how much the parties have stated something as true and how much the judge has, in turn, tried to discover it. At most, the process is a set of news and probabilities, more or less fruitful, according to the background information submitted by the parties."[28] Therefore, when the tribunal uses its inquisitorial powers *ex officio* for better fact-finding, it must do so "with the greatest parsimony and seriousness", "in a restrictive manner, also safeguarding, and preferentially, the right of the parties to be tried according, mainly, to their own and sole intervention in the trial".[29]

In keeping with the above, the expert report "is not intended to establish the occurrence of such and such facts, but, based on its nature, it is intended to explain to the tribunal the facts already proven by other means and whose appreciation requires special knowledge of a certain science or art."[30] In other words, if being an investigator is not the primary role of the tribunal, neither can the role of the tribunal-appointed expert be considered as such. Thus, fact-finding through the tribunal-appointed expert seems legitimate but it cannot be overarching in a way that overrides the parties burden of proof.

V. The Role of the Tribunal-Appointed Expert in International Commercial Arbitration

The regulation that is applicable to international arbitration generally combines an acknowledgement of the principle of the parties' burden of proof with an explicit recognition of the arbitral tribunal's inquisitorial powers.

In that regard, the UNCITRAL's Model Law on Arbitration is illustrative. Its Article 23(1) sets forth the burden on the claimant and the respondent to "*state the facts supporting his claim*". The respondent shall, "*state his defence in respect of these particulars*." But at the same time, the tribunal may, "*conduct the arbitration in such manner as it considers appropriate*", which indubitably also supports the ability to conduct investigative activities.

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[26] *Id*., page 140.

[27] At present, there are many voices that advocate both for a judge figure with broad inquisitorial powers (Andrés Bordalí Salamanca, "Los poderes del juez civil", *op.cit*., pages 192-193) and those who propose to eliminate such powers altogether (Fundamentos adjudicación, page 378., Diego Iván Palomo Vélez, "Sobre el papel del juez civil en materia de prueba, especialmente de las medidas para mejor resolver. A propósito de la paradoja que evidencia nuestro sistema procesal tras la reforma procesal penal", in *Reforma procesal civil, oralidad y poderes del juez*, Legal Publishing, 2010, page 361).

[28] Carlos Anabalón Sanderson, *Tratado práctico de derecho procesal civil chileno. El juicio ordinario de mayor cuantía*, Editorial Jurídica, Santiago, 1954, ¶ 1844. In the same vein, Jorge Larroucau Torres, "Hacia un estándar de prueba civil", *Revista Chilena de Derecho*, vol. 39 No. 3, pages 783 - 808 [2012], page 783.

[29] Carlos Anabalón Sanderson, *Tratado práctico de derecho procesal civil chileno. El juicio ordinario de mayor cuantía*, *op.cit*., ¶ 2183.

[30] *Id*., ¶ 2113.

The arbitral tribunal is further authorized to appoint experts through which it may carry out fact-finding on its own. Article 26 of the Model Law states: "Unless otherwise agreed by the parties, the arbitral tribunal (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal; (b) may require a party to give the expert any relevant information to produce, or to provide access to, any relevant documents, goods or other property for his inspection."

For its part, Article 25.1 of the ICC's Rules of Arbitration provides: "The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means." Paragraph 4 of the same Article 25 authorizes the arbitral tribunal to "appoint one or more experts, define their terms of reference and receive their reports." Paragraph 5 thereof makes clear the tribunal's authority to require the parties to "provide additional evidence."

Article 6.1, paragraph 3 of the IBA Rules offers a similar guidance: "Subject to the provisions of Article 9.2, 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 authority of a Tribunal-Appointed Expert to request such information or access shall be the same as the authority of the Arbitral Tribunal."

As a general conclusion, upon analyzing various legal and regulatory precepts, it has been suggested that: "the arbitral tribunal generally has (with some few exceptions) the power to investigate the facts on its own initiative," under the condition that, "the evidence ascertained must be submitted to the parties for comment, and that, in some cases, the parties' will must be taken into consideration in first instance."[31]

At the same time the tribunal "should not exercise its independent fact-finding powers to identify a factual basis for a conclusion different to the contentions of either party" or "to establish a prima facie case where the claimant has failed to do so." [32]

Accordingly, in general terms, with some restrictions, an international arbitral tribunal has broad powers to use expert opinions not only for purposes of assessing previously produced evidence, but also to fulfill a fact-finding task. This framework is similar to the situation in Chile and allows us to suggests that the Chilean experience that we shall now proceed to analyze, could offer insights interesting for international arbitration.

[31] *See* Teresa Giovannini, "Ex Officio Powers to Investigate: When Do Arbitrators Cross the Line?" in Domitille Baizeau and Bernd Ehle (eds.), *Stories from the Hearing Room: Experience from Arbitral Practice (Essays in Honour of Michael E. Schneider)*, Kluwer Law International, 2015, pages 59-76, page 67. Along the same line, Judith Levine, "Can Arbitrators Choose Who to Call as Witnesses? (And What Can Be Done If They Don't Show Up?)" in Albert Jan van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges*, ICCA Congress Series, Volume 18, Kluwer Law International, 2015, pp. 315-356, p. 319. *See also*, Nigel Blackaby, Constantine Partasides, *Redfern and Hunter on International Arbitration*, 6th ed., Kluwer Law International, Oxford University Press, 2015, pages 305-352, ¶¶5.23 and 5.24.

[32] Jeff Waincymer, *Procedure and Evidence in International Arbitration*, *op.cit.*, page 780.

VI. Typical Challenging Situations regarding tribunal-appointed expert interaction with the parties and the tribunal

As outlined above, on some occasions neither the parties nor the tribunal conceptualize the role of the tribunal-appointed expert. More specifically, they fail to manifest whether they require the expert report to assess the produced evidence or to aid the tribunal in investigating the facts and events that took place. Lack of awareness about the foregoing might produce challenging situations for the parties that put on trial the principles of due process.

First, this determination will impact on how and who define the scope of the expert's task. In Chilean legislation, the law requires a hearing called the "recognition" hearing, where the parties acknowledge the expert as per Article 417 of the CPC. Pursuant to Article 419, in that same hearing the parties may make any observations they deem appropriate, along with establishing the facts and circumstances they believe relevant. In the international realm, this outcome is attained using the terms of reference set for the expert.

The question is whether it is exclusively the parties that, driven by their burden of proof, must intervene in the drafting of the terms of reference and instruct him or her what evidence to assess to inform the tribunal. However, if the tribunal remains passive during this process, the parties could pose the questions in such a way that the expert would end up practically presenting two reports in one. Moreover, if the tribunal abstains from raising its own questions, a valuable opportunity to clarify certain facts could be lost.

By way of example[33], in a case in which the contractor was suing the client for the reimbursement of expenses incurred due to the early termination of the contract for causes attributable to the client, the tribunal ordered to issue two expert reports, one under the terms suggested by each party. The contractor requested the expert to analyze the expenses actually incurred, by reviewing the invoices, bills and receipts for expenditures. In turn, the client requested a valuation of the works according to a list of unit prices of the contract and not based on the actual expenses.

As the two assignments differed, it was impossible to compare the results. Ultimately, the tribunal ordered that both reports must simultaneously inform: (i) whether the works performed by the contractor were necessary pursuant to the contract; and (ii) whether the claimed expenses matched market values.

Another example was seen in arbitration proceedings between a construction company and its client, a mining company. The tribunal ordered expert assessment pursuant to parties' requests. The contractor requested the expert report to analyze the existence of changes in the project that could have affected the performance of the works, which were allegedly introduced by the client through the issuance of transmittal documents that enclosed new plans. In turn, the client requested the expert assessment to analyze the information from a certain point in time onwards after a *finiquito* (release and settlement) in connection with the prior disputes, which was being repudiated by the contractor.

[33] The cases we rely on in this section have come to our knowledge through professional experience. With the exception of one litigation case identified below, there are arbitral cases that we were involved in. Therefore, the cases are used as examples of practical situations, but we cannot provide further identification in order to respect their confidential nature.

Since the terms of reference of both expert assessments were different, the expert reports were not comparable with one another. Ultimately, the tribunal had to rely on a third technical report.

This experience shows that it is important for the tribunal to retain some degree of control over the terms of reference in order to take advantage of the efficiency gain provided by a tribunal-appointed expert.

Second, the question that unvaryingly arises in practice is whether the tribunal-appointed expert might request from the parties additional documents to those that they have previously produced. The documentation produced in the proceedings is of utmost importance for the expert, but sometimes it is just incomplete.

By way of example, it is customary in construction trials for the contractor to claim the existence of modifications or changes in the project that were introduced by the client, and which could have affected the normal development of the works. In cases of contracts in which the design is provided by the client it is relevant—to confirm such changes—to rely on the evidence consistent of the plans and technical specifications provided by the client at the time the works were contracted. It is not at all rare for the contractor to omit submitting all of the plans and technical specifications with which it rendered its economic bid, given that in complex projects the number of documents is significant. Without that information, the tribunal-appointed expert would be unable to determine whether modifications or changes to the project were made with respect to what was originally contracted.

A similar situation arises in relation to deadlines. When the contractor claims for time extension, it is essential to provide as evidence the project's official timelines and schedules, both the initial schedule (baseline) and any subsequent updates and rescheduling thereof. It is relevant that such documents were produced in both hard copy and in a digital format using programming software. Unfortunately, it is customary for parties to merely submit a part of those documents, or to file them as hard copies only. When the work programs are submitted only as hard copies, it is complex or sometimes impossible for the tribunal-appointed expert to reconstruct the links or connections between the different work activities, especially considering that their number could reach hundreds or thousands.

However, any request for supplementary information directed at a party improves its position with respect to the other party: the fact that the documents were insufficient means that such party failed to support its claims, which could lead to a dismissal of the claim.

In arbitral proceedings between a construction company and its client, a retail company, involving the construction of a shopping center, the evidence provided by the contractor did not suffice for the tribunal-appointed expert to complete his report. The expert informed the tribunal that it lacked background information including the tender blueprints, expenditure receipts, and records of the resources used in the works, among others. The contractor responded that the documents had already been produced as evidence. At the same time, it submitted the documents once again, alleging having refiled them for purpose of better presentation. Upon reviewing the submission, the expert found that it included new documents that had not been previously submitted, and informed the arbitral tribunal accordingly. Ultimately, the tribunal resolved that such new information should not be considered in the expert report given that the document production phase had already concluded.

The third problem, related to the foregoing, arises when experts directly ask for missing information the party that had not produced it. In those cases, the experts make the mistake of not consulting with the tribunal on whether or not the inclusion of additional information, which is a procedural matter that must be resolved previously by the tribunal, is admissible. Moreover, sometimes there is no record of what exactly are the documents that the party submits upon expert's request. In doing so, the opposing party is precluded from verifying the authenticity of the new information and the expert practically empowers himself to decide on the admissibility of the evidence produced informally and extemporaneously, possibly breaking the due process requirements.

Fourth, construction experts are, by definition, non-lawyers and have no ability to decide legal issues incidental their conclusions. Evidently, on many occasions, in order to establish the facts, the experts need to interpret the contract and related documents. As a result, they are frequently accused of making decisions on legal aspects that fall under the tribunal's jurisdiction. This concern is rather easily addressed by arbitral tribunals, given that they are not bound by the conclusions of the expert report and are free to amend their decisions that are of a legal nature.

However, opposite challenging situations may arise when the tribunal-appointed experts find themselves forced to consider issues that are outside of their technical expertise and would requires the tribunal's guidance to approach them. Should the tribunal decide to adopt a distant stance, avoiding contact with the expert, this could have complications for the expert's work. Exactly this happened in a case in the judicial realm that, nonetheless, we shall cite here. Particularly, the expert was facing the task of considering the effects of a settlement agreement entered into between the parties. Despite various attempts at seeking some guidance from the first instance judge on how he should interpret the effects of said agreement, he received none. The court ultimately based its judgment on the expert's conclusions. However, the Supreme Court later modified that decision, given that there were items considered in the report that should have been excluded because they were covered by the settlement agreement.[34]

Lastly, a problem that we sometimes observe in expert reports is the lack of clarity on the methodology used, which is not commensurate with the expert's task of informing the tribunal and serving as its assistant. For example, when quantifying damages in construction cases, two standard types of analyses are often employed: an analysis of actual damages, and a theoretical analysis. The need for the later type of assessment is due to the fact that the available information is not always sufficient to confirm actual damages and, consequently, experts must resort to supplement this gap.

For example, to calculate general expenses when contracts experience deadline extensions, the total amount considered for general expenses is divided by the number of days comprising the original term to perform the works and then multiplied of the number of the days the delay lasted. This simple method seeks to determine the proportional increase of general expenses that a deadline extension would entail. However, that method is theoretical. While it could be viewed as a reasonable method to determine the increase of general expenses, it does not allow knowing the actual expenses incurred by the contractor as a result of the deadline extension.

[34] Supreme Court of Chile, Case No. 33.634-2015, August 30, 2016.

On the other hand, oftentimes experts resort to theoretical methods to estimate productivity loss. This occurs because many constructors do not have detailed information on their workforce used and the impact it suffers due to external interferences. They are often unable to provide resources reports, periodical productivity reports by sector or item, attendance records, and remunerations records, among others. If the expert does not clearly state that theoretical calculation methods have been used, the tribunal will find itself in the dark while awarding certain damages.

VII. Proposed Guidelines

This article does not seek to offer a comprehensive treatment of issues related to the involvement of the tribunal-appointed expert. We rely on our experience within the Chilean legal order with the conviction that some of the problems that have arisen in the Chilean context, might be symptomatic for international settings as well. Thus, in order to address the situations discussed above we suggest the following:

First, the parties and the tribunal itself, should get involved in drafting the tribunal-appointed expert's terms of reference. This would allow unifying criteria for the expert's task. This way, the tribunal-appointed expert's report would address the parties' as well as the tribunal's concerns and inquiries. Even when it is decided to commission two expert assessments, thanks to the tribunal's intervention, these would be comparable with one another, avoiding incompatible expert reports that would be mostly useless for a tribunal that lacks the technical knowledge to contrast them in further detail. Instead, unifying the terms of reference through active involvement of the tribunal, would prevent it from having to order a third expert opinion or from hiring an informal personal consultant to get help to interpret diverging conclusions.

Second, the relationship of the tribunal-appointed expert with the parties must follow formal channel of communication so that all the parties could be aware of the expert's progress and requirements in order to safeguard the due process. This would allow the parties to react and the tribunal to intervene when any procedural questions arise that are beyond the expert's competence. It specifically means that any request for the production of additional documents should be directed to the parties in a formal way, avoiding receiving the evidence outside of those channels. It falls upon the tribunal to decide whether it wishes to use its inquisitorial powers and accept a broader production of evidence. But in order to do so, it must be made aware of the expert's request.

Third, the expert should inform the tribunal whether or not the concepts claimed or argued by the parties have been established by the documents originally provided. This would allow the tribunal to decide on whether the party has complied with its burden of proof prima facie, notwithstanding that it might want to go in further details and order production of additional documents. Even if the tribunal opts to play a fact-finding role, the entire burden of proof of the parties should not be transferred over to the expert.

Forth, the tribunal-appointed expert is usually expected to perform two tasks: confirm the facts and events occurred during the works, and assess their impact in terms of costs and time. Thus, the expert must avoid making conclusions on strictly legal aspects of the dispute. When facing situations that require considering this kind of aspects, the expert could propose different analysis scenarios conditioned by possible legal interpretations, so that it is the tribunal that ultimately determines the appropriate alternative. For example, the expert could

include in its report a decision tree that shows the multiplicity of possible scenarios and their effects on the facts to be assessed.

Fifth, the tribunal-appointed expert should explain in the report whether the conclusions reached are based on real damages actually suffered by the contractor or, conversely, they entail theoretical estimations indispensable for lack of other evidence, or a combination of both. This is relevant because it allows the tribunal to decide whether such conclusions have sufficient merit so as to be considered in its final decision.

Overall, these recommendations seek to ensure that the tribunal-appointed expert plays an active role in fact-finding, but always subject to tribunal's guidance on procedural and legal matters. At the same time, the suggested guidelines pursue channeling the expert's activity in such a way that the principle of the parties' burden of proof is respected by maintaining the arbitral tribunal's broad powers to decide on the admissibility and of the evidence and its probative value.