



Meetings of experts and joint statements

BACKGROUND

Dispute resolution can be both a time consuming and expensive process. A way of increasing its efficiency is through the meeting of experts, where the party-appointed experts meet to identify areas where they agree, discuss points of disagreement and narrow the issues requiring further consideration. The statement produced by the experts after the meeting, the joint statement, helps to direct the focus of all stakeholders on the unresolved issues and make better use of the expert time and evidence.

This practical perspective provides guidance on meetings of experts and joint statements for litigation before the courts in England and Wales, as governed by Rule 12 of Part 35 of the Civil Procedure Rules (CPR.P35) and Paragraph 9 of the corresponding Practice Direction 35 (CPR.PD35) which covers the topic of 'Discussion between experts'.

Arbitral proceedings sometimes include meetings of experts. Where expert meetings are planned, the guidelines for the meetings and any resultant statements may be defined by the tribunal or derived from rules from the adopted institution and/or ad hoc rules. The points identified in this helpsheet are equally applicable to meetings in the context of such arbitral proceedings.

MEETING OF EXPERTS

Meaning

A meeting of experts is a discussion between the party-appointed experts on issues of the matter under litigation relating to the experts' area(s) of specialisation and experience. These issues may be specified in the experts' instructions or outlined by the court.

Objective

The primary objective of a meeting of experts is to allow the experts time together to consider the issues before them, discuss their respective viewpoints and professional opinions on these issues and identify the differences between them. The experts are not given the mandate to settle a case, but to separate out the agreed positions from the contentious points. The points of disagreement may provide a prioritised agenda to the parties, their legal representatives and the court for use in the subsequent proceedings.

Requirement and Timing

A meeting of experts is not mandatory in litigation: it is organised either at the court's direction or by mutual agreement of the parties. Therefore, expert meetings will not take place in every case where experts are involved.

There is no prescribed timing for when during the litigation lifecycle the meeting of experts should be held; the court or the parties may ask the experts to meet during the early stages of a case, may defer until a more appropriate time later in the process or there may be multiple meetings at different stages. It is more common for the meeting of experts to be held after the issue of written reports by the experts but before the evidentiary hearings. In some smaller cases where expert reports are exchanged simultaneously, a meeting of experts is sometimes held in lieu of expert reply reports.

CPR.PD35.9.2 –

‘The purpose of discussions between experts is not for experts to settle cases but to agree and narrow issues ...’

CPR.P35.12 –

‘(1) The court may, at any stage, direct a discussion between the experts to (a) identify and discuss the expert issues in the proceedings; and (b) where possible, reach an agreed opinion on those issues. (2) The court may specify the issues which the experts must discuss.’

CPR.PD35.9.1 –

‘Unless directed by the court discussions between experts are not mandatory. Parties must consider, with their experts, at an early stage, whether there is likely to be any useful purpose in holding an experts’ discussion and if so when.’

Preparation

Expert meetings should be properly prepared for so that the meeting proceeds as effectively as possible.

Questions to consider before meeting include:

Should an agenda be set?

The experts should decide whether it would be appropriate to prepare an agenda before the meeting. An agenda which has been put together and agreed by the experts before the meeting can help the meeting to be productive. It could also prevent the meeting breaking down as a result of failing to agree the appropriate discussion points.

The agenda is generally derived from the key points included in the submissions of the experts and may be prepared initially by either expert. The agenda should be neutral in tone, as unambiguous as possible, and should clearly list the specific issues to be discussed.

CPR.PD35.9.3 –

‘Where the experts are to meet, the parties must discuss and if possible agree whether an agenda is necessary, and if so attempt to agree one that helps the experts to focus on the issues which need to be discussed. The agenda must not be in the form of leading questions or hostile in tone.’

What will be the format, venue and length of the meeting?

In determining the format and venue for the meeting, the experts and/or parties may review such factors as complexity of the matters under consideration, physical location of the experts and costs. While a face-to-face meeting is the common choice, experts could choose to conduct meetings via video conference or telephone.

If the experts meet in person, the most appropriate location to be used may be a neutral venue or the premises of one of the experts. If this is not feasible, the meeting may be held at the premises of either the legal advisers or the parties.

The experts may discuss the likely duration in advance of the meeting. For example, it could be organised as a single session over one day, multiple sessions over several days dealing with specific issues/class of issues per session or another mutually convenient format. However, it is not always possible to accurately predict the time required to discuss all the identified issues, so each side will need a certain degree of flexibility.

What meeting protocols should be set?

Experts may find it helpful to agree, where possible, protocols relating to the conduct of the meeting. These protocols can be agreed before the meeting or otherwise at the start of the meeting.

These protocols include agreeing on the following points:

- Who will be responsible for taking minutes or notes of the meeting and/or the joint statement? There may be an advantage to taking responsibility for drafting minutes and/or the first version of the joint statement, although this may be burdensome. Each expert is likely to want his own note of the meeting and not risk relying on the other side to provide the notes within a reasonable time.
- How will any meeting minutes/notes be exchanged?
- Will an independent scribe be invited to minute the meeting? It may be advantageous to have an independent account of the discussions of the meeting.
- Will the experts show their clients and/or legal representatives the joint statement before it is finalised? It may be helpful to discuss this protocol in advance of the meeting and have the agreement of the parties and legal representatives.

Who should attend the meeting?

Experts may choose to meet each other alone or bring colleagues with them. In such cases, it may be preferable to have the same number of representatives from each side, so experts should notify one another of the number and names of attendees before the meeting.

The expert meetings are intended to deal with technical issues, keeping away from points of law, and provide an environment for discussion and debate without the pressure of examination under oath. So it is standard (and better) practice for the experts to meet without either the parties or their legal representatives present. However, such attendance may be appropriate for some or all of the meeting, for example, where ordered by the court or jointly decided by the parties.

If legal representatives are present at the meeting, they should not interfere with the conduct of the meeting unless either specifically requested by the experts or to advise on a specific point of law. It is important that the experts are in control of the discussions and the proceedings at the meeting.

CPR.PD35.9.4 –

‘Unless ordered by the court, or agreed by all parties, and the experts, neither the parties nor their legal representatives may attend experts discussions.’

CPR.PD35.9.5 –

‘If the legal representatives do attend – (i) they should not normally intervene in the discussion, except to answer questions put to them by the experts or to advise on the law; and (ii) the experts may if they so wish hold part of their discussions in the absence of the legal representatives.’

Without prejudice

The discussion between experts is held without prejudice and as such is confidential and will not be disclosed in court, without the parties’ agreement.

The discussion of the experts and its outcome do not, under normal circumstances, bind the positions of the parties instructing the experts. In practice, parties may find it difficult to take a stand different from that agreed by their expert.

CPR.P35.12.4 –

‘The content of the discussion between the experts cannot be referred to at the trial unless the parties agree.’

CPR.P35.12.5 –

‘Where experts reach agreement on an issue during their discussions, the agreement shall not bind the parties unless the parties expressly agree to be bound by the agreement.’

JOINT STATEMENT

Objective

The key outcome arising from the meeting of experts is the joint statement detailing, with reasons, the areas of agreement and disagreement. The experts should clarify the reasons for their disagreement; for example, this could be due to the factual assumptions or the calculation methodology. It would be helpful if the experts could reach agreement on each other’s numbers, subject to the facts, so that the court would be able to understand the quantum effect of its findings and judgments.

The statement can also address:

- any further tests, analysis or steps to be undertaken to resolve the outstanding points of disagreement and corresponding timetable;
- any alternative recommendations; and
- any further material issues.

CPR.P35.12.3 –

‘The court may direct that following a discussion between the experts they must prepare a statement for the court setting out those issues on which (a) they agree; and (b) they disagree, with a summary of their reasons for disagreeing.’

CPR.PD35.9.2 –

‘... and in particular to identify:

- (i) the extent of the agreement between them;
- (ii) the points of and short reasons for any disagreement;
- (iii) action, if any, which may be taken to resolve any outstanding points of disagreement; and
- (iv) any further material issues not raised and the extent to which these issues are agreed.’

Structure

During the meeting, the experts may together decide the structure and order of the joint statement. Although there are no prescriptive rules on how to structure a joint statement it is common that they are structured either as a:

- Tabular format – for example 3 columns setting out (1) the issue, (2) the claimant’s expert opinion on the issue and (3) the defendant’s expert opinion on the same issue; or
- Memorandum format – each issue is addressed on a paragraph by paragraph basis where the issue is outlined and both experts outline their opinions in turn.

There are also no set rules on the order that issues are addressed in the joint statement. Examples of possible approaches include:

- in the order of discussion during the meeting;
- in the order issues are addressed in the expert reports; or
- similar classes together.

Experts may decide to address the areas agreed upon first, before addressing the areas of disagreement.

Timetable

During the meeting of experts, the experts must agree who should prepare the first draft of the joint statement. It is common, but not essential, for the claimant’s expert to produce the initial draft. However, enough time must be given to both experts to complete their drafting. In some cases, it is necessary for the experts to continue to communicate over emails and phone calls following the meeting of experts. During this process various iterations of the draft joint statement may be shared between the experts.

Review

The parties and/or their legal representatives may wish to review the joint statement before it is completed and additionally may ask experts to reconsider or even shift from the position agreed at the meeting. The experts must remember their overriding duty is to the court and that independence and objectivity are paramount for the discharge of their roles. There is no need for approval from the instructing parties before signing the joint statement. Any position assumed by the experts must be based on the free exercise of their own independent and professional judgement and the expert’s own opinion must be given in the joint statement.

Finalisation

After the joint statement is drafted, exchanged, agreed and finalised, it must be signed by each expert. The directions in CPR.PD35.9.6 specify that the joint statement must be signed by the experts within seven days of concluding discussions.

If the expert shifts their position significantly in the joint statement from that taken in their report, the expert must detail this change in the joint statement and explain the underlying reasons.

CPR.PD35.9.6 –

‘... Individual copies of the statements must be signed by the experts at the conclusion of the discussion, or as soon thereafter as practicable, and in any event within 7 days. Copies of the statements must be provided to the parties no later than 14 days after signing.’

CPR.PD35.9.7 –

‘Experts must give their own opinions to assist the court and do not require the authority of the parties to sign a joint statement.’

CPR.PD35.9.8 –

‘If an expert significantly alters an opinion the joint statement must include a note or addendum by that expert explaining the change of opinion.’

Conclusion

The aim of the meeting of experts is to identify the areas of agreement and clarify the issues of, and reasons for, disagreement. This should then be clearly explained by the experts in their joint statement. The court will then be in a position to understand the quantum effect of its findings and judgments on these areas.

Things to look out for:

- Have the meeting agenda and protocols been agreed beforehand?
- Do the parties or their legal representatives really need to be present at the meeting?
- Does it appear that the expert has been advised by the party or its legal advisers?
- Are the final positions at the end of the meeting clearly understood?
- Have the experts discussed whether they would consult the party or its legal advisers before signing the joint statement?
- Does the joint statement help the court?

ETHICAL ADVICE

If you are ever in doubt as to whether or not your conduct is ethical, you should step back from the situation and analyse it. It often helps if you put your thoughts down on paper or take a second opinion. Section 100 of the Code of Ethics (paragraphs 100.16 – 100.20) includes a framework for ethical conflict resolution. This outlines a series of steps that can help you not only to identify the problem but also to resolve the ethical conflict. In resolving such ethical conflicts it is important that you make a file note to explain the rationale for your position. This will help if your conduct is later challenged.

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