55 EDITORIAL

56 ArbItration

56 Challenging Arbitrators for Bias and Conflict of Interest
David Thomas QC & Jane Lemon QC

63 Experts Should be Under Control When Providing Evidence in Arbitration
John Temple-Cole

69 IN-HOuSE CounSEL foCus

69 Why are there so Many Sets of Arbitration Rules?
Ian Pennicott SC, QC

74 ADJUDICATION

74 An Overview of Security of Payment Legislation in Different Jurisdictions
Albert Yeu

81 MedIatIon

81 Facilitative Versus Evaluative Mediation
Christopher To

88 JURISdICtIoN FoCus

88 Malaysia Country Update
Dato’ Lim Chee Wee, Sharon Chong Tze Ying & Nimalan Devaraja

97 BOOK REVIEW

97 Williams & Kawharu on Arbitration (2nd Edition)
Reviewed by Robert Morgan

99 neWS

Past issues of the Asian Dispute Review are also available at www.kluwerarbitration.com.
EDITORIAL

This issue of *Asian Dispute Review* commences with an examination of the law and practice of challenging arbitrators for bias and conflicts of interest by David Thomas QC and Jane Lemon QC. It is followed by an article by John Temple-Cole on how to use expert witnesses in arbitral proceedings. Albert Yeu then discusses security of payment legislation in different jurisdictions.

The ‘In-house Counsel Focus’ article by Ian Pennicott SC, QC explores the commonalities and differences between the many sets of arbitration rules available and asks why there are so many. This is followed by an article by Dr Christopher To in which he compares the facilitative and evaluative approaches to mediation.

The ‘Jurisdiction Focus’ article by Dato’ Lim Chee Wee, Sharon Chong Tze Ying and Nimalan Devaraja explores legislative, case law and institutional developments in Malaysia.

This issue concludes with a review by Robert Morgan of the second edition of the leading New Zealand text, *Williams & Kawharu on Arbitration*.

CONTRIBUTORS

Sharon Chong Tze Ying
*Skrine*
*Malaysia*

Ian Pennicott SC, QC
*Des Voeux Chambers*
*Hong Kong*

John Temple-Cole
*KordaMentha*
*Sydney*

Nimalan Devaraja
*Skrine*
*Malaysia*

David Thomas QC
*Keating Chambers*
*United Kingdom*

Jane Lemon QC
*Keating Chambers*
*United Kingdom*

Dr Christopher To
*Gilt Chambers*
*Hong Kong*

Robert Morgan
*Consulting and Technical Editor, Asian Dispute Review*
*Barrister (England & Wales, Queensland)*

Ir Albert Yeu
*Civil Engineer*
*Hong Kong*
Experts Should be Under Control when Providing Evidence in Arbitration

John Temple-Cole

This article considers, from the viewpoint of an expert, matters of good practice that can contribute to the successful giving of expert evidence in arbitration. They include early initial briefings of experts, the formulation of questions and issues, reducing areas of disagreement between experts, effective joint conferencing and joint report strategies, and the concurrent giving of evidence at the hearing.

Introduction
In January 2017, Asian Dispute Review published an instructive article entitled Controlling Expert Evidence in International Arbitration. Whilst it is certainly not desirable for an independent and impartial expert to appear to have been ‘controlled’, experts ought very much to aim to be under control, so that the arbitral tribunal receives the full benefit of their expertise and experience in as clear, efficient and concise a manner as possible.

This article, which is written from the perspective of the expert rather than the instructing party or counsel, considers factors which can contribute to successful expert evidence in arbitration. It draws not only from the author’s own experience but also from a survey among colleagues in his forensic accounting and quantum expert practice who have kindly shared their experiences and thoughts in acting as party-appointed experts in a diverse range of legal disputes across Asia, Australia and elsewhere. Whilst the focus is on the arbitration context, comparisons with their shared experiences in various court roles are at times also useful.

Conduct the initial briefing as soon as feasible
It is hard to believe that an initial briefing can ever occur
too early. Early briefing of the expert allows him or her to provide meaningful input into the proposed questions or matters for expert evidence and the sources of evidence likely to be required in order to opine on those questions or matters. Given that the expert is usually called upon to opine on complex issues that fall largely outside the comfort zone of the instructing legal team, questions or misconceptions on the part of the latter about the significance of particular issues can, and do, occur. This can sometimes manifest itself in the proposed expert in fact advising that an additional or even an alternative expert (for example, from a different field) is required. Early briefing can assist in addressing these misconceptions before it is too late.

Whilst the days of receiving a call along the lines of “We’re in a hearing next week, are you available to prepare a report?” are mostly and happily a thing of the past, briefings still, by and large, do tend to be too late, perhaps in the belief that this may save expert costs through limiting the time available for their work. Inevitably what then follows is a curtailed expert report preparation process, and a much greater likelihood that a significant aspect of the expert’s evidence is compromised or overlooked, or that significant information that may have had a bearing on the expert’s analysis is not at hand.

The collective advice of the author and contributors to instructing lawyers is that a short, early briefing is invaluable and that it should ideally be conducted face to face. Involvement of key client personnel with first-hand knowledge of the significant events should ensure that the retained expert is able to assist the client in finding the appropriate questions, issues and information or identifying previously unknown issues with the opposing party’s case or its expert evidence. This may bring the additional benefit of meaning that the early input of the quantum expert can assist in better informed decisions about settlement strategy.

Use should therefore be made of the expert’s knowledge and insights to obtain a strategic advantage early in the case. By its very nature, expert evidence is difficult to understand for a lay person. It is critical to the success of any case that the legal team obtains a mastery of the expert evidence so that they can understand the strengths and weaknesses of the case and frame an appropriate case strategy. The expert is there to assist with that understanding, so it is wise to make use of his or her knowledge and expertise.

Questions for the expert: general or specific?
The formulation of questions requiring expert input is one aspect in which practices vary widely. Unless questions have been derived from arbitral orders or agreement between the parties, the provision of specific questions at the time of the retainer or initial briefing can sometimes cause difficulty where those initial questions turn out to be either misdirected or incomplete.

Similarly, even for an experienced and sophisticated client, it is difficult for them, when dealing with complex matters subject to expert knowledge, to ask all of the right questions. Even if they can, the analysis of information provided through document discovery or disclosure can often lead to a need to augment or amend the specific questions initially posed. Thus, the approach of developing and agreeing questions through the course of the expert’s engagement is preferred and to be encouraged.
Arguably, a better approach is to brief the expert with an initial general brief to, for example, provide an expert report setting out a quantification of damages, with further and more specific questions or scenarios to be developed in due course. Taking this example, the expert may then be free to apply his or her expertise to identifying additional pertinent questions, calculations or scenarios relevant to the case which can be formalised in a final brief around the time of settling the report.

**Interactions with other experts**

For the most part, the collective experience of the author and contributors is that the parties retaining them are adept at ensuring that experts from equivalent fields are matched, so that there is minimal risk of experts being asked to respond to reports that are partly or wholly outside of their area of expertise.

“Use should … be made of the expert’s knowledge and insights to obtain a strategic advantage early in the case. By its very nature, expert evidence is difficult to understand for a lay person. It is critical to the success of any case that the legal team obtains a mastery of the expert evidence so that they can understand the strengths and weaknesses of the case and frame an appropriate case strategy.”

Notwithstanding this, however, experts do, of course, tend to encounter many areas of disagreement. More often than not in the experience of the author and contributors, this is down to the conflicting instructions and assumptions given to each expert, or to information asymmetry.

**Conflicting instructions and assumptions**

By way of example, a starting assumption of one expert to the effect that a venture would have continued and was expected to prosper, countered by an assumption of the respondent’s expert that it would have failed, would complicate the task of preparing the responsive report and any joint report that follows (on which, more below). Each expert will need to be adept at balancing the need to assist the arbitral tribunal with the need to respond to the other expert’s position, within the boundaries of their respective instructions.

Likewise, it is not uncommon for one quantum expert to be instructed to quantify damages on the assumption that the party instructing him or her has suffered loss emanating from specified conduct. By contrast, the responding expert may simply be instructed to critique the approach and calculations of the quantifying expert, but on the assumption that the conduct in question either did not occur or did not contribute to loss. Whilst this approach allows the responding expert to highlight any perceived or actual flaws in the quantifying expert’s calculations, it may also somewhat disadvantage the responding expert and the probative value of his or her report where the responding expert has not put forward his or her own alternative calculation or methodology. It is therefore worth considering whether the scope of the responding expert’s report should go beyond a simple critique, to encompass his or her views on alternative calculations that may apply in the event that the alternative case is successful.
Information asymmetry

Information asymmetry can take a number of forms. An expert may report, for example, that the basis of a particular calculation or assumption is ‘management information’, without specific reference to particular documents. The task of the responding expert is hampered by the lack of access to or proper understanding of that information, at least at the initial reporting stage. The actual basis may only be revealed close to trial, thereby limiting the ability for the information to be properly assessed and challenged. The expert can assist in identifying such gaps in the information audit trail, so that efforts can be made to seek its production.

A more challenging and sometimes confronting issue, and again one which is not uncommon, arises from an encounter with an expert who does not necessarily understand his or her role, and who seeks to adopt views on interpretation of facts that are really the province of the arbitrator or judge. This can even extend beyond the report to oral evidence at trial, and is seen both in respect of professional advisers who are retained (and perhaps have less familiarity with the expert process and duties) and of ‘in-house’ experts who are held out to be independent.

From the author’s perspective, it is best to stay true to the principle that the expert is there to assist the arbitral tribunal. Whilst it may be necessary for the expert to ensure that the retaining client is made aware of apparent differences in opinion caused by informational issues or differing assumptions, or through a failure to understand the expert role – which is to assist in clarifying the issues at hand in an impartial manner – this should in no way detract from the need to maintain the expert’s independence.

Expert conferencing and joint reports

Jurisdictions such as Australia have been at the forefront of the use of concurrent evidence (of which, more below). This is now the norm in the Australian courts, as well as in most arbitration fora. Alongside this, an expert conclave or joint meeting does normally occur prior to the hearing, but not always.

It has been the experience of the author and contributors, however, that many experts called to give evidence are relatively new to the concept of concurrent hearing of evidence. Equally, all arbitration guidelines and rules, and even arbitral orders, that they have encountered in their practice offer no specific guidance or rules as to the manner or ‘running order’ in which the process will occur. It is fair to say that they have encountered every manner of variation in the process. What follows, therefore, is a narrative based on the ‘usual’ process, to the extent that such a thing exists.

Following the production of a quantifying expert’s report and responsive report, there is little doubt that the norm is for this to be followed by orders for a pre-trial conclave between experts, with subsequent examination of the experts concurrently – although not always. (In the case of a recent arbitration in which the author was involved, such orders were made, but evidence was not then heard concurrently.) Where it does occur, the conclave usually results in the production of at least one joint expert report or statement; however, how that occurs, and what the joint report contains, varies considerably.

“...[I]t is best to stay true to the principle that the expert is there to assist the arbitral tribunal. Whilst it may be necessary for the expert to ensure that the retaining client is made aware of apparent differences in opinion ... this should in no way detract from the need to maintain the expert’s independence.”
Typically, orders require the experts to produce a joint report setting out the matters on which they agree and the matters on which they do not, including reasons. Not unheard of, however, are orders requiring the production of one joint report setting out the matters on which the experts agree and, to the extent that they disagree, a separate report by each expert setting out those areas of disagreement. In other words, a total of up to three reports may emanate from the joint expert process, in addition to the two original reports. The author and contributors take the view that this latter formulation is somewhat problematic and unnecessarily complex. Their belief is that the arbitral tribunal is best assisted when dealing with a single joint report that presents the key issues and components of the calculations and, for each of those components, a brief statement on each of the experts’ positions, including whether they agree or disagree and, where the latter, the reasons why.

In addition to providing a more concise and logical presentation of the issues, such a joint report has the advantage, if well written and structured, of alleviating the need for cross-examination of the experts on their original reports. In other words, the joint report provides the arbitral tribunal and counsel with a convenient agenda for cross-examination and clear statements on each expert’s position. Only where the original reports contain significant detail should it be necessary for cross-examination on those reports to occur. Having said that, even where a joint report is prepared, the experience of the author and contributors is that it is not unusual for that report to be wholly ignored at the trial or arbitration hearing, and instead for the experts to be cross-examined on their original reports. This should highlight the importance of proper consideration being given by instructing lawyers to the purpose and structure of the joint report.

A final practical point to note is that preparation of joint expert reports may occur in a number of ways. The most satisfactory way is, however, to start with a face to face meeting between the experts (geographical challenges allowing), in order to maximise mutual understanding of where each expert is coming from in the development of his or her opinions, and to identify whether different opinions flow from different instructed facts or differences in methodology. The preparation of the joint report through a conclave is very much a process, not a single meeting, and can extend over a period of time and involve face to face meetings (including both experts and their assistants at times), communications and the exchange of various drafts.
When sitting alongside other experts, it is tempting to ‘cross-examine’ them, but one needs to be very measured and to temper this tendency, again by remembering that the primary function of the expert is to provide impartial expert assistance for the benefit of the arbitral tribunal.

Evidence at the hearing
As previously explained, concurrent evidence is now the norm, but with great variations in practice.

For experts, concurrent evidence, particularly in arbitration, is an entirely different experience to traditional examination in chief and cross-examination. It takes on more of the characteristics of a roundtable discussion and has both advantages and disadvantages in ensuring that an expert’s opinion is clearly understood by the arbitrators. This difference is exacerbated where there is a panel of arbitrators rather than a sole arbitrator.

Despite being the norm, the collective experience of the author and contributors is that often no adequate briefing is given as to the manner in which the evidence is to be heard, any instructions by the arbitral tribunal and the effect, if any, on cross-examination. It is not unheard of for each expert, without warning, to be invited at the beginning of the concurrent evidence session to “give a short opening statement”, clearly something for which advance warning would have been useful. The author’s personal mindset for addressing this is be prepared for anything.

Perhaps the key difficulty for an expert in concurrent evidence is knowing when to make a comment or ask a question, and when to leave it to counsel to ask the question or elicit the comment from the expert more directly. The author has personally witnessed an inexperienced expert interrupting not only counsel but also the judge, perhaps in the mistaken belief that open discussion was being encouraged. The style that is required will depend on the expectations of the arbitral tribunal: the more interactive the discussion is, the easier it is to ensure that points are raised without the expert appearing to be an advocate.

Ideally there should have been discussion with counsel before the concurrent session, in order to understand their expectations. Things obviously change in the concurrent session, and part of the expert’s role is to assess whether the arbitral tribunal has understood the expert’s perspective and opinions (even if it is less clear whether the tribunal accepts them). When sitting alongside other experts, it is tempting to ‘cross-examine’ them, but one needs to be very measured and to temper this tendency, again by remembering that the primary function of the expert is to provide impartial expert assistance for the benefit of the arbitral tribunal.

Conclusion
Experts can play a critical role in assisting the arbitral tribunal to understand key aspects of the case before it. To ensure that the tribunal has the fullest opportunity of understanding the expert’s perspective and opinions, clients are encouraged to commence the briefing process early and to develop specific instructions and questions through the engagement, allowing experts to apply their expertise to identifying additional pertinent questions, where appropriate.

2 KordaMentha (Australia, New Zealand, Singapore, Indonesia and Papua New Guinea). The contributing colleagues were Owain Stone (Melbourne), David Van Homrigh and Brian Wood (Brisbane) and ShiMin Lin (Singapore).
3 The author and contributors can broadly be described as forensic accountants and quantum experts, with experience in the assessment of loss, damages or valuation in matters arising from contractual or joint venture disputes, post-acquisition disputes and intellectual property disputes, together with the forensic investigation of corporate, family business, estate and matrimonial disputes.