

Experts and Their Roles – A Hired Gun?

Experts

Experts are persons having special skill or knowledge in his/her profession or calling, usually recognized by their peers as such. Professional qualifications or affiliation to a professional body is usually an indication of his special skill or knowledge. However, the expert need not be the leading or senior practitioner in the particular field, but need only be sufficiently skilled or knowledgeable and at most times this is equated with actual experience rather than purely a theoretical experience.

The importance of expert evidence

The importance of expert evidence is undeniable, more so in highly technical areas of dispute or litigation such as construction disputes, where lay persons may not have the knowledge or do not know the ‘meaning and implications’ of the evidence tendered or the ‘science’ involved.

This is prevalent in court litigation as Judges, in their wisdom and knowledge of the law, may not fully grasp or understand the ‘science’ involved. This is also true in arbitrations as well. Arbitrators, though in possession of the relevant and necessary qualifications of science, may lack the necessary practical state-of-the-art hands-on experience relevant to the dispute which is required to fully grasp the technical matters raised especially as ‘science’ never stops evolving.

The need for an expert in construction disputes is obvious: the lawyer needs to get into the technical detail and flush out factual strengths and weakness, which either support or conflict with the legal lines he is adopting to promote or defend the case.

Who is better than an experienced professional in the subject matter of the dispute to dig for dirt and hopefully strengthen the case in time for the next report to the client?

Added to this is the fact that, in construction disputes, there are allegations and counter-allegations and several different issues ranging from legal points, practice and procedure, money, time, quality, and/or building defects. As such, each side may wish to employ not just an expert, but a team of experts.

In fact, **Sections 45, 48 and 49** of the **Evidence Act 1950** set out the expected realm for expert evidence which includes science, art, foreign law, handwriting, customs and rights, and usage.

Role of the expert

The most fundamental role of an expert is to provide their professional opinions on technical matters to *assist* the court or tribunal in determining such issues of technical matters. It cannot be over emphasized that it is a lay person that ultimately decide on the issue factually, and on whether one expert is to be believed or relied on rather than the other.

It is pertinent to note that there is an important distinction between expert evidence, which is an opinion of the science involved based on the evidence/facts available, and the findings of facts necessary to apply such 'science'. The latter type of fact finding is the exclusive province of the fact finders such as judges, the jury or the arbitrators, who will decide on the existence or non-existence of a particular fact. Such decisions do not involve any 'science'. However, the persuasiveness of expert opinions and the acknowledgement that fact finders tend to lower their guard and accept such opinion have blurred the line between fact finding and expert opinion.

Unlike claims consultant whose task is to prosecute its client's case, the expert is to act as an adviser to the court or arbitral tribunal on those matters within the expert's particular expertise. Question arises however whether how plausible is this? The reason why this question is important is because the degree to which the expert is independently objective and impartial will impact upon the evaluation by the trier of fact of the probative value of the expert evidence.

Providing expert opinions for disputes or litigation is undeniably a multi-million dollar industry. Unlike lay-witnesses of fact, experts are paid witnesses to testify on behalf of the client. Therefore, not uncommonly, this results in the professional opinion tailored to mislead by turning a blind eye on material facts or ignoring alternative applicable 'science' or schools of thought. Opinions are also likely to be biased towards the paying client's case or even advocating the client's case, which are not easily detected by lay persons. This attitude is generally termed as the "hired gun" syndrome.

Almost inevitably, the solicitors' initial instruction to an expert is to support the contentions of the client in dispute not only for the proceedings but to also force a settlement. By this, it normally means to prepare an initial report to hit the other side so hard that he will have to seek a settlement. This practically forces the experts to look for some easy targets in the project documentation. As such it creates a culture of "us" and "them", "kill" or "be killed"

However, when the prospect of settlement is slim and the case is bound to go to court or tribunal, an unnatural act of self conversion normally takes place. The experts suddenly become supposedly unbiased and are supposedly capable of making objective judgment.

To expect experts to act impartially and independently of the parties who pay them seems to be inherently unrealistic. Just like a lawyer may argue a point of law one

way for one client and then later argue the same point for a different client exactly the opposite way, should an expert be expected to do otherwise.

The reality is that we live in the adversarial system of law and inevitably the expert comes to a case as a “hired gun” in the first instance. Essentially, “hired gun” syndrome means that the expert is no more than the mouthpiece of the client, i.e. to say virtually what its client wants him to say and to support the case. The cause of “hired gun” syndrome is largely attributable the element of financial control or incentive exercised by clients over their experts.

The question in which the expert is asked by the client’s lawyer is not “what is your opinion on the question” but in the first place “can you give me your opinion on which will prove my ‘truth’?” and “how can you express your opinion in a way which can best prove my ‘truth’”. Usually that is not how it is said but it is usually a good deal more subtle than that.

Unlike lay witnesses of facts, the sanction of perjury to stem out such biasness is not easily available against expert witnesses as they are merely giving their professional ‘opinion’ and not statements of facts. It is believed that there are no right or wrong opinions, as every expert is entitled to his/her professional opinion.

Avoiding the hired gun syndrome

Appointment by Court/Arbitral Tribunal

Section 28 of the **Arbitration Act 2005** deals with experts appointed by arbitral tribunal itself. It expressly provides for expert witnesses to be appointed by the arbitral tribunal, the parties’ duties towards such experts and the expert’s duty to participate in a hearing on request. The expert’s fee is of course considered as part of the procedural cost.

There is nothing unusual with the arbitral tribunal appointing the expert since provisions exist for the court to do likewise. This is provided under **Order 40** of the **Rules of the high Court 1980**. Prior to the **Arbitration Act 2005**, institutional rules such as ICC Rules, UNCITRAL rules and even PAM rules (but subject to parties consent) have provided this power to the arbitral tribunal. However, controversy still looms especially on whether the arbitral tribunal has then replaced its decision making functions with that of its expert.

The extent to which, as a matter of principle, an arbitral tribunal should risk being seen to remove the garb of the neutral umpire by actually calling expert witnesses is therefore extremely controversial.

Lord Denning MR in **Re Saxton** [1962] 1 WLR 968 at 972, speaking in the context of the judicial power to appoint experts, was far from positive about the utility of judicial intrusion into the adversarial arena:

“it is said to be a rare thing for it to be done. I suppose that litigants realize that the court would attach great weight to the report of a court expert, and are reluctant thus to leave the decision of the case so much in his hands. If his report is against one side, that side will wish to call its own expert to contradict him, and then the other side will wish to call one too. So it would only mean that the parties would call their own experts as well. In the circumstances, the parties usually prefer to have the judge decide on the evidence of experts on either side, without resort to a court expert.”

In the USA, r 706 of the *Federal Rules of Evidence* 1975 (US) provides for court appointment of expert witness but that it has almost fallen into disuse. In **Kian v. Mirro Aluminium Co** 88 FRD 351 at 356 (Mich 1980) the reason was highlighted: *“The presence of a court-sponsored witness, who would most certainly create a*

strong, if not overwhelming, impression of impartiality and objectivity, could potentially transform a trial by jury into a trial by witness.”

This is likely the reason why **Order 40** is practically unused in the Malaysia jurisdiction. It smacks of a civil inquisitorial attitude rather than an adversarial attitude.

On the other hand, in **R v. Jenkins; ex parte Morrison** [1949] VLR 277, Barry J in calling in aid the service of an assessor to aid the court under what was then s. 123 of the *Supreme Court Act 1928(vic)*, held that:

“...where the judge appoints an expert [to aid in examination of the welfare of a child] he is really supplementing by scientific technique the natural limitations of his own powers of observation. The expert is skilled in the experiment which can be observed and checked by the parties if they so desire; and in the proper exercise of its discretion the court would always allow the parties the opportunity of cross-examination.”

It must also be recognized that an expert appointed by the arbitral tribunal will also save much time and expense in the arbitration as the expert may be able to better crystallize or focus the issues than the adversarial lawyers. The arbitral tribunal appointed experts should meet the parties' experts and work with them to come to an agreed list of issues as well as a list of matter agreed.

Nevertheless, in order to avoid any aspersions of a replacement determiner, the arbitral tribunal ought to:-

- Ensure the expert appointed meets the same standard of competence and impartiality as expected of the tribunal;

- Attempt to get the parties to agree on the identity of the experts
- Set out in writing the scope of the expert
- The opinion sought should be limited to the experts competence without any conclusion as to the parties' case itself (i.e. no finding of breach of negligence etc)
- The procedures to be adhered must be done *inter partes* such as when the expert is allowed to examine or inspect physical evidence
- The report should be provided to the parties
- Parties be encouraged to question the expert

Ensuring Independence of the Expert

It is rare that the expert opinions are shown to be inaccurate by the lay counsel. The lay counsel would stand a better chance to show that the basis used for such opinion is wrong rendering the opinion not applicable to the instant dispute. By far, the majority of the cases where expert opinions are 'thrown out' are cases where the independence of the expert is shown to be questionable, the opinions are shown partisan and biased to the paying client's case.

As such, the expert must not only be independent but must also be seen as independent and not partisan to the dispute between the parties. He/she must not be seen advocating the paying client's case. The degree of independence will have an impact on the weight or probative value of the expert opinion.

The expert must not have any interest in the outcome of the matter, direct or indirectly, financially or otherwise. It is accepted that fees are payable for the expert's opinion, but it crosses the line of independence when such fees are contingent to the outcome of the client's case.

Writing in 1985, the American academic John Langbein, put it this way:

“At the American trial bar, those of us who serve as expert witnesses are known as ‘saxophones’. This is a revealing term, as slang often is. The idea is that the lawyer plays the tune, manipulating the expert as though the expert were a musical instrument on which the lawyer sounds the desired notes. I sometimes serve as an expert in trust and pension cases, and I have experienced the subtle pressure to join them-to shade one’s views, to conceal doubt, to overstate nuance, to downplay weak aspects of the case that one has been hired to bolster. Nobody likes to disappoint a patron; and beyond this psychological pressure is the financial inducement. Money changes hands upon the rendering of expertise, but the expert can run his meter only so long as his patron litigator likes the tune. Opposing counsel undertakes a similar exercise, hiring and schooling another expert to parrot the contrary position. The result is our familiar battle of opposing experts. The more measured and impartial an expert is, the less likely he is to be used by either side.”

There is abundance of judicial pronouncements on an expert's failure to evince independence.

In **London Underground Ltd. v. Kenchington Ford Plc & Others** [1998] HHJ Wilcox criticized the lack of independence of one expert. He said that he “*signally ignored his duty to both the court and his fellow experts*” and “*continued to assume*

the role of advocate of his client's cause". The judge concluded that the evidence was invalid and unscientific.

Similarly, Judge Wilcox in **Mukenbank and Marshall v. Kensington Hotel** [1999] criticized the expert for adopting "*the stance of an advocate*". The value of his evidence was thus very greatly diminished.

In **Clonard Developments Ltd v. Humbers**, the judge said one particular witness's evidence was "*unhampered by impartiality*".

In **Great Eastern Hotel Co Ltd. v. John Laing Construction Ltd and** [2005] EWHC 181 (TCC), HHJ Wilcox condemned Laing's expert for lack of independence. At paragraph 111, the judge said:

"I reject the expert evidence of Mr. Caletka as to the performance of Laing as Contract Manager in relation to periods 1 and 2. he has demonstrated himself to be lacking in thoroughness in his research and unreliable by reason of his uncritical acceptance of the favourable accounts put forward by Laing. I prefer the evidence of Mr. Wylie who was an impressive and conscientious witness who showed that he approached his role as an expert in an independent way and was prepared to make concessions when his independent view of evidence warranted it"

The judge continued at paragraph 117 that:

"Mr. Caletka who was charged with the duty of independently researching and analyzing these events singularly failed to take account of this documentation and the photographic evidence in his

written report for the court and presented a view of the course of the critical path which was clearly wrong”.

In **Pearce v, Ove Arup**, a case concerning copyright, the judge said:

“58. ---in my Judgment Mr. Wilkey’s ‘expert’ evidence fell far short of the standards of objectivity required of an expert witness. He claimed to have appreciated the seriousness of what he was saying but made blunder after blunder ---

(e) He showed his biased attitude by looking for triangles in the early stages of the Kunsthal design (‘keen to find the triangle’ as it was ‘an element alleged to have been copied’). His keenness resulted in his misreading a drawing and finding a vertical trapezium”.

The Judge said of Mr. Wilkey’s evidence:

“so biased and irrational do I find his ‘expert’ evidence that I conclude he failed in his duty to the court”.

In the UK, Lord Woolf had recognized the artificiality of the expert witness’s position under the old system and resolved to change it. Civil Procedural Rules, which captures the substance of Woolf Report, has provided for experts to be appointed in the capacity of advisor to the court and in that capacity all correspondence relating to that appointment may be discoverable together with any instructions the expert receives after appointment. It follows from this that *quantum*, method, and means of payment will also be discoverable.

Under CPR, the expert's independence is encapsulated in the "overriding duty to the court" set out in part 35. Part 35.3 states:

- “(1) it is the duty of an expert to help the court on the matters within his expertise.
- (2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is being paid.”

The Protocol for the Instruction of Experts to give evidence in civil claims published by the Civil Justice Council for England and Wales in June 2005 emphasises that the experts have an overriding duty to help the court, and this overrides any obligation to their clients. Item 4.3 states:

“Experts should provide opinions which are independent, regardless of the pressure of litigation. In this context a useful test of ‘independence’ is that the expert would express the same opinion if given the same instructions by an opposing party. Experts should not take upon themselves to promote the point of view of the party instructing them or engage in the role of advocate”.

As part of this obligation to help the court and remain independent, item 4.5 in the Protocol requires that reports should set out the facts and material on which the expert has relied in forming his opinions. He should also (4.6) inform his clients immediately of any change in his opinion. Item 4.7 reminds experts that their clients and they themselves may be penalized by costs orders.

In the USA, it was made a federal law in 1994 (Rule 26 of the Federal Rules of Civil Procedure 1994) that any expert appointed should disclose its expert report three months before a hearing, stating not only the expert's terms of reference and what it is to be paid for giving the evidence, but also listing any expert report it had previously

produced in the last four years and any article it had had published in the previous 10 years.

In the UK, there have been some positive guidelines on the duties and responsibilities of an expert witness. The landmark decision of “the Ikarian Reefer” [1993] FSR, a decision by Creswell J, set out the duties and responsibilities of an expert as follows:-

- Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation: *Whitehouse v. Jordan* [1981] 1 WLR 246, at 256. per Lord Wilberforce
- An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise: *Polivitte Ltd. v. Commercial Union Assurance Co. Pls* [1987] 1 Lloyd’s Rep 379 at 386, Garland J. and *Re J* [1990] FCR 193, Cazalet J. An expert witness in the High Court should never assume the role of an advocate
- An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (*Re J. supra*) [page 565]

There have been great efforts in the UK to set out various benchmarks, guidelines and even model terms of appointment to ensure the expert stays clear of the hired gun syndrome. These include:-

- The Expert Witness Institute Model Terms and Conditions of Engagement
- The Practice Direction part 49C-Technology and Construction Courts
- The TeCSA Expert Witness Protocol
- The Pre-action Protocol for Construction and Engineering Disputes

- Part 35 of the Civil Procedure Rules
- Draft Code of Guidance for Experts under the Civil Procedure Rules 1999

There is even some sound advice given in the **Cala Homes (South) Ltd v. Alfred McAlpine Homes (East) Ltd** [1999] FSR 531.

“... There is a world of difference between not volunteering evidence on topics on which you have not been asked to express a view and giving misleading answers on topics where you have.

...The function of a court of law is to discover the truth relating to the issues before it. In doing that it has to assess the evidence adduced by the parties. The judge is not a rustic who has chosen to play a game of Three Card Trick. He is not fair game. Nor is the truth. That some witnesses of fact, driven by a desire to achieve a particular outcome to the litigation, feel it necessary to sacrifice truth in pursuit of victory is a fact of life. The court tries to discover it when it happens. But in the case of expert witnesses the court is likely to lower its guard. Of course the court will be aware that a party is likely to choose as its expert someone whose view is most sympathetic to its position. Subject to that caveat, the court is likely to assume that the expert witness is more interested in being honest and right than in ensuring that one side or another wins. An expert should not consider that it is his job to stand shoulder to shoulder through thick and thin with the side which is paying his bill. ‘Pragmatic flexibility’ as used by [the expert] is a euphemism for ‘misleading selectivity’. According to this approach the flexibility will give place to something closer to the true and balanced view of the expert only when he is being cross-examined and is faced with the possibility of being ‘found out’

Further, 'Legal sounding language' or conclusions must not be used as it tends to suggest a partial opinion or that the expert is actually advocating the client's case. It may also suggest involvement of counsel which will have an adverse impact on the weight of the opinion. For example the expert describing his report as '*providing analytical product and legal liability evaluation*' with the expert concluding in his report as '*in the manner of a judgment, finding for the plaintiff on the three issues of causation, foreseeability and preventability*' was rejected by Miles CJ as '*of little or no assistance*' in **Forrester v Harris Farm Pty Ltd** (1996) 129 FLR 431.

The expert must not be seen to be '*stepping into the ring*' by expressing opinions without any basis at all. See **Re W v W** (2001) 164 FLR 18 where the expert expressed serious views on the mental condition of a child as '*having paranormal believes*' and '*highly dysfunctional set of fantasies*' without even having dealt with or seen the child. Needless to say, the Court of Appeal construed the opinion as bias and rejected it *in toto*.

Weight of the Opinion – Experience

Sound case strategy requires the selection of appropriate expert who are recognized as such or even an authority within the areas that require his/her expertise, but also experts:-

- 1) who is reasonably objective with hands-on experience with the latest development in the area;
- 2) ability in opinion writing and presentation as a witness in the witness box.

Previous experience as expert witness may be an added advantage in terms of composure and saying what is needed to be said. However, care must be taken as the expert's reputation perceived by the practitioners, Courts or Tribunals may hurt the case. Some expert opinion may carry little weight as he/she is perceived (rightly or

wrongly) as consistently biased, for example towards the Plaintiffs or insurance companies.

The importance of the expert's reputation is highlighted in the case of *Vakauta v Kelly (1989) 167 CLR 568* where the High Court of Australia held that the inevitable reality of a Judge's perceived general reputation of a particular expert would not necessarily amount to biasness resulting in the Judge's order or judgment being set aside. Although the judgment in that case was eventually set aside by the High Court of Australia, it was not on the ground of the Judge's perception but on the ground that the Judge's biasness had affected the judgment pronounced.

The point to note is that the danger of biasness in the trier's mind is inevitably and real as humans are not infallible. Biasness may not necessary translate into or seen in the judgment/decision itself to allow the relief of setting aside. Again, it is not realistic to say that such biasness had not or could not have affected the judgment as it may have been written to avoid such pitfalls.

There are also various types of experts to be noted. There are experts with sufficient experience and authority that may do well under cross-examination, but may lack the necessary Court/Tribunal experience as their time is mostly spent applying their special skills and knowledge in the industry. There are those who are 'experts' in providing expert opinion in disputes and appears so often in Court/Tribunal rather than in the discipline in issue.

There are also the pure theorists or academics, whilst exceptionally learned, may not have the necessary hands-on experience. There are also the 'Mr./Mrs. Big' leading a team of experts who may fit the role of an expert with practical and Court experience, but will leave the opinion to his/her junior members of the team, and usually, ending up with a multitude of amendment to the opinion at the 11th hour.

Ultimately, there must be a balance between experts with practical hands-on experience whilst at the same time, sufficiently tested in Court/Tribunal hearings. At the end of the day, it boils down to the technical issue in dispute as the guiding criteria for selection. Technical issues which are generally accepted and not in dispute or the subject of major criticism, will not require say such authoritative expert, expert with less authority but more Court/Tribunal exposure may be selected.

Protocol item 4.4 reminds the expert that he may only provide opinions in relation to matters which lie within his expertise.

In **SP International Ltd v. PPC (UK) Ltd and John Glen**, 10.5.02, CH. Div. Mr Justice Rimmer said:

“Mr. Dean’s main difficulty is that he has no relevant expertise. I doubt if there has often been an expert less expert than he. He is an ex-RAF officer, who no doubt has a specialized knowledge and experience of many fields of human endeavour, but they do not include the field of shot blasting (the subject of the case)”

Weight of the Opinion – Analytical Methods

Where options of method of analysis are available, the expert should justify why a certain option was adopted rather than others. This is especially the case where simpler and more direct methods of analysis are available.

An example of this is recently highlighted by the Federal Court in the case of **Asean Security Paper Mills Sdn. Bhd v. CGU Insurance Bhd.** [2007] 2 CLJ 1, the Federal Court quoted what the High Court said as follows:

“it is abundantly clear that none of the witnesses termed as experts by the defence mentioned above, inspected the site of the fire. No one ever examined the security paper kept at the warehouse, and none knew about the chemicals used in the production of the security paper. All admitted that it was crucial to visit the site. Their evidence was based among others, on photographs taken of the contents of the warehouse prior to the fire and photographs of the site after the fire”

In arbitration where delay and disruption becomes an issue in disputes, there have been a number of judicial pronouncements as to the necessity or desirability for the experts to support their conclusion based on logical, proper methods.

In **John Barker Construction Ltd v. London Portman Hotel Ltd** 83 BLR 31, Mr Recorder Roger Toulson QC (now Justice Toulson) had to determine whether an architect’s certificate of extension of time represented a valid exercise by him of the powers afforded to him under the contract.

The architect had adopted *an impressionistic rather than a calculated assessment*. The other party adduced evidence from a renowned expert relying on software-based critical path analysis. The learned Recorder held that the architect’s approach was *fundamentally flawed* because, amongst other things, he did not carry out a logical analysis in a methodical way.

Weight of the Opinion – The Written Document

Nowadays most, if not all expert opinions are required to be exchanged between the parties instead of the conventional method of giving oral evidence. Opinion writing skills are essential, to present an intelligible opinion for lay persons to understand and grasp the technical issues in dispute. Complexity of the issues involved is separate from comprehensibility of the opinion rendered.

Comprehensibility

The comprehensibility of the opinion may be enhanced by perhaps explanatory illustrations or sketches or drawings, to enable the reader to visualize and assist understanding of the opinion he/she is reading.

Based on the writer's own experience, this may be particularly useful in highly technical areas of constructions disputes as in an arbitration involving the construction of a cable stayed bridge where, amongst other issues, the design of the casting moulds for various segments of the bridge, the design for the bearings and its allowance for movements during the construction and during use of the bridge, are in dispute. A graphic visualization of such matters is helpful, for instance on the issue of whether the moulds as designed could cater for later modifications, or on the movements of the bridge during and after instruction.

Step by step

The manner of presentation of the opinion is crucial. A step by step analysis and explanation of the technicalities and applying the analysis to the established facts of the case before coming to a conclusion makes a difference as compared to a purely scientific opinion understood only by his/her peers. If the use of technical jargons is unavoidable, it must be explained. It is suggested that as a good practice the condition is first set out and then the technical term given. It is said that by giving the condition first, the lay person is educated on the technical term, instead of merely memorizing what the technical term means.

Convincing opinion

It must be emphasized that the duty of the expert is only to *assist* the Court/Tribunal as the ultimate decision is the Court/Tribunal, not the expert. As such, the Court/Tribunal is not bound to accept any expert opinion, unless the Court/Tribunal is convinced of the applicability of the opinion.

In the case of *Davie v Edinburgh Magistrates* despite only the Defendant adducing expert evidence by way of 3 technical opinions to show that the underground blasting did not cause damage to the Plaintiff's premises, these were all rejected. On appeal, the Court emphasized that the role of the expert is merely to assist the Court and not usurp the function of the Court to decide on the matter, i.e. whether the blasting caused the damage. The Court was entitled to reject the opinions adduced and come to its own conclusion based on the evidence of other witnesses of facts.

The basis of the opinion

A well researched, meticulous, thorough opinion factually and from a technical point of view, is a hall mark of a convincing opinion. This entails (though not exhaustive) going through all the contemporaneous evidence for example the contract terms, technical documentation, tender and contract drawings, site diary, site instructions, parties' correspondence, examination of the various samples and the independent test results of material, before concluding and giving an opinion on the issues.

This emphasises on the requirement of proper document management and at times immediate action to allow such detailed and thorough study, ensuring that the basis of the opinion is supported by evidence which he/she could give direct evidence on, for example, sample of materials taken by the expert personally to be tested and the method of testing undertaken by the expert etc. Reliance on the opponent's documents, technical or correspondence to support the opinion may be preferred, as it is unlikely that the opponent would resile their own contemporaneous documents,

unless of course it is substantively in contradiction with the client's correspondence or the experts view.

Only when the entire facts and technical issues are studied for its effect that the expert concludes and provide his/her expert opinion. Thereafter, authoritative texts may be sought to lend credence to the opinion. Facts relied on by the opponent are to be studied with the same meticulousness to ensure that the opponents case is also identified with precision. The expert must then be able to assess the technical importance of such evidence or any contradictory evidence and to deal with in his opinion. This ensures that the opinion is wholesome and does not ignore material evidence.

This will also avoid embarrassment should facts relied on by the expert is wrong or the opponent's case is misunderstood. In such event, the whole basis of the opinion may be proven wrong and inapplicable and may be rejected by the Court. For example an opinion on the effects of blasting from say 50 meters away may not be applicable or even fatal if it is shown that the actual blasting was carried out say 20 meters away, or that the claim is not based on the blasting carried out but the subsequent clearing by way of digging resulting in soil erosion.

Relevant to the facts in issue

The opinion must not be divorced from the facts in dispute, it must be relevant to the facts in issue. In Australia, there is a common law rule that expert opinion without the facts relied on expressly stated in the opinion, are not admissible (*Trade Practices Commission v Arnotts* (1990)). Opinions should only be limited to the instructions and the issues in dispute. Opinions over and above such facts in dispute will not only be rejected and not taken into account, but may invite an unwarranted cross-examination on the expert's credibility.

Language

The language used and the choice of words is important as the expert must stand by every detail of his/her opinion. The slightest form of contradiction may be used in cross-examination. The meaning of technical jargons, if unavoidable, must always be educated in the simplest of language.

Handling Cross Examination

One of the main arsenals in the opponent's legal counsel is cross-examination. In authoritative texts such as '*The Art of Cross-Examination*' the author after having stated the proposition that the expert witness will always be partisan, ready and eager to serve the party calling him, suggests that the cross-examiner to be mindful of this and efforts of cross-examination should be directed to or encouraging such exposure.

A good starting point is the decision the Court of Appeal (Lord Justice Otton) in *Saigol v Cranley Mansions Limited and Others* where the opinion given by the expert whilst acknowledging his limitations and difficulties where appropriate, with a thoroughly considered view and explanation of the limitations faced, have been held to be helpful and reliable.

Proper concession when and where sensible, instead of a high-handed 'reject all criticism' approach, is viewed positively by the Courts as seen in the speech of Lord Justice Brandon in *Joyce v Yeomans*. This is a clear indication of objectivity and independence of the expert, who must not be seen as biased or advocating the paying client's case.

Unwarranted aggression or defensive attitude to any alternative views suggested by the opponent is to be avoided. It is suggested that the best way to deal with such alternatives is to explain thoroughly why the same is inapplicable or flawed within the

facts of the case. In the event that one of the alternatives could be applicable, then the expert may explain why his view should be adopted, for instance it is 'state of the art' or covers a wider spectrum of variables or more comprehensive than the alternative suggested.

As observed by Hansen J in *Foody v Horewood (No. 2)* (2004) VCS 222, "...B's (the expert's) evidence suffered from a tendency to be argumentative, not content to simply and responsively answer the question and say no more, but to argue the matter, and at times to provide commentary. I do not consider that he ... or P for that matter, were not honest witnesses, but B clearly saw his role as being to argue a case for Foody. In my view, he took every point he considered possible in order to achieve the best result for (the client) ... (By contrast, M) impressed me as an independent and reliable witness, neutral to the interest of the parties, who sought to aid the court with his best professional view."

In one case, in answer to a question during cross-examination, the expert, somewhat jokingly say that his answer would depend on whether he was acting for the claimant or the defendant. That was the end of his report.

Mastery of the facts in issues is the key to sustain heavy cross-examination and emerging unscathed. Only those who are unsure of the facts would be terrified. A secure knowledge of the facts will not allow any counsel to twist and turn the facts in order to destroy the experts' opinion or credibility.

Also, the expert must not be too overzealous in his/her views or too enthusiastically involved in the trial process and exaggerate. Such opinions are easily detected and shown to be partisan, resulting in the opinion being rejected in toto together with the other parts of the opinion which may not have been exaggerated or which was indeed provided objectively.

Realizing the Potential Liability

The consequences of an expert opinion being considered partisan are serious. Not only that the report may be rejected or given little weight, the expert may be ordered to pay costs personally. The expert may also be reported to the relevant professional body he/she belongs to which may result in being struck off.

This is illustrated in the infamous case involving, Sir Roy Meadow a retired pediatrician whose expert evidence that resulted in the wrongful conviction of 4 women of killing their children, was found to be naive, grossly misleading, incompetent and careless. He was struck off the medical register by the General Medical Centre (GMC) and the Court of Appeal overturned the decision.

The Court was of the view that, given the basis of the complaint was based upon his evidence in court, Sir Roy Meadow had immunity. The Court further held that, even assuming the GMC panel was entitled to consider the complaint, it was difficult to think that the giving of honest, albeit mistaken, evidence could, save in exceptional case, properly lead to a finding of serious professional misconduct. This decision has come under fierce criticisms in the UK for being pro-experts.

What is clear from the above, however, is that an expert can still be referred to disciplinary board for action if his conduct is considered to have fallen so far below what was expected of him. By analogy, therefore, in an arbitration, such option is open to the arbitrator where he could decide whether to refer the matter to the expert's professional body. In making this decision, the arbitrator will need to keep firmly in mind the qualities which are expected of expert evidence.

Improving the Expert's Role

The trend is moving away from the traditional 'adversarial system' into a more hybrid system incorporating controls to ensure no unnecessary costs and time wasted due to unnecessary proliferation of expert evidence. Lord Woolf's final report, *Access to Justice* (published July 1996), have identified uncontrolled discovery and expert evidence as two major generators of unnecessary costs in civil litigations.

Based on the Lord Woolf's report, procedures had been formulated and implemented to address such concerns. For instance expert witnesses are only allowed if it is permitted by the Court (rule 35.4), the issues requiring expert opinions are to be narrowed down by early exchanges of expert opinions, requiring more openness in litigation, limiting the number of expert witnesses to only those reasonably required to the issues in dispute (rule 35.1) etc. These changes have been provided for in the Civil Procedure Rules in the United Kingdom.

Practice Directions 35, paragraph 1.3 provides that the expert opinion must be verified by 'a statement of truth' by the expert and by rule 32.14 of the Civil Procedure Rules, contempt proceedings may be brought against any person making, or causes to be made, a false statement in a document verified by the statement of truth.

Meeting between of experts

The Civil Procedure Rules also provide for the requirement of the expert witnesses to meet, without the presence of the parties or the parties' counsel. The object of the meeting is for the experts to identify technical issues which are not in contention and are therefore agreed to, and the areas they disagree. In short, 'agree to disagree'. This

is based on the theory that experts are more likely and readily concede to their peers instead of lay counsel during cross-examination.

More importantly, they are then required to explain why they are unable to agree on the other's opinion. The requirement to provide an explanation will, to some extent, ensure that technical issues are not disputed for the sake of dispute as disagreement without any credible reasons provided may be sanctioned by way of costs personally against the expert.

The experts then could concentrate the report on the areas in dispute and the reasons for such disagreement. This will save time and costs of litigation as only the specific narrowed-down areas in contention are required to be heard and determined.

However, under the CPR, such agreement between experts do not bind the parties and could be re-visited by the expert under an honest and independent change of opinion.

'Hot Tubbing'

'Hot tubbing' is a procedure where the experts are allowed to 'cross-examine' each other on their respective opinions in a controlled environment. The benefit is that the technical issues to be determined may be culled down as, in theory, experts concede to his/her peers more readily as opposed to counsel or lay persons. Another benefit is that all the technical issues are considered and probably decided in one go instead of the various stages of the proceedings depending on when the respective experts are called as witnesses.

The roles of the expert though remains fundamentally to assist the Court/Tribunal, are required to keep up with the changes in modern times. They are, to some extent necessary to the case. As such, the common pitfalls must be avoided.