Event summary of Session 3

Expert witness work

Presented by Irene Siu and Sarah Cham, both of Alvarez & Marsal

A. Role of Expert Witness

What is an Expert Witness?

There are basically two types of witnesses, i.e. fact witnesses, who testify what they have seen, but will not provide any opinion and expert witnesses, who provide independent opinion in a specific field of his or her expertise, education, knowledge and experience.

An Expert Witness

- can be anyone with knowledge or experience of a particular field or discipline beyond that to be expected of a layman. The expert witness's duty is to give to the court or tribunal an impartial opinion on particular aspects of matters within his expertise which are in dispute
- has an overriding duty to the court (or other tribunal). This duty supersedes any duty owed to you even though you are still responsible for paying the expert's fees
- is retained by a law firm and/or appointed by the court or tribunal to assist in matters beyond the Court's or tribunal's expertise
- provides relevant and impartial evidence in their area of expertise
- has in-depth knowledge and relevant experience of the subject matter in dispute
- is able to explain complex matters to the court or tribunal in an understandable manner (e.g. if the judge is not able to understand how underlying damages are calculated, this could impact your clients' compensation.)
- is able to express his/her professional opinions clearly and honestly
- experts may disagree or fail to reach the same conclusion. The court or tribunal will reach its own conclusion, with the assistance of the evidence of the experts,
- should be prepared to change their opinion or make concessions when it is necessary or appropriate to do so, in view of, for example, the availability of new information.

Roles of an Expert

- To assist in the preparation of the dispute for arbitration (which is quite similar to the litigation proceedings), litigation, or alternative dispute resolution
- To prepare an independent expert report
- To give evidence to the court/ tribunal, explaining technical matters in dispute, but the expert is not expected to advise on the interpretation of law

- To assess the strengths and weaknesses of the opposition's evidence
- To assist in the preparation of cross-examination of the opposition
- To act as an arbitrator, mediator, adjudicator

Qualification of an Expert

- Has the necessary training, accreditation or certification
- Specialised knowledge in subject area
- Relevant practical experience – experience is more important than professional qualification
- Experience in writing concise and understandable reports
- Experience in giving evidence and explaining matters in court or tribunal
- Able to command respect and trust of client, opposition and the court or tribunal

(Note: The Academy of Experts provides trainings, e.g. mock trials to various types of experts from time to time in order to prepare themselves to deliver their evidence in court.)

Expert Witness vs. Factual Witness

Expert Witness	**Factual Witness**
Independent, unbiased and objective	Honest and reliable
May be asked hypothetical questions	Unlikely to be asked hypothetical questions
Usually requires a written report	No requirement for a report
Paid for services provided	Not paid for testimony
Knowledgeable and competent	Any individuals who witnessed what has happened
Qualified by the Court	Qualifications not necessary
Testify to professional judgment and opinion based on his/her review and analyses of information	Testify to factual events in which he/ she witnessed

When can an Expert Help?

- At the beginning, providing initial advice before a disagreement becomes a dispute (which can help to determine whether an issue should be pursued further in court)
- During the preparation of the matter in dispute (e.g. in terms of claiming damages from another side, forensic experts can help identify what information is missing, what may need to be asked from the other side, etc.)
- During the pre-trial phase (e.g. related to the preparation of the expert reports)
- During the trial (e.g. to give expert evidence in the witness box)

How can an Expert Help?

- Analyse the information available
- Investigate on the matters in dispute, e.g. investigation of the relevant fund flows
- Interview the involved persons
- Write a report outlining the tasks performed and findings
- Determine the quantum of the liability in dispute
- Prepare a proof of financial evidence
- Critique the opposition's expert report

Types of Expert Witness

- Party appointed expert (each side of the underlying disputes will appoint their own expert)
- Single joint expert
- Expert adviser (shadow expert) (where expert reports are not required; experts' identities are not required to be disclosed; these experts are mainly appointed by clients to assist their lawyers to formulate strategies.)
- Court appointed expert

B. Duties and Responsibilities of Expert Witness (from the Hong Kong perspective)

Ikarian Reefer (Setting out duties of experts from a case *National Justice Compania Naviera S.A. v Prudential Assurance Co. Ltd* [1993] 2 Lloyds Rep 68)

- 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.
- An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate.
- An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
- An expert witness should make it clear when a particular question or issue falls outside his expertise.
- If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one

- If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court

- Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports

Statement of Truth and Expert Declaration

- Statement of Truth - The Rules of the High Court 37(A)

  - ✓ The expert believes that the facts stated in the expert report are true and the opinion expressed in it is honestly held

  - ✓ Expert report is not admissible as evidence without it.

- Expert Declaration - Rule 37(C)

  - ✓ Clearly setting out the expert's understanding of his/her role, duties and an acknowledgement that he/she has complied with all appropriate rules and requirements.

  - ✓ Experts have to commit before signing off the expert report.

Types of Conflicts of Interests Which an Expert May Be Faced With

Actual	**Perceived**
Should perform adequate conflict check procedure before the engagement (e.g. an expert is asked to quantify the relevant damages under the share purchase agreement for which the expert's employer has provided advisory services.)	Ensure the disclosure of actual / possible relationships with client (e.g. The expert who is engaged by a client may have also acted the opposing side of the client on another matter.)

Note: The level of acceptance sits with the client / instructing lawyers.

Privilege and Immunity

- Different courts may have different rules to deal with privilege and immunity

- Hong Kong

  - ✓ Litigation privilege protects confidential communication between clients and their lawyers, as well as between clients or their lawyers and third parties (such as expert witness), where such communications came into existence for the dominant purpose of use in connection with actual, pending or contemplated litigation.

(e.g. the preliminary unfavorable result of quantifying a damage is protected and is not required to disclose in courts.)

- ✓ Expert immunity still applies - has not (to date) been successfully challenged in the courts in Hong Kong (e.g. experts cannot be sued for negligence.)

What an Expert Should Do

- Understand the matter in dispute and fully comprehend the instructions and the required tasks
- Opinion must be independent, objective and impartial
- Should state clearly where question or issue falls outside the area of expertise, or qualifications to opinion provided
- To adhere to professional training requirements
- Primary duty to the court/tribunal
- State the facts or assumptions upon which the opinion is based; not to omit material facts which could detract from the concluded opinion
- Comply with the procedure rules of the court/tribunal
- To adhere to professional ethical conducts

What an Expert Should Not Do

- Be a hired gun - advocate and argue the client's case
- Give advice
- Accept any appointment on terms that are conditional on the outcome of the case
- Give opinion outside his/her area of expertise
- Act in matter whether there is a conflict of interest (unless resolvable by disclosure)
- Play the role of a judge/arbitrator

C. Expert Report

What is it?

According to the Academy of Experts:

- The purpose of an Expert's Report is to set out the expert's opinion on matters within his/her expertise that he/she has been instructed to report on.

- The ultimate use of the report is to inform the court on matters outside its expertise and on which it has to reach a decision in order to resolve the dispute before it.

- In addition to the court's use, the report will also inform the instructing party and its lawyers on technical matters to enable them to determine the strength of their legal case. During the preparation for the hearing it will be disclosed to the other side in the dispute, thus helping them to assess the strength of their own legal case. Should the other side have their own expert witness, a copy of their Expert's Report will be given to you at the same time as they receive your Expert's Report.

General content of the expert report

A. Scope and bases of review	• Expert's qualification • Terms of reference and instructions • Disclosure of interests
B. Background of the dispute	• The relevant parties • The given / assumed facts • The assumptions adopted
C. Issues / Questions being asked to address	
D. Approach and analysis carried out	• Set out the different approaches or analysis available • Explain why a particular approach or result of analysis is used
E. Expert opinion	• Reasons for opinion • State the qualification if unable to give opinion
F. Expert Declaration and Statement of Truth	

Evidence on which the opinion is Based

The information used or relied upon by the expert should be reliable and relevant	• Consider the source of information and/or underlying supporting documents – e.g. use of audited accounts vs management accounts • Contemporaneous information
Develop an information request list if certain types of documents are not available	The level of relevant information provided may affect the extent of the expert opinion e.g. may need to make more assumption which may weaken their case.
Use of hearsay evidence	Expert may use the evidence recorded in the witness statements when factual contemporaneous documents are not available
Use of hypothetical examples	• Can easily be challenged. • Can be interpreted differently in different situations – potential danger.

Tips for Expert Report

- Always be impartial, i.e. do not merely focus on the favorable findings for your clients; unfavorable sides should also be taken care of as these may be used by the opponent experts
- Be clear and concise - the reader of the report should be able to understand and to follow the reasoning leading to the opinions reached
- Avoid unexplained jargon or acronyms, i.e. a lay person should be able to understand the relevant terms.
- Be impartial and avoid bias - do not focus only the favourable side of a client's case and ignore other issues which may be less favourable to the client
- Assumptions adopted should be clearly stated - where alternative assumptions can be made, it may be necessary to deal with each set of assumptions
- Facts and the expert's opinion should be clearly separated
- Sought written instructions or, where the instructions are given verbally, to confirm them in writing in order to avoid misunderstandings
- Don't go beyond your expertise
- If the client (e.g. a lay person) doesn't understand it, the judge won't
- Logical flows should be in place in the report
- Appendices should be used to support your main arguments in the report
- Paragraph numbering should be used for the readers to follow, and if possible, together with the use of charts and diagrams for the ease of understanding of the expert report

Exchange of Expert Report

Simultaneous	Sequential
• The report is exchanged at the same time by two experts.	• An expert will exchange his/her report only when the other side's expert has surrendered his/her report. • This exchange may be preferable as duplications of work can be avoided.

D. Meeting of Experts

- Narrowing the areas of difference to be addressed during the trial or hearing, but they are not seeking to settle the matter.
- After the meeting, the experts should be able to identify:
  - The issues that the experts agreed and not agreed on
  - The reason for disagreement on any issued not agreed on

- What action (if any) may be taken to resolve any outstanding issues

- Who should attend?
  - The experts
  - Should lawyers be present?

- When?
  - Direction from Court/tribunal (after the submission of the expert reports of the both sides, normally 4 to 6 weeks may be given by the court for both experts to conduct a meeting)
  - Agreed between the experts

- Where?
  - Face-to-face preferable

    In the past, normally the first meeting will be conducted face to face; subsequent follow ups will normally be done via conference calls.

  - To be agreed between the experts, usually the office of one of the experts

  - May be conducted with the assistance of visual or audio technology, particularly in view of the pandemic (such as via the internet, video link and/or by telephone)

  - The lawyers should not join the meeting so that experts themselves can openly and freely their concern.

- Without prejudice (the underling discussion cannot be tendered as evidence in court.)

Preparation for Meeting of Experts

- Agreed on an agenda for the meeting
  - Issues agreed
  - Issues in dispute
  - Questions to be answered by the experts

- Familiar with the materials upon which own opinions are based on

- Familiar with the opinions of the other experts

- Prior to the conference, experts should also consider:
  - where they believe the differences of opinion lie between the experts
  - what process and discussions may assist to identify and refine those areas of difference.

Joint Statement

- After the meeting of experts, the experts are to prepare a written joint statement setting out the result of the meeting. It is essentially the minutes to the meeting of experts.

- Usually one expert will start preparing the joint statement, then other expert will add on. Once finalised, it should be signed by the both experts.

- The joint statement should include:

  - The issues the experts agreed on and the basis of agreement, and the underlying rationales
  - The issues the experts disagreed on and the basis of disagreement and reasons on why the experts disagree
  - Any further issues that have arisen that were not included in the original agenda for discussion
  - What further action to be taken or recommended, including if appropriate a further discussion between the experts
  - Any significant change in an expert's opinion and explanation of the change of opinion
  - Joint statement declaration

E. Giving Evidence in Court/Tribunal

How is evidence adduced in Court/Tribunal, i.e. assume that you are in the witness box

Examination-in-Chief (done by your own lawyer)	• Party questions the witness it has called to give evidence • Not allowed to ask leading questions (e.g. questions that prompt or encourage you to give out particular answers)
Cross-examination	• The evidence given by the witness is tested by opposing party through the use of leading questions
Re-examination	• Party questions the witness again after cross-examination • Can only ask questions that clarify points raised in cross-examination

Preparing for and Giving Testimony

- Allow sufficient time to prepare. Particularly, there may be a time lap between the date on which an expert report has been submitted and the date on which you may be asked questions in courts.

- Detailed knowledge of the report - not only the body of the report, but also include the appendices and exhibits of the expert report

- Be familiar with the relevant underlying facts of the case

- Prepare not only questions to which you already know the answers to, but also anticipate other questions ahead of time and prepare the answers

One may wish to invite other colleagues to read your expert reports and to come up with possible questions that may be raised by other parties

- Be impartial and do not appear to be advocating your client's position; the expert's duties are always to the courts, not to the clients

- Remain courteous but firm during cross-examination

- Do not volunteer information or stray from the specific topic

- Say so if you do not know the answer or did not consider/analyse something

- Think before responding – take your time and it is ok to have thoughtful pauses.

- Be prepared - possible areas of attacks during cross-examination are:

  - Expert's qualification
  - Expert's independence
  - Facts and assumptions in the expert report
  - Mythologies adopted by the expert
  - Conclusions reached by the expert

Concurrent Expert Evidence

- Also known as "hot-tubbing"
- The court/tribunal may determine that it is appropriate for experts to give some or all of their evidence at the same time and in each other's presence
- Sometimes a question over a single issue is asked by the judge/arbitrator for open discussion among the experts so that they could arrive at a final and accurate conclusion.

Pros	Cons
• Save time and cost • Less confrontational and more inquisitorial by a judge, rather than having a legal counsel to put forward to either side • Encourages open and frank discussions • Easier for a judge to recall and understand the positions of both experts by hearing the evidence simultaneously and sequentially • The exchange of questions between experts often allows an issue to be explored in greater detail until it is clear to everyone.	• Takes away the opportunity for the parties to scrutinize the experts, as there is no cross examination • Key evidence which the expert considers important could be missed if the court/tribunal does not raise them • One of the experts may be able to manipulate a discussion if he/she has a greater knowledge of a particular topic than the other experts • Time may be wasted if the experts go around in circles or digress from the relevant issues

Any differences between Court vs Arbitral Proceedings, and Criminal vs Civil Proceedings?

Court vs Arbitral Proceedings

- No differences, in terms of the underlying workloads of experts.
- The former's judgment will be recorded and open for the public to search. In case an expert was crticized by the court, this will be documented and will be made public available.

Criminal vs Civil Proceedings

- The burden of the proof of the former is "beyond reasonable doubt", while the latter is "the balance of probability".

F. Other Roles Played by Expert Witness in Court/Tribunal

Court-Appointed Expert

- Different from a single joint expert, which is engaged by the joint parties.
- Same role as an independent expert
- An expert appointed by the court to inquire into and produce a report on any particular issue arising in the proceedings
- The court may either appoint an expert based on the agreement between the parties or at the court's discretion
- The court may give the expert directions as to the issues to be dealt with, and the facts and assumptions to be relied upon in forming the expert's opinion
- The court-appointed expert can apply to the court for directions to assist in the performance of the expert's functions
- The expert report will be sent to the court instead of to the parties
- The parties can apply to the court to seek clarification of any aspect of the court-appointed expert's report
- Except by leave of the court, the parties cannot adduce evidence of any expert on any issue arising in proceedings if a court-appointed expert has been appointed in relation to that issue

Expert Determination

- A form of alternative dispute resolution where an independent expert in the subject matter of the dispute is appointed by the parties to resolve the matter, rather than putting forward the matter to be resolved by the court
- Consensual and usually drafted into the contract or agreement as a dispute resolution clause
- Parties will make submissions to the expert and the expert will then give a decision
- The determination by the expert is final and binding on the parties, unless the parties agreed otherwise
- More suitable to the disputes involving single issue and over technical matter, and may be used on a stand-alone basis or in connection with an arbitration, mediation or court proceedings
- Can also be used when there is no dispute, but a difference which needs to be resolved, for example, the valuation of a private business.

Advantages	Disadvantages
• Speed of determination • Less formal • Cost savings • Confidentiality	• Uncertainty • The power of the expert is entirely dependent on what had been agreed between the parties • No appeal or setting aside a determination • No statutory immunity for the expert