



## 'Driving Efficiency in International Construction Arbitration – Lessons from a survey of International Construction Disputes' webinar by Dr. Dean Lewis and Mr. Mohammed Talib

23 June 2020, Hong Kong

The Branch had the honour of hearing from Dean and Mohammed on their interpretation of the results of the Pinsent Masons' and Queen Mary University of London 2019 International Arbitration Survey, which was presented by Zoom conference.

Mohammed started the presentation with a selection of facts and figures and Dean shared his insights and thoughts on how construction disputes could be resolved more economically and efficiently.

Some key findings coming out of the survey include:

- The value of the dispute can sway decision makers' views on whether it is a commercially sensible step to pursue arbitration. For 42% of respondents, the minimum threshold for considering arbitration is where the value of the dispute is between US\$ 1m and 10m, but the study found that 43% of in-house counsel surveyed believed that disputes need to be valued between US\$ 11m and 25m to make the claims worth pursuing in arbitration.
- 73% of respondents regard technical complexity as a defining feature of international construction arbitration, 66%



from left to right: Mr. Mohammed Talib, Dr. Dean Lewis and Mr Nicholas Turner (Branch Chairperson)

of respondents cited the large amounts of evidence required.

- When appointing arbitrators, the vast majority of decision makers valued experience of how construction projects work above all other factors. In terms of arbitrator characteristics, the leading attributes comprised issuing an award within a reasonable period of time (70%), being willing to make difficult decisions, including on procedural issues (68%), possessing case and counsel management skills (68%) and having technical knowledge of construction disputes (63%).
- The majority of respondents showed support for mandatory compliance with pre-arbitral decisions (which might be obtained as part of the contractual dispute resolution mechanism) as a pre-condition to arbitration. This statistic was underpinned by other survey results which showed that more than two-fifths of parties do not voluntarily comply with decisions issued in alternative dispute resolution processes.

Welcome to the October edition of the CI Arb Newsletter.

Excellent feedback has been received on two special articles included in July edition of Newsletter. These articles examined the impact of Covid-19 on the dispute resolution proceedings from an arbitrator's perspective, written by Peter Caldwell and Nicholas Turner & Christopher To respectively.

In this edition, we are delighted to feature a further Covid-19 related article by John Cock, from an expert witness perspective. Mr John Cock was the past EAB Chairperson 2007/2008 and is currently the Treasurer for the Branch.

Recordings of all webinars took place during the last quarter are available for members to download from the EAB website.

I hope you will find this issue of Newsletter a good overview of the events happened in the last quarter.

Enjoy!

*Gina Leung*

- Although respondents acknowledged that technical automation has a role to play in increasing the efficient management of large volumes of evidence, there was resistance to the idea of automating the entire decision making process.

Dean's and Mohammed's presentation was well-received and there were many questions. The event was attended by approximately 57 members.

*Nicholas Turner*

## 'One Year Reflection: Singapore Convention on Mediation, How It Is Relevant To Hong Kong and Latest Development' webinar by Mr. Ting-kwok IU

21 July 2020, Hong Kong

The Branch organised a second webinar on 21 July 2020 to examine the significance and effects of the United Nations Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention on Mediation").

Mr. Ting-kwok IU, an experienced mediator and solicitor based in Hong Kong and a panel mediator of the Singapore International Mediation

Centre, went through some of the key sections of the Singapore Convention on Mediation and particularly, the interpretations of 'international' context and 'in writing' requirement.

Mr. IU also highlighted the practical effect and applicability of the Singapore Convention on Mediation towards the parties in Hong Kong and how the parties shall be aware of such development.



from left to right: Mr Nicholas Turner (Branch Chairperson) and Mr. Ting-kwok IU

There were about 40 participants, the webinar ended with an interactive questions and answers session. The feedback was positive.

*David Luk*

# Expert Witness in the Time of Covid

By John Cock



## Introduction

This article considers the impact of Covid-19 and some challenges it brings to expert witness work. It is the third in a series commenced in the last issue of this newsletter. The first two articles were 'Challenges in Using Online Dispute Resolution for Arbitration Proceedings', by Peter Caldwell, and 'Some Practical Considerations When Running Virtual Hearings', by Nicholas Turner and Christopher To.

Both previous articles primarily considered the tribunal's perspective, whereas I shall approach the issue from that of a practising expert. As noted by Nicholas Turner and Christopher To in their article, 85% of hearings at HKIAC in April-May 2020 were conducted as virtual hearings. Anecdotally, Covid-19 was the cause of many hearings being conducted virtually – the alternative, often, being only to defer or abandon the hearing entirely. As Peter Caldwell pointed out in his article about online dispute resolution [ODR], disruption by Covid 19 'may well be the catalyst needed to propel the arbitration community into the widespread use of ODR'.

Expert witnesses have been and will continue to be affected by these changes, as have tribunals, parties, counsel and advisers in arbitration.

## Guidance for Experts Delivering Remote Evidence

The Academy of Experts [TAE] has published a useful guide entitled 'Remote & Virtual Hearings – Guidance for Experts' (published 2 September 2020). The Guidance has been published under the auspices of TAE's Judicial Committee, which includes senior judges representing the English, Scottish, Northern Irish, Singapore and Hong Kong Benches. While focusing primarily on the needs of expert witnesses, the Guidance also includes information helpful for anybody involved in online hearings.

The Guidance defines two primary modes by which remote evidence may be delivered. 'Remote hearings' are defined as situations in which the tribunal and most other participants are together in the hearing room, while one or more persons participates remotely. Such

hearings have been conducted for many years using telephone and video links for remote participant(s). A more recent development is the use of 'virtual hearings', defined as situations in which most if not all participants are remotely located, and the 'hearing room' is provided by a virtual platform. Virtual hearings are a sub-set of ODR, in which all facets of the proceedings are conducted online.

Expert witnesses are recommended to check at the earliest opportunity whether they will be required to deliver their evidence remotely. In so doing, experts should find out whether the matter for which they are engaged is to be conducted by way of remote hearing, virtual hearing or fully by ODR. If by virtual hearing or ODR, although some participants may choose to work with hard copies, the hearing bundle will generally be compiled and accessed online. Therefore in such scenarios, the expert will not only need to prepare to deliver oral evidence remotely, but will also need to ensure that his or her reports are suitable for online access and use.

## Preparing Expert Reports for Virtual Hearings

Reports for online submission in evidence should be prepared with on-screen display in mind. Consider including cross-references as hyperlinks to facilitate efficient navigation. Reduce file sizes where practicable to improve document loading and display speeds. PDF files can be "optimised" for web use, as can images in word processing and other applications.

Beware however, if high resolution images are required for illustration of evidence. In such situations, consider including in the bundle separate high-resolution JPG or PNG files, hyperlinked from the report. This approach permits access to the high-resolution images when required, without slowing down access to the report at other times.

In ODR proceedings and other matters involving virtual hearings, consider the jurisdiction(s) within which the various participants are to be located. Are any or all participants subject to data privacy requirements such as the EU General Data Protection Regulation or similar legislation? If so, the expert may need to take steps to ensure that any requirements are complied with. If

participants are in different jurisdictions, it may be necessary to comply with the requirements of multiple regimes. Consider whether it may be necessary to redact information to avoid breaches of data privacy.

## Preparing for Oral Evidence by Virtual Hearings

The most obvious area of concern for expert witnesses participating in virtual hearings is the remote nature of the proceedings. This leads to a loss of personal contact, reducing both the amount and the effectiveness of non-verbal communication such as body language. This can make it more difficult for the expert, other witnesses, counsel and tribunal to 'read' the reactions of the other participants.

Experts should bear in mind that the tribunal and cross-examining counsel may well be able to see a closer view of the expert's face than would be the case in a face-to-face hearing. The expert's facial expressions may then have greater impact than they might otherwise. On the other hand, non-verbal cues such as posture, hand movements and so on may be less noticeable. The overall impact may be either positive or negative. Experts should practice delivery of evidence using their computer video's mirror function. The aim is to reduce the negative and maximise the positive 'tells', for optimal presentation.

Experts should be dressed as they would for face-to-face hearings. The fact that proceedings are remote or virtual does not make them either more or less formal. If the proceedings are in court, they should be approached with the same deference as for a physical hearing. For arbitration, experts are advised to seek guidance from their instructing solicitors regarding the degree of formality expected. When in doubt, err on the side of formality. In any event, experts should adopt an appropriate degree of professional solemnity and decorum.

Other matters the expert should consider include the hearing protocol, the expert's physical environment and the technological set-up.

## Protocol for the Hearing

Some courts and tribunals may work to a remote hearings protocol. If so, ensure you have a copy of it, together with any court / tribunal

orders modifying it, and be familiar with its requirements. Protocols establish in effect the ground rules for the hearing. If no protocol, the rules may just be set by agreement, or by order of the judge or arbitrator. In any case, the rules may develop as the matter proceeds.

The ground rules may include such matters as whether remote witnesses must be alone, or if not, any conditions under which other persons may be present with the witness. Other matters that may be covered include whether virtual backgrounds are permitted, the means for accessing and presenting the hearing bundle and restrictions on the witness referring to documents not included in the bundle.

As with face-to-face hearings, witnesses are expected to deliver their evidence in isolation, while incommunicado with the outside world. Therefore, most protocols also require the witness to ensure that mobile phones are switched off, landlines are disconnected or inaccessible and messaging systems are disabled.

The witness may be required to declare that all specified conditions for giving evidence have been complied with. For example, you may be asked to confirm that you will not communicate with any other person about the case while giving evidence, including during any break or overnight (with limited exceptions, such as administrative matters).

Whether or not governed by a protocol, the methodology for communication between the expert and the client's legal team should also be agreed and understood. If you are using an online platform's 'chat' facility, take care that any communication is only accessible by the intended recipient(s).

### **Environment for Delivering Remote Evidence**

Experts presenting evidence virtually are advised to consider their physical environment carefully, with a view to ensuring effective delivery. Lighting, noise, visual background and framing are all important, as are personal presentation and behaviour. If you are permitted to have access to hard copy documents while giving evidence, ensure you have whatever you need within reach.

Any such papers should be easily retrievable, and you should have sufficient space to work with them. Copies should be identical to those in the trial bundle. Depending on the protocol, papers may be permitted to be highlighted

but not annotated. As a general principle, if a witness refers to anything that is not included in the hearing bundle, the opposing party may be entitled to have the evidence excluded or for the additional information to be disclosed. Referring to an annotated copy of your report, for example, may inadvertently lead to your notes being entered in evidence. If you intend to give evidence on oath, ensure also that you have a copy of the appropriate religious text on hand.

Whether in an office or home, the room should be private and ideally free of distracting ambient noise. Take steps to ensure that you are not interrupted during the hearing. Avoid back-lighting and lighting that creates dramatic shadows or strange colour effects, particularly on the witness's face.

Set up the camera so that the witness's head, shoulders and upper torso comfortably fit the frame. Framing that is too tight, with the face filling the screen, can be intimidating and more tiring for viewers to watch for extended periods. Tight framing also robs the audience of any non-verbal cues apart from facial expressions. Framing that is too wide results in the subject appearing far away, making the face difficult to read. Ideally, framing should be close enough so the face can be seen clearly, while allowing the witness room for some non-verbal body language and even perhaps to use their hands occasionally to express themselves.

Ensure the background is not overly cluttered or distracting. A plain, neutral background is generally best. A bookshelf may provide a suitable background, if the overall effect is sufficiently abstract, provided titles are not legible. However, viewers can become distracted trying to work out what books are on display, while files with legible labels could lead to inadvertent breaches of confidentiality and privacy.

Many software platforms allow users to deploy a virtual background. Do not use any such background without express permission to do so. Follow the protocol in this respect, if any, and if in doubt seek clarification from those instructing you.

### **Technology for Virtual Hearings**

The primary question regarding technology is, which software platform is to be used? The number of platforms on the market is increasing, and they can vary significantly in the way they work. Check early which platform is to be used.

Ensure that it has been properly installed on your system, that it works and that you are familiar with and are confident operating it.

Consider also your hardware set-up. Do you have multiple screens? If so, does the software platform allow you flexibility in how you can use them, and do you know how to use it? Three screens are ideal, allowing you to see the tribunal, the bundle and counsel at all times, without constantly switching views.

An expert witness's evidence depends largely on his or her vocal communication. If you cannot hear the question clearly, you may be unable to answer properly. Sound is therefore important, for both speaking and hearing. Do not rely on basic mobile phone headsets. They may be fine for telephone calls but inadequate for giving evidence. If you are going to wear headphones, ensure they are of good quality, that they work and that you know how to adjust input and output levels. You should also be aware of what you look like and comfortable wearing them. Where background noise levels are not a problem, a better option can be a good quality echo-cancelling speakerphone.

Of course, all software platforms require an internet connection, so experts are advised to ensure that they have access to a sufficient and stable broadband connection. If bandwidth is limited, it may be necessary to prevent or limit others from using the service for data-heavy purposes like downloading or streaming during the hearing.

### **Conclusion**

While giving evidence as an expert witness is often rewarding, it can also be demanding and stressful at times. The emergence of remote and virtual hearings adds further layers of complexity to what is already a difficult job. Giving remote evidence introduces specific procedural, technological and personal challenges over and above those associated with in-person hearings.

Remote and virtual hearings are likely to be 'new ground' for most people involved in them, including judges, arbitrators, lawyers and parties. The TAE Guidance warns that psychologists advise that online interaction is more demanding and tiring, and that processing information through online contact is more difficult, than in face-to-face situations. This is especially so in the air of uncertainty and stress that pervades this time of Covid 19.

## 'Time, Privacy and Cost Considerations in Maritime Arbitration' webinar by Mr. Arthur Bowring MH and Mr. Jagmeet Makkar

20 August 2020, Hong Kong

The Branch organized a third webinar on 20 August 2020, with the support of Institute of Chartered Shipbrokers, Institute of Seatransport, Marine Insurers Club, Hong Kong Maritime Arbitration Group, Hong Kong Maritime Law Association and Hong Kong Shipowners Association, on maritime arbitration.

Mr. Arthur Bowring MH and Mr. Jagmeet Makkar firstly examined the peculiarities of the maritime arbitration including internationality, sources of law, specialized arbitration centres and a collection of rules and principles. International nature of shipping, a highly volatile industry with increased probability of financial losses and defaults, viscous to change, relatively small claim amounts with a large number of cases are some of the attributes that differentiate maritime industry from others.

The speakers then considered the historic timeline of maritime arbitration followed up by the role of arbitrators. Arbitration was a concept adopted to expedite the resolution of a dispute at a minimal cost while maintaining the process private. However, over a period of time, "judicialisation" of arbitration process has resulted in more and more sophisticated and "regulated" way of doing things, with control over the process moving towards law firms and away from the actual



from left to right: Mr. Nicholas Turner (Branch Chairperson) and Mr. Jagmeet Makkar

users of this process. Transition from an "informal procedure" to formal rules increasingly modelled on court proceedings of resolving disputes has not helped the original objective.

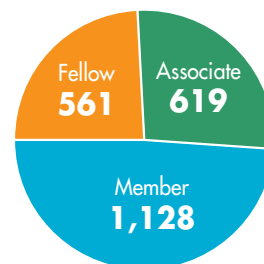
Among others, the speakers suggested ways to expedite the process by directing the arbitration to solve factual or technical issues, while giving reasonable and adequate relevance to legal question (rather than the other way around), managing the defensive tactics that may not necessarily be related to the merits of the dispute, managing the procedural objections and limiting dilatory tactics and keeping the focus on the merits of the dispute while promoting voluntary agreement by the parties.

Nearly 50 participants joined the webinar with a questions and answers session at the end. The feedback was positive.

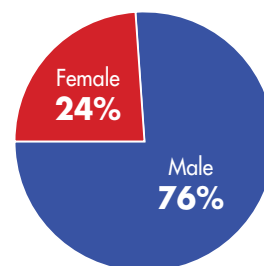
## Current Branch Membership

### Distribution by Membership Grade

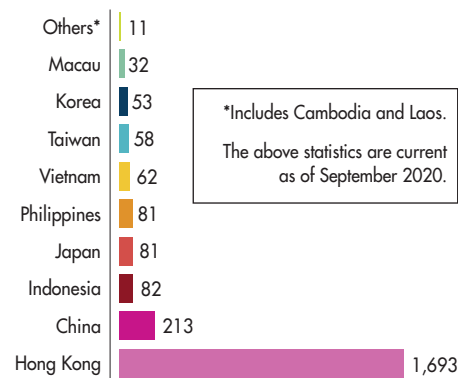
(excluding the Retired Members and students)



### Distribution by Gender of Members



### Distribution by Region



## CIArb East Asia Branch

The East Asia Branch provides a regional organisation for members of the Chartered Institute of Arbitrators who are residents in the geographical area of Hong Kong, mainland China, Indonesia, Japan, Korea, Macau, Mongolia, the Philippines, Taiwan and Vietnam. Thailand and Singapore, formerly part of the Branch, were constituted as separate branches in 2003 and February 2010 respectively.

The objectives of the Branch are to promote, encourage and facilitate the practice of settlement of disputes by arbitration, mediation and other means of dispute resolution, and generally to support and promote the status and interests of the Institute.

## CIArb East Asia Branch Committee 2020/21

Chairperson – **Nicholas Turner**, Vice Chairperson – **David Fong**, Branch Secretary – **Helen Au** assisted by **Donovan Ferguson** (co-optee), Branch Treasurer – **John Cock**, Adjudication – **Joseph Leung** (observer), ADR Editorial – **Christopher To**, Communications within CIArb – **Nicholas Turner** assisted by **Scott Ramsden** (observer), Communications with outside bodies/Public Relations Officer – **David Fong**, Diversity – **Giovanna Kwong** (observer), LinkedIn – **Vincent Li**, Mediation – **Lawrence Lee**, Membership – **Cordia Yu** assisted by **Jagmeet Makkar** (observer), Newsletter – **Gina Leung** (observer), Professional Development & Training and Faculty List – **Christopher To** assisted by **Stephen Chu** and **Saniza Othman** (observer), Programme – **Albert Yeu** and **David Luk**, Regional – PRC – **Mingchao Fan** assisted by **Richard Leung**, Regional – Taiwan, Korea, Japan, Indonesia and others – **Glenn Haley** assisted by **Anny Wong** (observer), YMG Chairperson – **Ronald Pang** (co-optee), University Promotion – **Helen Au**, Vis East Moot – **Mary Thomson** assisted by **Jagmeet Makkar** (observer), Website – **Micky Yip**, **Karen Mills** (co-optee), **Chun Wai Ling** (observer)

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