Introduction

1. This brief paper is based on surviving and still enjoying the shipping world as a marine engineer for fifty years. Thirty of those years have been spent as a consultant/expert witness and the last six as a full member of the LMAA.

Quality of Instructions

2. This important first step is invariably in the hands of solicitors. The expert has to be the right person for the job and instructed properly. The expert needs to be able to address the subject matter with confidence and in detail. It seems that in earlier days cases were, or appeared to be, simpler.

3. Since the introduction of the ‘Woolf reforms’ I can say that I have really only been instructed twice in a correct and proper way. These two instructions were issued in two distinct styles. A combination of these would illustrate a good example of how to instruct an expert.

4. In the first case I received a brief telephone call from a lawyer I had known for many years. The purpose of the call was to ensure I had no conflict in the case. I then received a file of papers and a letter of instructions. The package included extracts from the Civil Procedure Rules Part 35 (CPR 35) and a message which said – “I know you have been giving evidence for some while, but think I should remind you of your duties as an expert”.

5. This was good advice. As an arbitrator I increasingly see that one of the first questions put to an expert in cross examination is – “Are you
familiar with CPR 35?”. The answer is usually ‘yes’, but further questions follow until the expert may be insecure. An uncomfortable start for an expert invariably gets worse and the expert is now ‘off balance’ before the real cross examination begins. I would just add that there is of course no reason why the CPR 35 should apply to arbitration proceedings – but the principles should, that is, the duty of an expert.

6. The second illustration involves a very different, but effective, style. Again, I had known the solicitor in question for many years. The conversation went like this – “Assume I own a bulk carrier and need to load bulk cement in Thailand. I have no hose attachment openings in my hatch covers – not unusual. So, I cut openings and weld them up afterwards – nothing wrong with that – is there?”. Reply – “there is everything wrong with that!”. Solicitor – “You’re instructed!”. I had effectively been ‘proofed’. It would have been easier for the instructing solicitor, and more common, to have assumed I could deal with the matter, but without knowing my real and immediate opinion, I should add that opponents later conceded before a hearing took place.

7. In summary – try and ensure the expert is the right person then ensure they have CPR 35 extracts and the relevant pleadings among the other relevant documents.

Experience of Giving Evidence

8. The first time is, like most first experiences in life, never forgotten. In my case I was cross examined by a youthful Richard Aikens, now LJ Aikens. Looking back I recall reading all I could on how to give evidence including answering the question based on five standard answers – yes, yes but, no, no but, don’t know. It is easy to forget this advice over the years and I am not adverse as an arbitrator to remind experts to ‘answer the question’.
9. Experts should not allow themselves to be rushed or confused by cross examination questions which begin – “were it not the case that the vessel had not …” or “I know it is not your case, but assume for a moment …”. These are often effective tactics used by counsel.

10. From time to time I hear solicitors say – “we have an expert with the right experience, but he/she has not given evidence before”. In my view, this is of less relevance than finding a person with the appropriate experience. In fact, as an arbitrator I have heard some of the best evidence from ‘beginners’ compared with some ‘experienced’ experts.

11. In a High Court case (1989) the Admiralty Judge was considering a collision case. One party had appointed an ‘experienced’ expert; the opponents a young relatively inexperienced expert. Of the former, the Judge said that the expert’s report was “most unsatisfactory - he did not apply his mind to the question”. Of his oral evidence the Judge said he found this “of very little assistance”. When it came to the younger expert, the Judge said – “In contrast to the evidence given by Mr X.... the evidence of Mr. Y was helpful. Mr. Y is only 34 years of age. When he commenced to give his evidence I wondered whether he had sufficient experience and training to be a useful witness. But during the course of his evidence, and in particular when he was answering questions under cross-examination, I realised the depth of thought which Mr. Y had devoted to his task. I found his evidence most convincing”. Instructing solicitors please note!

12. It can be seen from reported court cases that where experts have been criticised for not complying with their duties, in most, if not all cases, these criticisms have been directed at ‘experienced’ experts. There are times when I hear experienced experts not only going beyond their expertise, or failing to answer a question they would rather avoid, but, worst of all – acting as advocates. There is also a tendency for experts today to write lengthy reports covering ‘all angles’ and often quoting from the charterparty, witness statements and documents already in
the bundle. This is unnecessary, costly and irritating. LJ Aikens said recently in a case in which I was an expert – “no expert is to write more than 10 pages”. Fully endorsed!

**Arbitration is Not a Court**

13. As I have mentioned earlier, CPR35 does not apply to LMAA arbitration, but there is no doubt that the principles should apply to experts.

14. From time to time there are suggestions that arbitration awards should be made public. I do not favour that view. I am still active as an expert and therefore meet shipowners. The Greek merchant fleet is the largest in the world and talking with owners in the small streets around Piraeus – or the outer parts of Athens – the feedback is very much in favour of leaving the system as it is – that is, on a confidential basis.

15. It seems to me that over the years the arbitration process has become more formal. While I can see that this is perhaps a necessary process, I do think there is a loss of focus on what owners (and others) like about London arbitration i.e. commercial men making prompt commercial decisions. The system was praised for being quick, inexpensive and, usually right. Times have changed, or at least, moved on, change is inevitable. It may well be that the complexity of a lot of cases today and the work load of many arbitrators means it takes longer to produce an award. While this paper is not intended to analyse the cost of arbitrations I do wish to say that ever increasing interlocutories and legal costs in general are all part of the overall cost, but I see nothing ‘cheap’ with today’s services, ranging from dentistry to running a motor car. I hear it said that the court is cheaper than arbitration but it seems to me that all the preparation costs will be equal to, or perhaps more than those necessary for arbitration. The systems are different and arbitration in London has its place.
Expert Tribunals

16. The question is – do we need expert tribunals? I am aware that in the Admiralty Court, the Elder Brethren advise the Judge. But this is the court.

17. It may be suggested that a way forward in arbitration is to have a single expert on the tribunal. In my view, this is fraught with potential problems, e.g. who chooses the panel of experts, will both parties agree and so on. In fact, my view on single experts has been endorsed recently where I read that in a recent insurance case a Judge ordered there should be a single expert. The expert produced an initial report favouring the Claimants. He was then in contact with or contacted by the Respondents’ solicitors, following which he produced a second report which favoured the Respondent! This is obviously unacceptable – but a risk with a single expert appointment.

18. Appointing a court expert is common practice in Europe. In my experience, this can be a ‘hit and miss’ affair. In fact, I was once told by a French advocate – “the Claimants and Respondents get the two best experts; the court ends up with third best”. While this may obviously not always be the case, I think we should stay with our tried and tested system of experts being appointed by each party. Thereafter, users of the system should control and operate it effectively.

Calling Experts/Costs

19. As I have mentioned earlier, over the last 30 years or so I perceive an increasing tendency to involve several experts on a case where a single or two experts, often a marine engineer and a mariner, were considered adequate. So, why is it thought necessary today to engage several experts on a case? First, it seems to me technology has advanced in general terms. There are ‘new’ areas of expertise, e.g.
electronics, advanced metallurgical and laboratory techniques, computers and so on. It is inevitable more experts may be required on a case.

20. Secondly, my perception is wrong! It was recently pointed out to me that a very long time ago a court case involved numerous experts. Today, we simply have new technology and new expertise.

21. However, I think experts should be ‘controlled’ by which I mean not only in the content and length of their reports, but they should only address areas confined to their expertise and points essential to the case.

22. In the big picture of the costs of an arbitration, the hourly fees charged by an expert are low. Because the Wolff reforms effectively ‘front load’ cases it is necessary for experts to be involved at an early stage in a case – and the clock carries on ticking thereafter.

23. A final point on this subject – I have recently been involved in a case as arbitrator where a colleague arbitrator instructed the experts to address about ten particular points. At the hearing, one expert had complied, the other had not – much to the irritation of the arbitrator. I know the expert who did not address the arbitrator’s points and was surprised he had not done so. Some time later, I concluded that the instructing solicitor had probably not ensured his expert had the questions in the first place. The point here is that there may be times when it is a good idea for an arbitrator to pose questions, but I do think there is a danger of being seen to be intervening. In any event, if the points do not come out during the hearing the arbitrator will have every opportunity to ask his questions.
Experience of Other Countries

24. I have been involved with cases as an expert in various countries including USA, Greece, Sweden, Republic of Ireland, South Africa and the Netherlands. While there is inevitably a stress factor giving evidence in any country, I can say that the most searching and penetrating system is, in my opinion, to be found in this country – be it High Court or Arbitration. I think the standard of preparation for a case by solicitors is high and I am constantly impressed by the quality of barristers. The system involving both a solicitor and a barrister is in my view proven.

Conclusions

25. In summary:-

- Instruct and select experts with care and ensure they know and comply with CPR 35.
- Select the expert for the job rather than an ‘experienced’ expert.
- Control the length and content of experts’ reports.
- Encourage potential ex-seafaring experts to become arbitrators – the LMAA is a maritime organisation.