

The newsletter of GBRW Expert Witness

August 2018

Welcome to the August edition of *Expertise*, the first edition of our new quarterly publishing schedule.

It's been fairly challenging to meet this month's deadline because of the high level of approaches and engagements over the past two months. We usually experience a seasonal "spike" each summer and organise ourselves to respond to enquiries as quickly as possible. However, this year seems to have been particularly busy, even though our record hot summer has slowed the general pace of business life in London!

In this edition we feature two thought provoking articles by experts with whom we work:

From Hong Kong, Andrew Kinloch comments on developments in China's Belt and Road Initiative and in particular on the stresses and strains created by the rapid pace with which projects are being implemented. Given the enormous scope of the BRI and the numbers of players involved, it looks as if experts in a range of disciplines may have a busy few years ahead.

Closer to home, Robin Bryant, one of the most experienced banking experts currently practising, discusses the issues involved in conducting experts' meetings. Robin draws on his experience of numerous meetings (which include a couple with myself) to suggest a number of ways in which they can be conducted as productively as possible.

As lawyers return from summer vacations, we anticipate a continuing busy workload and welcome your enquiries for experts in our core areas of banking, investment and insurance disputes.

Paul Rex

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ENQUIRIES

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Areas of Expertise

BANKING & FINANCIAL

Corporate Lending
Personal Lending
Risk Management
Investment Banking
Corporate Finance
International Banking
Correspondent Relationships
Commercial Property
Residential Mortgages
Syndicated Lending
Loan Workouts
Recoveries and Realisations
Back Office Procedures
Trade Finance
Letters of Credit
Leasing
Credit and Debit Cards
Know Your Customer
Anti Money Laundering
Anti Terrorist Financing

INVESTMENT MANAGEMENT

Investment Services
Investment Advice
Fund Management
Structured Investment Funds
Stockbroking
Hedge Funds
Options, Swaps, Derivatives
Treating Customers Fairly
Pensions

FINANCIAL MARKETS

Money Markets
Commodities Markets
Securities Trading
Financial Instruments

INSURANCE

Claims Handling
Public Liability
Employer's Liability
Broking
Underwriting
Property Insurance
Professional Indemnity
Life Assurance
Liability/Casualty
Financial Institutions
Directors & Officers
Motor
Motor Fleet
Reinsurance
Regulation
Loss Adjustment
Treating Customers Fairly
Space
Medical Malpractice
Financial Institutions

BUSINESS FINANCE

Limited Companies
Partnerships
Private Companies
Sole Traders
Mergers & Acquisitions
Treasury Management
Sales of Businesses
Property Finance
Business Planning
Company Valuation
Venture Capital

OTHER AREAS

Employment Disputes
Loss of Earnings
Compensation Calculations
Arbitration and Mediation



China's Belt and Road Initiative: Expert Witnesses needed



Based in Hong Kong since 1998, **Andrew Kinloch** advises across the whole infrastructure finance cycle in Asia. Clients include governments on policy, investors on fundraising and parties in dispute where he acts as an expert witness. Amongst other qualifications, he is a member of the Expert Witness Institute. For more of Andrew's opinion pieces, see www.logiegroup.com.

China's Belt and Road Initiative turns five this year. Originally aimed at financing the building of all kinds of infrastructure along the overland routes to Europe (the "Belt") and maritime ones across the Indian Ocean to eastern Africa (the "Road"), it has since evolved to embrace the Pacific and Arctic Oceans, and even cyberspace.

BRI involves political ambition, huge amounts of money, difficult value judgements, inexperienced players, changes of heart, immature legal systems, poor record keeping of land ownership, the potential for corruption, deals put together in a rush and more – this is a heady brew in which disputes will ferment and in which expert witnesses will be needed.

BRI is enormous. China Development Bank, the Silk Road Fund, China EXIM, Sinosure (which reinsures political risk), various regionally-focused funds, the Asian Infrastructure Investment Bank, the world's four largest commercial banks (all of which are Chinese) and more may eventually invest, lend to or insure perhaps \$1 trillion of business over the next twenty years.

But the merits of a number of early BRI deals are already being questioned. Hydro-electric dams in Myanmar and Nepal have been suspended. The \$360 million Hambantota port in Sri Lanka has already defaulted and been leased back to China Merchant, branded a victim of "debt trap diplomacy". In July, the new Malaysian government suspended construction of the \$20 billion East Coast rail link (separately, it is also revisiting the \$27 billion KL – Singapore high speed rail project where the Chinese were one of four bidders). All want reassurance that the cost represents reasonable value given that there was often no realistic competition at the tendering stage; that project economics will be sufficient to repay the loans; that softer issues such as opportunities for local employment, treatment of landowners will be addressed and more.

Further afield, the West remains concerned that BRI favours Chinese contractors (which have taken 83% of the business to date) and Chinese practices. Of course, it does! At one level, BRI is just another export credit agency with extra zeroes. The World Bank and the IMF have been

pushing for greater transparency in China's lending terms (China is not a member of the Paris Club of creditor nations) and scrutiny of these has now been caught up in the Trump administration's trade war with China, the status of which changes daily.

At the same time, even Beijing cannot afford for BRI to continue as it began. So, BRI is at an inflexion point with the emphasis changing from doing deals, sometimes rash ones, to doing deals which both sides can agree are sustainable in the long term. Either way, disputes are inevitable.

This has been recognized in HK by the Trade Development Council, the Arbitration Centre and more. Although China set up courts in July this year to handle some of the commercial disputes in Xian for the Belt and in Shenzhen for the Road, disputes between states or between investors and states are more likely to be held offshore in HK (and Singapore and elsewhere).

Depending on their language skills, expert witnesses across all disciplines involved in building, operating and financing power plants, ports, airports, railways, roads and more across Asia should be busy for a long time to come!



The Experts' Joint Statement



Robin Bryant

(www.bankexpert.net) has provided expert banking evidence in some 400 claims, attended many experts' meetings and signed up to the consequential joint statements. His background is as a lending banker to both the corporate and personal sectors. He has worked in large banks as well as smaller investment banks at director level. Robin has given evidence overseas as well as in the UK and has been cross examined 18 times.

Section 9 of Practice Direction 35 requires experts in civil cases to... "agree and narrow issues and in particular to identify: (i) the extent of the agreement between them; (ii) the points of and short reasons for any disagreement..."

Only a judge could say how much he or she is influenced by the joint statement written by the experts to identify what they are agreed and what they are not agreed upon and why, with references to their expert reports.

Personally, I believe that experts' meetings are worthwhile exercises.

They should save valuable time in Court but more particularly, they ought to help in the settlement negotiations, which is the more usual way in which claims are resolved.

Most of the expert meetings that I have attended have been good hearted and held in a spirit of apparent co-operation. I have only occasionally seen experts change their views from those expressed in their written reports and one might question the worth of the joint meeting if it merely serves to repeat the views already expressed. However, instructing solicitors might be somewhat horrified to see any reversal of an expert's hitherto stated position.

As to the preparation needed for a meeting, the experts should agree the topics for discussion beforehand, each focusing on the points that need to be brought out. Naturally, the inclination is for each to concentrate on the features and arguments that favour their side, subject to the expert's duties to the Court. Agreeing an agenda saves time at the meeting as well as keeping instructing solicitors aware of what is to be discussed. It may also highlight situations where opposing experts find they are working to materially different sets of instructions.

This brings us to the question of the solicitors' involvement in the meetings

and then the joint statement. It is my experience that solicitors do not attempt to attend the meetings. However, most solicitors expect to be involved in the wording of the joint statement. It is up to the expert to agree or not to any suggested amendments/additions.

As regards the conduct of the meetings, I believe in drafting the joint statement during the meeting on a 'without prejudice' basis, topic by topic and think this must be the preferred method to catch the nuances of the discussion. It might then be 'adjusted' after reflection and further discussions between the experts. The alternative of writing the joint statement after the meeting is less satisfactory; it may make for shorter meetings, but I do not believe that it is particularly desirable.

My major concern is that the value of the experts' joint statement can be eroded when one side or the other attempts to import blocks of text from their expert report, or – even worse – sections of the pleadings. If this happens, it risks obscuring the whole purpose of the exercise – to highlight for the judge the main points where the experts agree or not – and may also distract attention from content of the experts' individual reports, on which they will have spent considerable time and effort.

GBRW Expert Witness's briefing papers for topics on which we are approached most often can be downloaded from:

www.gbrwexpertwitness.com/Expert-Witness/briefings

GBRW Expert Witness

Our directors and associates contracted by us are instructed as experts in banking, investment and insurance disputes. We advise on civil and criminal court proceedings, arbitrations and mediations in jurisdictions including England and Wales, Northern Ireland, Scotland, Australia, Bahamas, Cayman Islands, France, Hong Kong, Ireland, Jersey, New Zealand, Poland, Singapore and Sweden.