'Anti-Corruption Legislation and Their Inter-Play in Cross-Border Businesses'.

'Innovative Due Diligence Techniques – How Can We Improve?'

Even break time was busy in the Exhibition Room.

Delegates make their way through the winding paths at Kodaiji to The Garden Oriental Kyoto on Kyoto Night.

Ninna-ji, a UNESCO World Heritage Site, was closed to all but IPBA delegates on Kyoto Night.

Bidding for items in the Silent Auction, which raised close to US$34,000 for the Japanese Red Cross Society.

The Gala Dinner was held at the Miyako Hotel Kyoto, with a Noh performance and a programme to honour special IPBA achievements.

The Annual General Meeting was well attended, with the Officers reporting on IPBA business over the past year.

See more photos on the IPBA website at: http://ipba.org

The Best Paper Prize Winner

The Efficient Arbitration: Party Appointed Experts

Although essential in international arbitration, party appointed experts have rarely been used efficiently. This article highlights key reforms of arbitration rules and procedure and the use of the common law as a model, and suggests ways to optimise the use of expert witnesses.

Professor Doug Jones*
President, Chartered Institute of Arbitrators
Partner, Clayton Utz

The use of party appointed expert witnesses is common in international arbitration, yet lamentably the efficient use of these experts is far less common. Various rules and protocols exist to regulate this area of procedure, including the International Bar Association's Rules on the Taking of Evidence in International Arbitration (IBA Rules) and the Chartered Institute of Arbitrator's Protocol for the Use of Party Appointed Expert Witnesses in International Arbitration (CIArb Protocol). While these guidelines are useful, the proactive management of party appointed experts beyond simply adhering to these guidelines can greatly reduce the time and costs associated with arbitration.

An essential element of using party appointed expert witnesses efficiently is ensuring the independence of the experts. Only when the experts recognise that their duty is to the tribunal, and not to the party by whom they were appointed, is the expert's evidence going to be most efficiently and effectively utilised. Various procedures can be utilised by tribunals to attempt to maximise the independence of expert witnesses, and various parts of both the IBA Rules and the CIArb Protocol are relevant to ensuring the expert remains as independent as possible.

The use of party appointed experts, and the associated challenges, is not unique to arbitration. Indeed, the use of experts has been the subject of much scrutiny in the context of domestic litigation in recent years, beginning in the UK and spreading throughout other common law countries. The lessons learned in the courtroom are worth considering, as tribunals and parties to arbitration can consider how the courts have addressed these issues, and adapt their solutions to suit arbitration.

This article will look at these curial developments and the context in which they occurred in order to gain a complete understanding of the way the courts have handled this issue. Following this, recent changes to the IBA Rules will be examined, considering how they, along with the CIArb Protocol, should be used to effectively regulate the efficient use of expert witnesses in international arbitration. Finally, this article provides a number of procedural suggestions of various ways in which the use of expert witnesses can be optimised for use in international arbitration, building on a basis of curial procedure, arbitral rules and guidelines, as well as the experience of experienced arbitrators and counsel.

History of Reform

In 1996, Lord Woolf in the UK produced a report that expressed concerns over the excessive costs and delay involved in litigation.[1] The report acknowledged the value of 'the full, "red-blooded" adversarial approach' but stated that this approach 'is appropriate only if questions of cost and time are put aside'.[2] The Woolf report identified several reasons for the lengthy delays and high costs of litigation.

One of these was the uncontrolled proliferation of expert evidence. Two problems arise from this phenomenon. First, there has been a tendency for experts to view themselves (and to be viewed) as being within the 'camp' of the party by whom they are appointed and remunerated. This gives rise to the risk that they will give partisan evidence as a 'hired

gun' which does nothing to assist either the tribunal, or indeed their 'own' party. Time and money may be wasted where opposing, partisan experts espouse extreme and vastly different opinions in an effort to support the case of the party by whom they have been retained. It may also produce injustice where an extreme but more convincingly portrayed view is preferred by an arbitrator, even though it may not be a genuine or accurate reflection of expert opinion in the relevant area.

Second, this leads to a focus on quantity of expert evidence, not quality. Parties hoping to strengthen a weak case or perhaps simply hoping to render a strong one that is impenetrable have exhibited a tendency to call multiple experts where perhaps one would have sufficed, or to call an expert where none was needed at all. This too leads to unnecessary delay and cost which may result in an unjust outcome where there is financial inequality between the parties.

As a result of these concerns, Lord Woolf proposed a number of measures for reducing the likelihood of expert bias. These measures centred around active case management by judges and full court control of how, when and by whom expert evidence is given. Fundamentally, his Lordship's reforms were based on the notion that the expert has an overriding duty to assist the court impartially and independently, and not to advocate the case of the party by whom he or she is retained.

IPBA Past President Jim FitzSimons (right) presenting Doug Jones (left) with the Best Paper Prize which was elected at the 21st Annual Meeting and Conference in Kyoto/Osaka.

Conflicting expert evidence is not of itself necessarily problematic and is a natural consequence of dealing with areas of complex, specialist knowledge. However, when this conflict arises due to the reticence of the experts to depart from the 'party line', the fundamental utility of expert evidence is called into question.

The adversarial nature of the common law tradition, and that of many international arbitrations, can account for this attitude in several ways. First, the simple fact that the expert is appointed, instructed and paid by a particular party can result in a feeling of loyalty towards that party, particularly where the expert seeks to be appointed by that party in future disputes. Second, the confrontational cross-examination environment can put experts on the defensive and generate a fear that his or her professional credibility is at stake. This can result in a reluctance to concede that certain parts of the tendered evidence are not as concrete as may otherwise be thought. Finally, as identified by a former member of the Council of the Australian Medical Association, there is a reluctance amongst professionals to subject themselves to the rigorous process of providing independent expert evidence when the conflicting evidence of an expert acting as a 'hired-gun' is accepted, despite lacking scientific credibility.[3]

Party Appointed Experts in International Arbitration

Overview

In international arbitration the use of party appointed experts is widespread and arbitrators are often left with the challenge of determining the accuracy and veracity of conflicting expert evidence. The issue has become more than just a common law one. Arbitrators from a civil law background, accustomed domestically to the sometimes exclusive reliance by courts on court appointed experts (for example in France) have increasingly embraced the use of party appointed experts.

The IBA Rules

Most institutional rules deal only with basic aspects of the evidence procedure, leaving the more specific procedural elements as a matter for the parties and tribunals to determine. The IBA Rules are a resource for arbitrators and parties, enabling them to conduct the evidentiary process involved in international arbitral proceedings in an efficient and economical manner. While the IBA Rules are not exhaustive,[4] partly due to the wide scope of their intended operation, they provide a 'tried and tested' basis upon which arbitral tribunals can base their evidentiary procedure.

The reforms that followed from the Woolf Report provide the context for the amendments to the IBA Rules regarding party appointed experts in 2010. Article 5 now requires the party appointed expert's report to contain a statement of independence from the parties, from their legal advisors and from the arbitral tribunal. This requirement is not as robust as that for tribunal appointed experts who must provide a statement of independence before appointment, thereby ensuring the expert's mind is focused upon his or her paramount duty to the tribunal before he or she has a chance to identify with the case of either party. Nevertheless, the revisions are a step towards establishing an assumption that party appointed experts will be independent.

Other 2010 revisions to the IBA Rules expressly provide for consultation between the tribunal and the parties at the earliest appropriate time 'with a view to agreeing on an efficient, economical and fair process for the taking of evidence'.[5] It is stated that this should include issues such as the 'scope, timing and manner' of, among other things, 'the preparation of witness statements and expert reports'.[6] These revisions acknowledge the importance of both expert and fact witnesses, and the importance of tailoring the process of adducing this evidence to each particular arbitration.

The CIArb Protocol

A popular and helpful protocol for the engagement of party appointed expert witnesses is found in the CIArb Protocol, which provides an established manner of conducting the evidence of expert witnesses.[7] As with all procedural guidelines, heed should be taken, but not at the expense of an alternative procedure that may be more suited to the particular arbitration. The CIArb Protocol has been developed alongside the recent common law developments in the treatment of expert witnesses, and as a result of this it reflects and draws on many of these developments. This is most evident in the emphasis it places on the independence of experts.[8] It also requires the experts to meet before they tender their reports in order to establish areas of consensus on the relevant evidential issues.[9]

Under the CIArb protocol, the experts must first enter a discussion for the purpose of identifying issues upon which they are to provide an opinion.[10] The experts must also identify tests and analyses that need to be conducted and, where possible, reach agreement on those issues, tests and analyses, as well as the manner in which they must be conducted. The tribunal may direct the experts to prepare and exchange draft outline opinions for the purposes of these meetings. These opinions are without prejudice to the parties' positions and are privileged from production to the tribunal. Further, the content of the discussion is without prejudice to the parties' positions and must not be communicated to the arbitral tribunal, save as outlined below.

Following the discussion, the experts must prepare and send to the parties and the tribunal a statement setting out:

- the issues upon which they agree and the agreed opinions they have reached;
- the tests/analyses that they agree need to be conducted and the agreed manner for conducting them;
- the issues upon which they disagree and a summary of their reasons for disagreement; and
- the tests/analyses in respect of which agreement has not been reached, whether they should be conducted and/or the manner in which they should be conducted, and a summary of the reasons for disagreement.

The CIArb protocol also includes an important article that establishes the independence of party-appointed experts.[11] This declaration of independence follows the recommendation of the Woolf Report in requiring the expert to acknowledge that his or her duty is to the arbitral tribunal.

Limiting the Differences

In addition to ensuring the independence of experts, an essential tenet in maximising the efficiency of the arbitral process is to encourage the experts to limit the differences between themselves *prior* to giving evidence. This allows the evidentiary hearings to be conducted more quickly, and thus with less expense. It also increases the chances of settlement, as the conferral of experts with their colleagues in relation to matters of contention may lead them to revise their opinion in such a way that a party's claim no longer has the same prospects of success as originally thought.

There are several methods by which the streaming of contentious issues can be achieved, and these should be considered by arbitral tribunals and parties to an arbitration in order to achieve best practice in utilising expert evidence.

Hot-tubbing

Hot-tubbing is a positive trend in arbitration, and it is becoming increasingly common to dispose of traditional witness examination and cross-examination procedures. While there is no standardised definition of exactly what 'witness hot-tubbing' or 'witness conferencing' entails in the context of arbitration, generally they refer to degrees of the same concept, namely the process of taking evidence from witnesses in the presence of other witnesses (from both sides of the dispute)

and allowing them to engage with each other as to the accuracy of their claims. Frequently, the term 'hot-tubbing' is used in relation to expert witnesses and 'conferencing' to refer to both lay and expert witnesses, but this distinction is not universal.

Hot-tubbing and conferencing will not always be appropriate, but are especially effective in highly technical arbitrations where there are complex factual and technical issues that need to be resolved and both parties rely on evidence from a number of expert witnesses. Traditional methods of each side calling their witnesses in a linear fashion can lead to a cognitive disconnect in the arbitrators' and counsel's understanding of the issues. This disconnect is exacerbated in situations where there are large numbers of witnesses and it could be days before the contradictory evidence of an expert witness' counterpart is heard. Further, it is possible that due to the highly technical nature of the evidence, opposing counsel will not be able to form fully informed questions until they have been advised by their own expert. Therefore, allowing experts to analyse and question directly the evidence of other experts ensures greater celerity of the hearing.

There are no standard guidelines or rules provided by any arbitral institution to facilitate conferencing or hot-tubbing, primarily due to the nature of the process being particularly dependent on the specifics of the matter. The CIArb Protocol does not provide specifically for conferencing or hot-tubbing beyond granting the tribunal the power to conduct expert testimony in such a manner as to assist the tribunal to narrow the issues between the experts, and to understand and use the expert witnesses efficiently.[12] Witness conferencing and hot-tubbing can be an efficient and effective tool when used correctly, but care must be taken to ensure the proceedings are conducted in a manner that will result in the most accurate, as well as efficient, evidence. Tribunals wishing to utilise these methods of adducing expert evidence should pay heed to court guidelines such as those discussed above in ensuring that the process is undertaken as effectively as possible.

Exchange of Draft Reports

An effective way of limiting the differences between experts is to require them to exchange drafts of their reports early in the proceedings. This allows for the early clarification of contentious issues. Further, it exposes the experts to the views of their fellows, which may prompt them to consider things differently, and potentially reach consensus on some of the issues at the outset of proceedings.

The CIArb Protocol allows for, but does not mandate, the exchanging of draft reports by expert witnesses, when so directed by the arbitral tribunal.[13] It is suggested that, as far as it is practical, tribunals should utilise this discretion in order to facilitate the most efficient procedure for hearing expert evidence.

Potential Areas for Reform

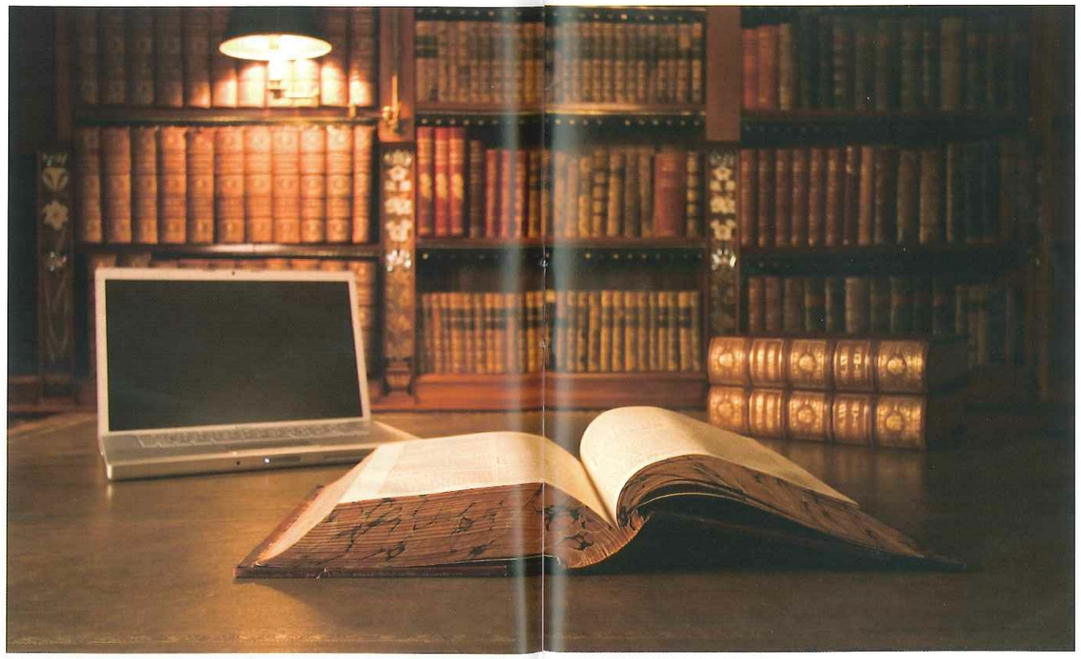
As has been noted, many of the measures described above are already employed in arbitration to varying degrees. However, there is room for even greater reform, and for arbitral tribunals to draw on the lessons of common law courts in order to ensure that arbitration is an effective and efficient process for all involved.

To this end, it is useful to identify a number of general areas in which reform is lacking or could be more extensive. These are examined below.

Evidence by Leave

The notion of 'evidence by leave' refers to the practice, adopted in some situations by certain Australian and English courts, of requiring the parties to apply for the leave of the court before expert evidence can be adduced on a given question.

Restrictions as to when leave will be required vary between jurisdictions. In England, for example, the court has a very broad power to restrict expert evidence. Part 35.4 of the English Civil Procedure Rules 1998 precludes the adducing of any expert evidence by a party, either orally or in the form of an expert's report, without the leave of the court. Further, an application for leave must identify the field in which the party wishes to rely upon the expert evidence, and if possible, the particular expert desired. The leave of the court to adduce the evidence, if granted, will then be confined only to the designated field. The Family Court of Australia has adopted similar provisions.[14]



Despite the practical advantages in terms of case management offered by far-reaching leave requirements such as those employed in England, the potential problems they pose in the context of arbitration include:

- The need for the tribunal to understand the issues sufficiently in order to make an informed decision. Where an issue is particularly technical or complex, or subject to debate within the relevant field of expertise, the restriction of expert evidence in this way may prevent the tribunal from fully understanding the issue at hand, resulting in an unjust or unsatisfactory outcome.
- The question of whether denying leave could amount to preventing a party from presenting its case, so as to prejudice the enforceability of the award under the New York Convention.[15]
- The requirements of the Model Law and UNCITRAL (and other institutional) Arbitration Rules that a party be given a 'full',[16] 'reasonable',[17] or 'sufficient'[18] opportunity to present its case.

For this reason, and in the absence of applicable rules so providing, or the agreement of the parties, tribunals should be wary of denying leave for expert evidence to be adduced. Ideally, there should be a balance between the practical concerns of case flow and time management on the one hand, and enforceability on the other. Accordingly, there remains scope for some restriction, by means of the tribunal itself considering what expert evidence parties wish to adduce by way of party appointed experts, and then ruling on the character of the evidence and potentially upon the expertise itself.

Weight

The weight to be attached to the evidence of experts whose independence is compromised needs to be known and understood by the parties from the outset of the process. This serves two purposes:

- It clarifies the role and duty of the expert so that unconscious bias may be minimised; and
- it makes experts and parties aware of the risk that biased evidence will be discounted *prior* to its being adduced. As a result, the chances of impartiality are increased, as this allows (and encourages) parties to take active steps to avoid partiality at the commencement of the process.

Since a party whose expert is found to have acted partially risks little or no weight being attached to their evidence, the knowledge of what (if any) weight will be accorded to such evidence affords the opportunity for parties to strengthen their cases by ensuring that their experts are independent.

Transparency

Opinion over the desirability of such a rule regarding the exposure to disclosure of communications between lawyers and their experts in litigious proceedings, and the extent to which communications should be revealed, is divided. The Woolf report recommended that expert evidence be inadmissible unless all written instructions and a note of any oral instructions were annexed to the expert's report. This recommendation has not generally been adopted in Australia. Most Australian courts require an expert's report to include details of the instructions informing its scope, and the facts and assumptions upon which the expert's opinion is based.

The 2010 IBA Rules also include a provision in Art 5(2)(b) requiring the expert to provide a description of the instructions they have received from the parties. This ensures that the parties will not instruct the expert to behave in a manner that would adversely affect the expert's impartiality. However, this requirement needs to be carefully

considered given that the CIArb Protocol and IBA Rules are designed to operate in conjunction with one another. The CIArb Protocol provides that while instructions are not 'privileged', they should not be ordered to be disclosed by the arbitral tribunal without good cause. As such, Art 5(2)(b) of the IBA Rules should be understood to require that the description of the instructions received by the expert must always be provided, but the instructions themselves should only be requested by the arbitral tribunal when there is good cause for doing so, for example, where the expert's impartiality comes into question.

The Single Expert

There is increasing interest in international arbitration in the appointment of a single expert, either by the parties' agreement or at the tribunal's direction. This is said to bring with it benefits in terms of efficiency as well as cost-effectiveness, but this must be considered in light of the inherent disadvantages of a single expert, including the difficulties of reaching agreement upon a single expert, and the prospect that one or both of the parties will have an inadequate opportunity to present their case.

The cost benefit of appointing a single expert is obvious when considering the need to only renumerate a single expert for his or her services, as opposed to each party paying for its own expert, thereby halving the costs of hearing expert evidence. In terms of minimising delay in the process of the evidentiary hearing, the use of a single expert can have a significant impact. This is because when each party appoints their own expert, often each expert report will cover the same ground, with only minor areas of difference.

A single expert does, however, have some disadvantages. First, there is the possibility that the expert will misunderstand his or her role and make a determination on a question more suited to determination by the arbitral tribunal. Second, in some areas of expertise, there are genuinely held alternative views which will not be brought to a tribunal's attention with only one expert appointed.

Expert Teaming

In his 2010 paper presented at the International Council for Commercial Arbitration (ICCA) Conference in Rio de Janeiro, Dr Klaus Sachs introduced the concept of expert teaming.[19] Briefly, expert teaming consists of parties presenting a list of desired experts to the tribunal. Each party is given the opportunity to register any conflicts of interest with the opposing party's listed experts. Taking these into account, the tribunal selects an expert from each list and appoints the two experts jointly as an 'expert team'. Following this, the tribunal, the experts and the parties meet to establish a protocol by which the expert evidence will be adduced. The expert team will then prepare a joint report, and may be questioned by the tribunal or the parties at their discretion. The expert team will be expected to work as an independent team, and all communication with the parties or the tribunal must be disclosed to both members of the team.

This concept has many attractions. It attempts to minimise the feelings of loyalty often associated with party appointed experts who are individually instructed by the appointing party. Further, it ensures that the parties are able to have an expert of their choice utilised, as opposed to the use of a tribunal appointed expert. By having each party produce their own list of experts, each party is given significant input into the choice of experts, but without the difficulties associated with having both parties agree on the appointment of a single expert. Finally, expert teaming has cost and time benefits, in that only a single expert report is produced. This reduces the amount of work required by each expert. This also ensures that the situation does not arise whereby two conflicting reports are produced that operate from disparate assumptions as to basic facts relating to contentious issues.

Best Practice Directions

The effective use of party appointed expert witnesses requires a proactive acknowledgement on behalf of the arbitral tribunal as to the difficulties of adducing expert evidence, and communication with the parties as to the best process to be utilised. As a matter of general guidance, the tribunal should raise this issue with the parties at the earliest practical stage of the proceedings, to ensure that all the parties and the tribunal are aware of the ensuing process.

Best practice directions for the appointment and use of expert witnesses should have regard to an early identification of the areas that will require expert evidence and an appointment of the experts, with the approval of the tribunal. This will ensure that expert evidence is only heard on relevant issues. Expert evidence can be superfluous, especially in situations where the tribunal already possesses the relevant expertise. Further, it is not uncommon for the situation to arise whereby, in the process of determining the issues on which expert evidence will be produced, the parties find that the scope of their disagreement on those issues does not require the production of expert evidence.

The tribunal should then settle joint briefs to the experts within each discipline area. This brief should include directions for two types of reports produced. First, a joint report from the experts in each area of expertise identifying areas of agreement and disagreement in response to their briefs with reasons for disagreements. Second, individual reports produced by the experts but only on areas of disagreement. This requires the experts to confer and limit the differences as far as possible. By tendering a joint report, cost and time benefits are realised, and the utility of the evidence increased, as the tribunal's attention, and that of the parties, will be focused primarily on the contentious issues.

Conclusion

The efficient use of party appointed expert witnesses is a worthy goal, and given the desire to do so, it is certainly within the grasp of any arbitral tribunal. Essentially, what is required is the proactive management of these experts, with procedural decisions made by the parties and the tribunal at the earliest possible stage of the proceedings. The IBA Rules and the CIArb Protocol provide a strong foundation for tribunals to build from, in tailoring the optimal procedure for each particular arbitration.

By considering recent common law developments in this area, practitioners in the area of arbitration are provided with a strong model by which arbitral procedure can be shaped. Although many of the courts' approaches and reforms have already infiltrated the arbitral process in one way or another, uniformity and structure has not yet been achieved. What is required is an assessment, across the board, of the value that recent litigious developments can bring to the use of expert witnesses in arbitration, and the establishment of a framework by which such measures can be implemented and enforced. The recent amendments to the IBA Rules goes some way to addressing this need, but more still needs to be done to ensure the efficient use of independent expert witness in international arbitration.

Notes:

* The author gratefully acknowledges the assistance provided in the preparation of this paper by Timothy Zahara, Legal Assistant of Clayton Utz, Sydney.

1 The Right Hon Lord Woolf MR, 1996, *Access to Justice: Final Report to the Lord Chancellor of the Civil Justice System in England and Wales*.

2 *Ibid*, [13.6].

3 M Nothling, *Expert Evidence: The Australian Medical Association's Position*; available at: www.aija.org.au/info/expert/Nothling.pdf accessed on 4 March 2011.

4 For example, there is some question as to how they operate in regards to hearsay, see SI Strong and James J Dries, 'Witness Statements under the IBA Rules of Evidence: What to Do about Hearsay?' (2005) 21(3) *Arbitration International* 301 at 301-21.

5 IBA Rules, Art 2(1).

6 *Ibid*, Art 2(2)(a).

7 Available at: http://www.ciarb.org/information-and-resources/practice-guidelines-and-protocols/list-of-guidelines-and-protocols/ accessed on 4 March 2011.

8 CIArb Protocol, Art 4.

9 *Ibid*, Art 6.

10 *Ibid*, Art 6.

11 *Ibid*, Art 4.

12 *Ibid*, Art 7.1.

13 *Ibid*, Art 6.1.

14 Family Law Rules 2004 (Cth), Rule 15.51. Notably, the leave of the court is not required for single expert witnesses or where a child representative intends to tender a report or adduce evidence from a single expert witness on an issue.

15 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature 10 June 1958, [1975] ATS 25 (entered into force 7 June 1959).

16 See, for example, UNCITRAL Arbitration Rules 1976, Art 15(1); ICC Rules of Arbitration 1998, Art 15(2); Australian Centre for International Commercial Arbitration (ACICA) Arbitration Rules 2005, Art 17.1.

17 See, for example, LCIA Arbitration Rules 1998, Art 14.1(i).

18 See, for example, Rules of the Arbitration Institute of the Stockholm Chamber of Commerce 1999, Art 20(3).

19 Dr Klaus Sachs, 'Experts: Neutrals or Advocates. Protocol on Expert Teaming: A new approach to expert evidence' (paper presented to the International Council for Commercial Arbitration Conference, Rio de Janeiro, 2010).