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Party Appointed Experts: Can They be Usefully Independent?

by D. Jones

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Can they be usefully independent?

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1. Introduction

The use of party appointed expert witnesses has been the subject of much attention in recent years, both in the context of domestic judicial systems, as well as in international arbitration. This is because they tend to be perceived as 'hired-guns', tailoring their evidence to positively reflect upon the party by whom they were appointed. This situation is exacerbated when parties and tribunals operate on an implicit understanding that this, indeed, is their role.

Recent changes in 2010 to the International Bar Association's Rules on the Taking of Evidence in International Commercial Arbitration (**IBA Rules**) require a reconsideration of whether, and if so how they, along with the Chartered Institute of Arbitrator's Protocol for the Use of Party Appointed Expert Witnesses (**CIArb Protocol**), should be used to regulate the use of expert witnesses in international arbitration. The reforms aim to increase the efficiency and effectiveness of expert evidence, but there is scope for further improvement. Particularly, ongoing developments in curial procedure within Australia and the UK are worth considering in order to determine the extent to which these developments can be suitably adopted by arbitral tribunals, and to establish a framework by which such measures can be effectively implemented and enforced.

An important assumption underlying these reforms is that party appointed experts should be independent of the parties. Particularly in North America it is an open question whether they should actually be independent. Elsewhere, the proposition is considered naïve.

This paper provides a brief history to the reform undertaken in this area, initially in the UK and as adopted by Australian courts, examining the historical context of this contentious (but underexplored) area. Following this, a brief explanation of how the IBA Rules and CIArb Protocol operate to regulate this area is provided. Finally, areas in which there is room for reform within international arbitration are identified, and this paper concludes with the proposition that while recent developments in international arbitration show some promise, more needs to be done to ensure the useful independence of party appointed experts.

* The author gratefully acknowledges the assistance provided in the preparation of this paper by Nadia Yetton-Lim and Timothy Zahara, Legal Assistants, of Clayton Utz, Sydney.

2. History of Reform

In 1996, Lord Woolf in the UK produced a report which 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, including the uncontrolled proliferation of expert evidence.

Two problems arise from this. 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. Secondly, this leads to a focus on quantity, not quality. Parties hoping to strengthen a weak case or perhaps simply hoping to render a strong one 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, especially where there is financial inequality between the parties, may also result in an unjust outcome.

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. In furtherance of this basic premise, His Lordship's key recommendations included the following:

- No expert evidence should be given on a subject unless it would be of assistance to the court;
- No expert evidence should be adduced without the leave of the court, either on its own directions or at the application of one of the parties;
- The scope of expert evidence should be limited by means of directions by the court as to the issues upon which expert evidence can be led, limits to the number of experts permitted to be called and/or jointly or court appointed experts;
- The practice of ordering joint conferences of experts should be continued, and experts should be required to produce a joint report detailing issues agreed and not agreed upon (with reasons for disagreement); and
- Single experts (jointly appointed by the parties, or appointed by the court) should be used wherever possible.

2.1 Post Woolf – reform in the UK

The Woolf Report triggered reforms in the UK. More recently, the Civil Justice Council drafted a *Protocol for the Instruction of Experts to give Evidence in Civil Claims*, which applies to all steps taken

[1] 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] Right Hon. Lord Woolf MR, 1996, *Access to Justice: Final Report to the Lord Chancellor of the Civil Justice System in England and Wales* at [13.6].

by experts or by those instructing experts after 5 September 2005. The protocol is to replace the *Code of Guidance on Expert Evidence*. It sets out matters such as:

- The importance of experts to litigation;
- The duties owed by experts (and the need to balance the duty of reasonable skill and care owed to the retaining party with the overriding duty to the court);
- The considerations that ought to be taken into account when evaluating whether expert evidence is necessary in any given case; and
- The contents of experts' reports, including a standard statement that must be included at the end of all reports, verifying the truth of the statement and the completeness of the opinion (the wording of which is mandatory).

3. Reform in Australia

Courts and tribunals in Australia have also undertaken a change in outlook in recent years. There has been a dramatic shift towards judicial case management as Australian judges and arbitrators also grapple with delay and its associated costs, with the goal of ensuring greater access to justice for all parties.

Reforms have been adopted by the Federal Court of Australia and the various State Supreme Courts. In particular, these reforms relate to methods of:

- Enhancing the independence of experts;
- Limiting the differences between expert opinions prior to trial in order to streamline the process; and
- Narrowing contentious issues between experts during trial.

The extent of reform varies from court to court, and it would be naïve to say that a culture change has occurred everywhere. Further, there is ongoing debate as to the effectiveness of certain measures, even where they have already been implemented in some courts. However, the fact that the issue is receiving attention by the profession is heartening and many of the proposed and adopted measures have the potential to improve access to justice for the average litigant. Accordingly, it is worthwhile considering these measures in order that the lessons learned in court may be applied with equal success in the arbitral tribunal.

In 1999 an empirical study[3] was carried out by the Australian Institute of Judicial Administration (AIJA) regarding the perspectives of the Australian judiciary with respect to expert evidence. Over half of Australia's judges responded. The study showed that one of the major concerns felt by a very large proportion of Australian trial judges was a perception of bias on the part of expert witnesses. Related to this was the concern that many experts used in proceedings were purely forensic and no longer active participants in the field in which they were being portrayed as specialists. These concerns equally affect the practice of international arbitration.

Importantly, these concerns did not necessarily arise only with regards to overtly biased experts. In fact, greater disquiet was expressed at the number of experts whose bias was less obvious, or even subconscious.

[3] Dr I Freckelton, Dr P Reddy, Mr H Selby, *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* (1999).

It is easy to see how an expert who has been appointed and is being remunerated by a particular party for his or her opinion could feel a sense of obligation to advance the case of that party. In *Issues in Expert Evidence: a report on the 2004 Expert Evidence Forum*,[4] a report produced by the Institute of Chartered Accountants in Australia, the question was posed whether the adversarial system creates a desire on the part of experts not merely to give their views but to defend them, and whether it is possible or even desirable to prevent this.

Lord Woolf observed in 1996 that many experts had expressed uncertainty as to their roles and duties with respect to both the court and the parties, and noted that formal recognition of their independent duty to the court would help to ensure this independence. For example, he suggested that requiring the expert's report to be addressed to the court and not to the parties would be an effective way of reminding the expert to whom his or her duty was directed first and foremost. Similarly motivated was the recommendation that all experts be required to sign a declaration expressly acknowledging that the primary duty of an expert is to the court.

In November 2004, the NSW Law Reform Commission produced Issues Paper 25 on the topic of expert witnesses, for the purposes of which they were required to inquire into and report on the operation and effectiveness of rules and procedures governing expert witnesses in NSW. Chapter 2 of the paper deals with the issue of bias. The paper affirms the AIJA's finding that bias was a concern to many judges and looks at possible ways of enhancing the independence and objectivity of experts, including:

(a) **Expert codes of conduct** - Many Australian courts have adopted formal codes of conduct for expert witnesses, which aim to clarify the role of the expert and the way that role should be performed. The codes adopt the fundamental premise of Lord Woolf that the overriding duty of an expert is to assist the court impartially and emphasise that an expert is not an advocate for the party by whom he or she is retained.

In some courts, such as the NSW and Victorian Supreme Courts, the rules are annexed to the Court Rules[5] and are made binding on experts by those rules, which require a copy of the code to be provided to all experts upon their appointment and to be acknowledged by the expert in writing as binding in order for the report to be validly served and the evidence of that expert to be admissible.

Importantly however, there are currently no sanctions in place for experts who breach the code. It has been noted that without some mode of enforcement, witness codes of conduct do little more than remind experts of what they should already be doing. However, even without penalty for breach, simply focussing the expert's mind upon the duty to the court, as well as the proper role of an expert, may at least prevent unconscious bias. Although, it is unlikely to have any effect on experts who are overtly or consciously partial.

(b) **Prohibition of "no win, no fee" arrangements -** The Law Reform Commission examines these types of arrangements and notes that they can undermine the independence of experts by providing them with financial incentives to advance the case of the appointing party. The Commission suggests that such practices be actively discouraged by means of legal and ethical sanctions, prohibitions in the codes of conduct or the inadmissibility of expert evidence where such an arrangement is in place.

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[4] Australian Institute of Chartered Accountants, "Issues in Expert Evidence: a report on the 2004 Expert Evidence Forum" (2004).

[5] Schedule 7, *Uniform Civil Procedure Rules 2005* (NSW) and Order 44A, *Supreme Court (General Civil Procedure) Rules 1996* (Vic).

These methods can add value to international arbitration as well. For example, a standardised code of conduct produced by arbitral institutions would provide uniformity and remind experts that the same duties of independence and impartiality apply equally to the process of arbitration as they do to formal litigation.

3.1 Federal and Supreme Courts

In response to concerns amongst the profession, the *Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia*, were produced in 1998 (and last amended in March 2004). The guidelines, which were produced by the Federal Court in conjunction with the Law Council of Australia, represent a co-operative and constructive new approach to court procedure by the courts and the legal profession. They aim to clarify the role of the expert in order that experts may be used more effectively and in a way that is most likely to assist the court and enable the effective disposal of the matter at hand. The Explanatory Memorandum to the guidelines states that they are intended to facilitate the giving of expert evidence, clarify the expectations of the court with regard to expert witnesses and help experts to avoid the appearance (or fact) of bias or partiality. So that the reforms may be effective, it is a requirement that legal practitioners issue all expert witnesses with a copy of the guidelines.

Fundamentally, the guidelines take their cue from Lord Woolf in emphasising that the overriding duty of the expert is to the court and not to the party by whom he or she has been retained. In addition, they set out the form in which expert evidence should be given. Among other things, the expert must give details of:

- Expert qualifications, and any material or literature that has been used to prepare the report.[6] This ensures that the court knows the extent of expertise of the witness, and the information upon which his or her opinion is based.

- Reasons for each opinion stated.[7] This allows the court to identify the method of reasoning used to draw each conclusion, making the process as transparent as possible and enabling the court to explore the technical issues of the case.

- The issues that the expert has been asked to address when giving evidence, the alleged facts upon which the opinion is based and any other materials that he or she has been instructed to consider.[8] Awareness of the instructions and facts upon which the opinion is based is necessary for the court to put the opinion into context in order to assess its relevance and value to the proceedings.

- Any inaccuracy or incompleteness in the report, whether due to insufficient data or otherwise. This allows the court to weigh the value of the opinion and to ascertain to what degree it is based upon research and to what degree it is based on mere speculation.

Such requirements introduce a measure of certainty and efficiency into proceedings, ensuring that the expert report is prepared in a manner that is most likely to be assistance to the court. They also ensure that the court knows what to expect of expert evidence in any given case, and can concentrate on the complex or technical issues at hand rather than the form in which these issues are presented. Thus the case is likely to be more quickly and effectively resolved.

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[6] *Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia*, para 2.1.

[7] Above n 6, para 2.5.

[8] Above n 6, para 2.7.

The various State Supreme Courts have largely followed the lead of the Federal Court, releasing Practice Notes dealing with expert evidence and amending their Court Rules to reflect the shift in focus. Although the rules and guidelines vary from State to State, a common element is the adoption of Lord Woolf's fundamental premise that the duty of the expert is to the court and not to the parties.

4. International Arbitration Guidelines

4.1 The IBA Rules

In international arbitration the use of party appointed expert witnesses 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. Civil law arbitrators used domestically to the sometimes exclusive reliance by courts on Tribunal appointed experts, for example in France, have increasingly embraced the use of party appointed experts citing the very considerable challenges of identifying, and then briefing, tribunal experts.

Conflicting expert evidence is not of itself necessarily problematic, and is a natural consequence of dealing with areas of complex, specialist knowledge. But 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. Secondly, 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 correct as may otherwise be thought. Finally, as recognised 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.[9]

Most institutional rules deal only with basic aspects of the evidence procedure, leaving it the procedure as a matter for the parties and arbitrators 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,[10] partly due to the wide scope of their intended operation, they provide a "tried and tested" basis upon which arbitration tribunals can base their evidentiary proceedings.

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 the assumption of party appointed expert independence.

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[9] M Nothling, *Expert Evidence: The Australian Medical Association's Position*, available at <www.aija.org.au/info/expert/Nothling.pdf> accessed on 28 January 2011.

[10] For example, there is some question as to how they operate in regards to hearsay, see S I 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 301-321.

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".[11] 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".[12] These revisions acknowledge the importance of both expert and fact witnesses, and the importance of tailoring the process of receiving this evidence to each particular arbitration.

Academic opinion on the 2010 amendments has been somewhat divided. Sachs and Schmidt-Ahrendts identify the aim of the changes as "fostering the independence of the party-appointed expert" and "facilitating co-operation and consensus development between the experts."[13] The authors also think that the amendments act to align the requirements for party-appointed and tribunal-appointed experts in terms of quality, accuracy and independence.[14] On the other hand, Harris identifies the remaining difference between the 'statement of independence' required from tribunal-appointed experts, and 'statement of relationships' provided by party-appointed experts as an "unexplained dichotomy".[15]

However, opinion seems to converge on the overall impact of the amendments. Sachs and Schmidt-Ahrendts conclude that the changes will "contribute significantly" to the IBA Rules fulfilling their purpose, though reserve final opinion pending the way in which these changes are adopted by international arbitral practice.[16] Harris concludes that the revisions go to strengthening the independence and impartiality requirements for party-appointed experts, which reflects current best practice and is likely to be adopted by international arbitrators and practitioners.[17]

While these amendments acknowledge the need for independent expert witnesses, they fall short of the developments of recent reforms found in many common law jurisdictions.

4.2 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. [18] As with all procedural guidelines, heed should be taken of it, but not at the expense of an alternate 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 placed on

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[11] IBA Rules, Art 2(1).

[12] IBA Rules, Art 2(2)(b).

[13] Dr K Sachs & Dr N Schmidt-Ahrendts, "Expert Evidence Under the 2010 IBA Rules" (2010) 13(5) *International Arbitration Law Review* 217.

[14] Above n 13, at 218.

[15] C Harris, "Expert Evidence: The 2010 Revisions to the IBA Rules on the Taking of Evidence in International Arbitration" (2010) 13(5) *International Arbitration Law Review* 215.

[16] Above n 13, at 219.

[17] See above n 15.

[18] Available at <http://www.ciarb.org/information-and-resources/practice-guidelines-and-protocols/list-of-guidelines-and-protocols/> accessed on 28 January 2011.

the independence of experts,[19] as well as requiring the experts to meet before they tender their reports in order to establish areas of agreement on the relevant issues.[20]

Under the CIArb Protocol,[21] the experts must first enter a discussion for the purpose of identifying issues upon which they are to provide an opinion. The experts must also identify tests of 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 shall be conducted. The tribunal may direct the experts to prepare and exchange draft outline opinions for the purposes of these meetings, which 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 this 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.

In the next stage, the agreed tests/analyses are conducted in the agreed manner. After testing/analysis, each expert must produce and exchange a written opinion dealing only with those issues upon which there is a disagreement. Following such an exchange each expert is entitled, should they so wish, to produce a further written opinion dealing only with such matters raised in the written opinions of the other experts. This further facilitates the narrowing of issues and helps to save time and money.

The tribunal may at any time direct the experts to confer further and to provide further written reports to the tribunal either jointly or separately.[22] In addition, the arbitral tribunal may at any time hold preliminary meetings with the experts.[23]

Each expert who has provided a written opinion in the arbitration must give oral testimony at the hearing unless the parties agree otherwise and the arbitral tribunal confirms that agreement.[24] If an expert who has provided an opinion does not appear at the hearing, when required to do so, without a valid reason, then the tribunal shall disregard the expert's written opinion, unless the parties agree otherwise and the tribunal confirms that agreement or unless, in exceptional circumstances, the arbitral tribunal determines

[19] CIArb Protocol, Art 4.

[20] CIArb Protocol, Art 6.

[21] CIArb Protocol, Art 6.

[22] CIArb Protocol, Art 7.2.

[23] CIArb Protocol, Art 7.3.

[24] CIArb Protocol, Art 6(1)(i).

otherwise.[25] Any agreement by the parties that an expert need not give oral testimony shall not constitute agreement with, or acceptance by a party of, the content of the expert's written opinion.[26]

The CIArb protocol also includes an important article establishing the independence of party-appointed experts.[27] 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.

5. Limiting the differences

In addition to ensuring the independence of experts, an essential tenet of the useful independent expert is that the expert evidence be tendered as efficiently as possible. An important aspect in maximising the efficiency of the 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 presents 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 as a matter of best practice in utilising expert evidence.

5.1 Hot-tubbing

Hot-tubbing is a positive trend in arbitration that it is becoming increasingly common to dispose of traditional witness examination and cross-examination procedures. As a manner of increasing the efficiency of receiving expert evidence, witness hot-tubbing and witness conferencing are techniques progressively being adopted by both arbitral tribunals and courts. 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. This is due to the fact that 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 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. It is therefore understandable that there are benefits in terms of celerity inherent in allowing experts to analyse and question directly the evidence of other experts.

Hot-tubbing and conferencing can also be an effective tool with lay witnesses, in order to establish a mutually accepted set of facts on contentious issues. This prevents the extensive examination and cross-examination of factual witnesses with the same ground covered with each successive witness, attempting to draw discrepancies from their recollections. However, a possible disadvantage of hot-tubbing or

[25] CIArb Protocol, Art 6(1)(i).

[26] CIArb Protocol, Art 6(3).

[27] CIArb Protocol, Art 4.

conferencing involving factual witnesses is the possibility that the evidence of one witness can affect the evidence of another, especially if they attempt to "save face" as they are forced to directly confront one another. This is not so much an issue with expert witnesses, as their evidence is less likely to be influenced in such a manner.[28]

Joint conferences of expert witnesses have also been successfully used in the courts, and guidance can be found in the procedures developed by the courts. The NSW Supreme Court Practice Note SC Gen 11 (Joint Conferences of Expert Witnesses) states that the objectives of joint conferences include:[29]

- The just, quick and cost effective disposal of the proceedings;
- The identification and narrowing of issues in the proceedings during preparation for such a conference and by discussion between the experts at the conference. The joint report may be tendered by consent as evidence of matters agreed and/or to identify and limit the issues on which contested expert evidence will be called;
- The consequential shortening of the trial and enhanced prospects of settlement;
- Apprising the court of the issues for determination;
- Binding experts to their position on issues, thereby enhancing certainty as to how the expert evidence will come out at the trial. The joint report may, if necessary, be used in cross-examination of a participating expert called at the trial who seeks to depart from what was agreed; and
- Avoiding or reducing the need for experts to attend court to give evidence.

These objectives are equally applicable to arbitrations, and should be kept in mind when utilising witness conferencing. In 2001, Wood J observed that the joint conference experience had been "entirely positive" because: [30]

- When experts need to justify their opinions to fellow experts, extreme views are usually moderated, bias or adherence to junk science being quickly apparent and abandoned;
- It is easier to concede a point in a non confrontationist environment, than it is in the glare of a trial, where there is pressure to adhere to a previously expressed opinion, if not to overstate it, since to shift from that opinion involves a loss of face and can be seen as weakening of the witness's overall credibility;
- The meeting is often the occasion for disclosure of facts or relevant information that was unknown to, or unappreciated by, one or other of the experts;
- Most often, peripheral issues can be agreed or isolated as being of no consequence, while significant points of disagreement can become identified and better defined;

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[28] For a further discussion of the benefits of witness conferencing, see Wolfgang Peter, "Witness 'Conferencing'" (2002) 18(1) *Arbitration International* 47 at 47-58.

[29] NSW Supreme Court Practice Note SC Gen 11, at [5].

[30] Justice J Wood, "Expert Witnesses: the New Era" (paper presented at the Eighth Greek Australian International Legal and Medial Conference, Corfu, 2001).

- The discussion between the experts is likely to be conducted on a higher plane, and in a more scientifically appropriate fashion, than in court, where it is led by counsel not versed in the technicalities; and

- The discipline of drafting a report itself tends to bring sharper focus to the issue.

The Woolf Report identified two reservations felt generally within the profession with respect to conferences between experts. To begin with, many expressed the concern that a successful outcome could be undermined by parties or their representatives issuing instructions not to reach agreement or to reach agreement subject to ratification by the instructing lawyer. The view of Lord Woolf was that steps could be taken to remove or a least mitigate this problem.

The second reservation related to the perceived expense of holding such meetings. In relation to this, His Lordship was of the opinion that the initial cost incurred in holding the meeting would nevertheless result in savings further down the track.

The view of Australian courts towards joint conferences has been favourable. As recommended by the Woolf report, most Australian courts have overcome the potential for joint conferences to be undermined by expressly prohibiting experts to receive instructions to withhold agreement.[31] Experts are free to disagree of course, but such disagreement must arise from the exercise of their independent expert judgment.

The Federal Court guidelines aim to enable the court to streamline adversarial expert evidence by providing that it would be improper for experts to be given or to accept instructions not to agree with the experts of the opposing side, where the court has ordered that they meet for the purpose of limiting their differences. Experts' conferences have the potential to play a major role in case management, by focussing upon the genuinely contentious issues and enabling experts to reach agreement as to others. Where experts have been directed to effectively boycott this process, further time and money can be wasted. The guidelines also specify that experts should give reasons where they are unable to reach agreement on a particular matter. This allows the Court to make a more informed judgment with respect to conflicting opinions on a particular issue.

There are no standard guidelines or rules provided by any arbitral institution to facilitate conferencing or hot-tubbing, due primarily 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.[32] 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 the court guidelines, such as those discussed above, in ensuring that the process is undertaken as effectively as possible.

5.2 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.

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[31] See, for example *Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia*; SA Supreme Court *Practice Direction 46 (Guidelines for Expert Witnesses in Proceedings in the Supreme Court of South Australia)*; NSW Supreme Court *Practice Note SC Gen 11 (Joint Conferences of Expert Witnesses).*

[32] CIArb Protocol, Art 7.1.

The CIArb Protocol allows for, but does not mandate, the exchanging of draft reports by expert witnesses, when so directed by the arbitral tribunal.[33] It is suggested that, as far as is practical, tribunals should utilise this discretion in order to facilitate the most efficient procedure for hearing expert evidence.

6. Potential areas for reform

As has been noted, many of the measures described above are already employed in arbitration to varying extents. 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 delivers a successful outcome 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.

6.1 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 the 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.[34]

Restrictions in other Australian courts on the adducing of expert evidence are not as heavy as those in England and the Family Court. Rule 31.33 of the NSW *Uniform Civil Procedure Rules 2005*, for example, prohibits a party from adducing evidence on any question in relation to which the Court has appointed an expert, except with the leave of the Court. In June 2005, the NSW Law Reform Commission produced a report on expert witnesses[35] which recommended the amendment of the *Uniform Civil Procedure Rules 2005* (NSW) to require that parties seek the leave of the court before adducing any expert evidence.[36] However, as yet there are still no overarching leave requirement in NSW in respect of expert evidence generally.

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 involve:

- The need for the tribunal to sufficiently understand the issues 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.

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[33] CIArb Protocol, Art 6.1.

[34] *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.

[35] NSW Law Reform Commission *Report 109 - Expert Witnesses* (June 2005).

[36] Above, n 35, Recommendation 6.1.

- The question of whether denying leave could constitute preventing a party to present its case so as to prejudice potential enforceability under the New York Convention.[37]

- The requirements of the Model Law and UNCITRAL (and other institutional) Arbitration Rules that a party be given a "full",[38] "reasonable",[39] or "sufficient"[40] 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 may 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.

For example, where the parties to an arbitration disagree as to the extent of expert evidence required in order for the tribunal to decide any of the issues, the tribunal may order that the relevance, if any, of such evidence be ventilated prior to the hearing. This would require the parties to specify in their written submissions the character, effect and relevance to the determination of the preliminary issues of any expert evidence, although it would not necessarily require the provision of the expert evidence itself at that stage.

6.2 Weight

The weight to be attached to the evidence of experts who prove to be less than independent 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 partial 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.

Indeed, 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 remain independent.

The case of *Tang Ping-Choi & Anor v The Secretary for Transport*,[41] heard in the Hong Kong Court of Appeal, is a good illustration of the usefulness of upfront knowledge with regards to weight. One of the issues in that case was that the respondent's experts were found to have conducted "private detective work" by secretly recording a conversation which was highly damaging to the appellants' case. As the conduct was held to be "beyond the scope of expert duty", the Court attached no weight to the contents of

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[37] *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).

[38] 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.

[39] See for example, LCIA Arbitration Rules 1998, Art 14.1(i).

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

[41] [2004] 2 HKLRD 284.

the conversation at all. The Court acknowledged that the investigation was merited, but noted that it was not the role of the expert to carry it out. The result was the ultimate exclusion of relevant evidence.

The case demonstrates the detrimental impact which a lack of independence can have upon a party's case. More importantly however, the investigations might not have been improperly undertaken by the experts, had it been made clear from the outset that the evidence of partial experts would be wholly disregarded by the Court.

6.3 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. In NSW, for example, it is common practice for letters of instruction to be made available,[42] and a report will be inadmissible unless it specifies the assumptions of fact upon which it relies. Any further communications however, must be sought by way of subpoena/notice to produce and may be subject to a claim for privilege.

In *Report 109 - Expert Witnesses*,[43] the NSW Law Reform Commission weighed the arguments for and against disclosure of all communications between the parties and experts. Although it was acknowledged that disclosure might help to reveal improper behaviour such as bias, dishonesty on the part of the expert and the exertion of unacceptable pressure upon the expert, the Commission came to the conclusion that the policy reasons for maintaining client legal privilege over such communications outweighed the potential benefits of disclosure. Accordingly, the Commission held that the existing law in NSW should not be changed.

The 2010 IBA Rules also include a provision, at Article 5(2)(b), requiring the expert to provide a description of the instructions which they have received from the parties. This ensures that the parties will not instruct the expert to behave in a manner that would 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, Article 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.

6.4 The Single Expert

There is increasing interest in international arbitration in the appointment of 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 agreement upon a single expert, and the prospect that one or both of the parties will have an inadequate opportunity of presenting 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

[42] Above, n 35, para 6.23

[43] Above, n 35.

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. While this can be managed through specific directions from the tribunal directing the experts to focus their reports on the areas where they disagree, the use of a single expert ensures that time will not be wasted covering familiar ground. This is especially important if oral testimony is to be heard, where cross-examination can require the same ground to be covered in order to ensure that each expert is operating on the same basic assumptions and set of facts.

Another benefit of the use of a single expert relates to the coherence and cohesiveness of the evidence tendered. A single expert will be more likely to consider the relative merits of both parties' arguments, and take the strength of each into consideration when tendering an expert report.

A single expert does however have some disadvantages. Firstly, 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. Secondly in some areas of expertise there are genuinely held alternative views which will not be exposed to a tribunal with only one expert.

6.5 Expert Teaming

In his 2010 paper presented at the International Council for Commercial Arbitration (**ICCC**) Conference in Rio de Janeiro, Dr Klaus Sachs introduced the concept of expert teaming.[44] 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, in that 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.

6.6 Best Practice Directions

The effective use of party appointed expert witnesses requires a proactive acknowledgement on the 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. The

[44] 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).

hearing of 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 should include directions for two types of reports produced. First, joint reports from the experts in each area of expertise identifying areas of agreement and disagreement in response to their briefs with reasons for disagreements. Secondly, individual reports produced from 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, as well as the increased utility of the evidence, as the tribunal's attention, and that of the parties, will be focussed primarily on the contentious issues.

7. Conclusion

Clearly, managing the independence of experts needs to be balanced with the need for a full range of opinions and the pragmatic aspirations of cost-effectiveness, efficiency and time-minimisation. In order to achieve this, support can be found in recent litigious developments, and what is needed is an assessment across the board of the lessons that have been learned in court, and how these can be applied with equal success by the arbitral tribunal

The influence of the Woolf Report has been remarkable in instigating a cultural change within judicial and arbitral culture. Two noteworthy recommendations from the Woolf Report include that:

(a) expert reports, in recognition of the paramount duty of the expert to the court should be addressed to the court and not to the appointing party; and

(b) single experts (jointly appointed by the parties, or appointed by the court) should be used wherever possible.

The former recommendation has been adopted domestically within the UK and Australia.[45] While the CIArb Protocol makes it clear where the experts' duties lie, the IBA Rules remain silent on the matter. The wide implementation of this recommendation reflects its importance, and it is suggested that such a requirement would further encourage the most efficient use of expert witnesses within international arbitration.

The latter recommendation would significantly assist in reducing the costs associated with providing expert evidence, and would reduce wasteful expenditure, especially in instances where expert evidence is tendered by both parties that covers the same ground. However, in contrast to the clarification of the experts' duty, this measure has met significant opposition. Primarily, those opposed argue that an adversarial clash of experts is unavoidable when it comes to complicated questions of technical expertise, and this clash is desirable in order to reach the most informed opinion. Further, it has been argued that appointing a single expert can actually increase associated costs, as parties may appoint "shadow experts" where they do not agree with the opinion of the official expert.[46] In addition, where the tribunal appoints a single expert, it may be more inclined to accept the evidence of an expert it appointed. Despite this, the use of a single expert can be an effective means of adducing expert evidence, particularly where cost and time implications are of prime concern.

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[45] See *Civil Procedure Rules* (UK) r 35; Federal Court of Australia, *Practice Note CM7 — Expert Witnesses in Proceedings in the Federal Court of Australia*, 25 September 2000; Uniform Civil Procedure Rules 2005 (NSW), Sch 7; Supreme Court (General Civil Procedure) Rules 2005 (Vic), Form 44A.

[46] S Drummond, 'Firing the Hired Guns' (11 March 2005) *Lawyers Weekly* 13.

Although many of the court approaches and reforms have now 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 independence 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 in addressing this need, but more still needs to be done to ensure the useful independence of expert witnesses.