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Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last

by DOUG JONES*

ABSTRACT

Reforms in the common law world with respect to the procedures surrounding party appointed expert witnesses are now filtering through to the world of international arbitration with the creation of the Chartered Institute of Arbitrators' Protocol for the Use of Party Appointed Expert Witnesses in International Arbitration. This Protocol is an attempt to harness the strengths of developments in common law litigation with a view towards enhancing the independence of party appointed experts in arbitration. Key elements of the Protocol are identified and contrasted particularly with the IBA Rules on the Taking of Evidence in International Commercial Arbitration, which focuses more heavily on tribunal appointed expert witnesses. These elements include the much needed statement of independence for party appointed experts that clarifies the duty of experts to the tribunal, necessary to maintain expert independence. Further strategies to limit the differences between party appointed experts are explored in the context of this new Protocol, including joint conferences and exchanging draft reports, along with methods of giving evidence such as hot tubbing.

I. INTRODUCTION

THE USE of party-appointed expert witnesses has been contributing to high costs and inefficiency in dispute resolution. With these concerns in mind, the Chartered Institute of Arbitrators ('CIArb') has recently finalised a Protocol on the use of expert evidence that seeks to deal with the vexed issue of party-appointed expert witness in international arbitration, drawing on the substantial reforms that have recently been undertaken in some common law jurisdictions.

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This article traces the background to the litigation reforms in England and Australia, assessing the value and usefulness of these measures to international arbitral procedure. It examines both the CIArb Protocol, including significant features such as the requirement for a declaration of expert independence, as well as the much briefer section on this issue in the IBA Rules on the Taking of Evidence in International Commercial Arbitration. The article also identifies other significant areas for reform in this area.

II. THE WOOLF REPORT

In 1996, Lord Woolf in the United Kingdom produced a report[1] which expressed concerns over the excessive costs and delay involved in litigation. 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'. Lord Woolf observed that in many cases it was preventing worthy cases from ever coming to court. 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 the tribunal or court. 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 or judge, 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 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 key recommendations included the following:

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

- 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.

(a) Post-Woolf Reform in the United Kingdom

The Woolf Report triggered reforms in the United Kingdom and the Civil Justice Council drafted a Protocol for the Instruction of Experts to give Evidence in Civil Claims, which since 5 September 2005 applies to all steps taken by experts or by those instructing experts. The Protocol replaces 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 which 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).

(b) Reform in Australia

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

Contemporaneously with the English reforms and recommendations with respect to expert witnesses, reforms have been adopted by the Federal Court of Australia[2]

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[2] The Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia were produced in 1998 (and last amended in June 2007). Under them, the expert must give details of his or her qualifications, and any other material or literature which has been used to prepare the report (para. 2.1); the reasons for each opinion stated (para. 2.5); the issues which he or she has been asked to address when giving evidence, the alleged facts upon which the opinion is based and any other materials which he or she has been instructed to consider (para. 2.7); and any inaccuracy or incompleteness in the report, whether due to insufficient data or otherwise.

and the various State Supreme Courts.[3] 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. These reforms provide the context for the creation of the CIArb Protocol, by providing an insight into the development of the use of party-appointed experts in major commercial disputes, which, in common law jurisdictions, occur more often than not in the courts. 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.

III. THE INDEPENDENCE OF EXPERTS

In international arbitration, there are two types of experts: those appointed by the tribunal, and those appointed by a party. The IBA Rules on Evidence deal comprehensively with the former. While there have been steps taken in common law jurisdictions, such as Australia, to formalise the rules surrounding the party-appointed expert witnesses,[4] the CIArb Protocol is a major step towards a common approach to the use of party-appointed experts in international arbitration.

(a) IBA Rules on Evidence

The IBA Rules on the Taking of Evidence in International Commercial Arbitration,[5] which were adopted in 1999, already provide methods of enhancing and preserving the independence of expert witnesses to a certain extent. Article 6.2 of the Rules, for example, requires all tribunal-appointed experts to submit a statement of his or her independence to both the tribunal and the parties *before* accepting an appointment in the proceedings. The independence of the expert is

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[3] 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] *See e.g.*, the Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia (produced in 1998, last amended in June 2007), and the expert codes of conduct found in the rules of the New South Wales and Victorian Supreme Courts (Uniform Civil Procedure Rules 2005 (NSW), Sch. 7 and Supreme Court (General Civil Procedure) Rules 2005 (Victoria), Form 44A, respectively).

[5] Hereinafter 'IBA Rules on Evidence'.

further assured by the timing of this statement: by submitting it before looking at the issues, 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. In addition, the statement serves as a powerful reminder to the parties of the role of the expert as an impartial assistant to the tribunal.

Notably, however, there is no like provision in the Rules with respect to party-appointed experts. As there is just as great a likelihood of bias on the part of party-appointed experts in arbitration proceedings as there is in court proceedings, it would be useful for international arbitration to draw upon the practices of the courts in this respect by safeguarding the impartiality of party-appointed experts in the same manner as tribunal-appointed ones. Indeed, it is probably more important to ensure the independence of the former by means of guidelines, as the fact of being appointed by a particular party is more likely to give the expert the impression that his or her evidence must advance that party's case.

Perhaps it is time to revisit these rules in the light of developments since their introduction.

(b) Chartered Institute of Arbitrators Protocol

The CIArb has recently finalised a Protocol for the Use of Party Appointed Expert Witnesses in International Arbitration.[6] The Protocol has been structured along similar lines to the IBA Rules on Evidence, with the aim of enabling an arbitral tribunal to include in its directions 'expert evidence shall be adduced in accordance with the CIArb Protocol'. The drafters have also endeavoured to align the Protocol with the IBA Rules on Evidence by ensuring that the language is consistent, if not identical. Given the increasingly wide acceptance of the IBA Rules on Evidence, this is an important and useful feature. In addition, the Protocol follows the IBA Rules on Evidence in not including optional directions and the Preamble to the Protocol is adapted from the Preamble to the IBA Rules on Evidence.

The CIArb Protocol, however, is intended to give more detailed guidance than the IBA Rules on Evidence, for example, on what should and should not be in an expert's written opinions. The Protocol also caters for tests and analyses to be conducted, which the IBA Rules on Evidence do not.

The CIArb Protocol goes some way to enhancing the independence of expert witnesses and their usefulness to the tribunal. It picks up on many of the reforms that have occurred in litigation as outlined above. Article 4 states that an expert that gives evidence in the arbitration shall be independent of the party which has appointed it, although payment of reasonable professional fees will not of itself vitiate this independence. The CIArb Protocol contains two additional clear statements of the principles of independence:[7]

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6 Hereinafter 'CIArb Protocol'.

7 Article 4.3 and 4.4.

- an expert's duty in giving evidence is to assist the arbitral tribunal to decide the issues in respect of which expert evidence is adduced; and
- an expert's opinion should be independent, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any party.

The CIArb Protocol then details the content of the expert's written opinion to facilitate the tribunal's assessment of its independence and usefulness:[8]

- details of any present or past relationship with any of the parties;
- the expert's background, qualifications, training and experience;
- a statement setting out all instructions the expert has received from the appointing party and the basis of remuneration;
- the opinion should only address the issue or issues in respect of which the arbitral tribunal has given permission for expert evidence to be adduced;
- a statement of which facts and matters, including any assumed facts or other assumptions, have been considered in reaching the opinion;
- a statement of which facts and matters, including any assumed facts or other assumptions, upon which the opinion is based;
- a statement of the opinions and conclusions that have been reached and a description of the method, evidence and information used in reaching the opinions and conclusions;
- a statement of the matters on which the expert has been unable to reach an opinion; and
- a statement of the matters (if any) which are outside the expert's area of expertise.

The CIArb Protocol also aims to save time and cost by requiring the opinion to be as brief as is reasonably possible, reference all documents and sources relied upon, not contain copious extracts from other documents and not annex more than is reasonably necessary to support the opinion. The opinion must also contain an expert declaration in the form set out in Article 8.[9]

IV. LIMITING THE DIFFERENCES

In addition to enhancing the independence of experts, the Australian court reforms and the CIArb Protocol aim to establish a process by which experts can be made to limit the differences between themselves *prior* to giving evidence. Lord Woolf observed in his final report that this was one of the basic elements of case management. It allows the trial or arbitration 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

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8 Article 4.5.
9 See discussion *infra*.

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 streamlining of contentious issues can be achieved, to which the practice of international arbitration is equally amenable.

(a) 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.

In New South Wales, experts' reports must be served upon the other active parties to proceedings in accordance with an order or Practice Note of the court, or where there is none, at least 28 days prior to the hearing.[10] Order 36A, Rule (2) of the Rules of the Supreme Court 1971 in Western Australia also makes service of an expert's report mandatory upon the other parties where the evidence concerned is medical evidence for personal injuries. For all other expert evidence, where an application is made the court has the discretion to order the exchange of experts' reports.[11]

(b) Joint Conferences

Court-ordered conferences between the opposing experts of the parties are another way of limiting the differences of expert opinion on a given question. The NSW Supreme Court Practice Note SC Gen 11 (Joint Conferences of Expert Witnesses) states that the objectives of joint conferences include:[12]

- the just, quick and cost-effective disposal of proceedings;
- the identification and narrowing of issues in the proceedings at the preparation and discussion stages of the conference;
- a shortened trial and greater prospects of settlement;
- informing the court of the issues to be determined;
- binding experts to the position they take during the conference, increasing the certainty of the trial process and the issues raised therein (as the joint report may be called as evidence of agreement where the expert tries to assert an opinion other than that to which he or she agreed to be bound); and
- avoidance or reduction of the need for experts to attend court to give evidence.

Joint conferences are able to achieve these objectives by bringing together experts in a non-adversarial context to discuss their views in their capacity purely as expert. In 2001, Wood J observed[13] that the joint conference experience had been 'entirely positive' because:

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10 Uniform Civil Procedure Rules 2005 (NSW), Rule 31.28(1).
11 Rules of the Supreme Court 1971 (WA), Order 36A, Rule 3(4).
12 NSW Supreme Court Practice Note SC Gen 11, para. 5.
13 Justice J Wood, 'Expert Witnesses: the New Era' (paper presented at the Eighth Greek Australian International Legal and Medical Conference, Corfu, 2001).

- the non-confrontational environment made it easier to concede a point than it would be under the pressure of a trial;
- the professional context, in which experts were required to justify their opinions to their fellows, lessened the likelihood of adherence to extreme, unsubstantiated or 'junk science' views;
- the meeting (and the subsequent drafting of the report) enabled both the discarding of insignificant peripheral issues and the clarification and identification of major matters of contention; and
- the meeting could lead to a fuller revelation of fact to the expert, which (depending on the facts of the case) might have an impact upon the view held by the expert.

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.[14] Experts are free to disagree, of course, but such disagreement must arise from the exercise of their independent expert judgment.

Thus, 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 focusing upon the genuinely contentious issues and enabling experts to reach agreement as to others. Where experts have been directed effectively to 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.

Rule 31.24 of the NSW Uniform Civil Procedure Rules 2005 grants courts the power to order experts to confer with a view to reaching agreement either

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[14] *See e.g.*, Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia; SA Supreme Court Practice Directions 2006, direction 5.4.7; NSW Supreme Court Practice Note SC Gen 11 (Joint Conferences of Expert Witnesses).

generally or with regard to specified matters. The court may direct such conferences to be held with or without the involvement of the parties, or (where the parties give their consent) with or without the parties or their legal representative. Practice Note SC Gen 11 was released on 17 August 2005 to facilitate compliance with joint conferences of experts under Part 31, Division 2. The Practice Note draws and expands upon the Federal Court guidelines, listing the objectives of joint conferencing and detailing the steps experts should take prior to and during the conference itself. Paragraph 9 actively focuses on the efficient disposal of cases by providing that questions to be answered by the experts should be capable of a yes/no answer wherever possible or by a brief response, such that they are framed to resolve the issue at hand. Paragraph 28 lists the sections that a joint report following the conference should contain, so as to enhance efficiency by means of a uniform standard format.

The Note also clarifies the role of the expert, which is to give an expert opinion based on assumed facts, and not to decide questions of fact or credibility. As in the Federal Court, experts in the NSW Supreme Court should produce a joint report outlining matters agreed and not agreed upon, with reasons for disagreement. The Note confirms that the role of the expert is to assist the court by specifying that experts should produce and sign the report without advice from the parties or their legal representatives.

(c) Application to Arbitration

The measures described above for streamlining the differences between experts in litigious matters are therefore clearly relevant to and not uncommon in international arbitration. For example, article 5.3 of the IBA Rules on Evidence provides the arbitral tribunal with the discretion to order party-appointed experts to meet and confer with respect to the reports they have submitted.[15] Further, it states that where so ordered, experts *shall* attempt to agree on issues of difference, and record in writing any matters with respect to which agreement is reached.

Importantly, however, there is no provision requiring experts to record issues on which they fail to agree (and the reasons why) during these conferences (a common order by some international arbitrators). This is an important lesson that can be drawn from court reforms. Not only does it really clarify the issues of contention which will be dealt with in the proceedings themselves, but it also forces experts to set down in writing the reasons for their differences of opinion. This makes it less likely for experts to continue to hold to unsubstantiated opinions purely for the sake of not reaching agreement.

Another element of the court reforms that could render the provisions of the IBA Rules on Evidence more effective is the prohibition on accepting instructions not to agree, which (as noted above) has the potential to undermine the joint conference and waste further time and money.

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[15] *See also* Techniques for Controlling Time and Cost in Arbitration, released March 2007 by the Arbitration Commission of the International Chamber of Commerce at para. 70.

Some of these concerns are addressed in the CIArb Protocol. The CIArb Protocol provides for the following procedure for adducing expert evidence,[16] which is arguably more effective than that in the IBA Rules on Evidence as holding a conference before reports are produced will assist in narrowing the issues early on and will avoid the situation in which time and money is wasted in experts writing excessively on matters on which they are in agreement.[17]

Under the CIArb Protocol, the experts must hold a conference for the purpose of identifying issues upon which they are to provide an opinion, identifying tests or analyses which need to be conducted and, where possible, reaching agreement on those issues, tests and analyses, and the manner in which they shall be conducted. The arbitral 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 arbitral tribunal a statement setting out:

- the issues upon which they agree and the agreed opinions they have reached;
- the tests/analyses which 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 on either whether they should be conducted and/or the manner in which they should be conducted, and a summary of their reasons for disagreement.

In requiring a statement of aspects of disagreement and reasons for it, the CIArb Protocol is clearly an improvement on the IBA Rules on Evidence. This method also empowers the arbitral tribunal by ensuring it is fully informed and better able to assess the expert evidence.

The next stage is that the agreed tests/analyses are conducted in the agreed manner. Any agreed tests/analyses upon which there was not agreement as to the manner of conducting are conducted in such manner as each expert considers appropriate in the presence of the other experts. Any tests/analyses which have not been agreed are conducted in such manner as the expert requiring them to be conducted considers appropriate in the presence of the other experts.

After testing/analysis, each expert must produce and exchange a written opinion dealing only with those issues upon which there is disagreement. Following such exchange, each expert is entitled, should they so wish, to produce

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[16] Article 6.
[17] Article 6.

a further written opinion dealing only with such matters as are raised in the written opinions of the other experts. This further facilitates narrowing the issues and helps to save time and money.

The arbitral tribunal may at any time, up to and during the hearing, direct the experts to confer further and to provide further written reports to the arbitral tribunal either jointly or separately.[18] In addition, the arbitral tribunal may at any time hold preliminary meetings with the experts.[19] Used wisely, these mechanisms could save time later on.

The provisions in the CIArb Protocol concerning oral testimony mirror articles 5.4 to 5.6 of the IBA Rules on Evidence.[20] 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. If an expert who has provided an opinion does not appear at the hearing without a valid reason, then the arbitral tribunal shall disregard the expert's written opinion, unless the parties agree otherwise and the arbitral tribunal confirms that agreement, or unless in exceptional circumstances the arbitral tribunal determines otherwise. 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.

V. METHODS OF GIVING EVIDENCE

In the 1970s a variant of joint conferencing was developed in the Australian Competition Tribunal (formerly the Trade Practices Tribunal), which enables the differences between opposing adversarial experts to be limited during the course of the hearing itself. This method is known as 'hot tubbing',[21] and involves the swearing of all experts one after another in a panel format, after all factual evidence has been heard. Generally each expert will briefly outline his or her opinion on the matter in question. The other experts will then have the opportunity to question and makes comments on the views of that expert. Cross and re-examination is generally only permitted after each expert in the panel has undergone the process back to back.

Notably, hot tubbing promotes the independence of experts, as it separates their evidence from the factual evidence of the party by whom they have been retained. Other key advantages of hot tubbing include:

- a greater capacity for witnesses to explore and fully understand the issues about which they are expressing an opinion, by questioning and interacting with other experts;

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[18] Article 7.2.
[19] Article 7.3.
[20] CIArb Protocol, arts 6.1(h), (i) and 6.3; IBA Rules on Evidence, arts 5.4–5.6.
[21] *See generally*, A. Stephenson, 'Experts Ease their Tensions in the Hot Tub' in *Clayton Utz Projects Insights Newsletter*, 5 May 2005, available at www.claytonutz.com.

- the creation of a less adversarial environment than the traditional procedure. The panel aims to have the feel of a roundtable discussion between colleagues. This makes it less likely that experts will defensively maintain extreme positions or partisan opinions that are not genuinely held, as here too experts may be required to justify these views to their professional peers;
- removal of experts from questioning by counsel until after all relevant expert opinions have been espoused. This should make it easier for experts to make concessions where appropriate, without feeling as though they are weakening the case of the party by whom they are retained; and
- the capacity for expert issues to be dealt with on a more advanced level, and in a manner that is more relevant to the question at hand, because panel evidence is led by the experts themselves with little or no interference by counsel.

Hot tubbing may also enhance the prospects of settlement in a similar way to joint conferencing, by identifying holes in a case that may previously have been covered up by expert evidence, given in its traditional form.

Following the experience of the Australian Competition Tribunal, hot tubbing has been adopted in the Federal Court of Australia. The Victorian Supreme Court has now amended its Court Rules to allow the court to direct expert evidence to be given in the 'hot tub' as well. These are expressed in paragraph 11.4 of the Supreme Court of Victoria Practice Note 4 of 2004 (Commercial List).

Most recently, the Supreme Court of New South Wales has provided for the hot tub approach in the new Uniform Civil Procedure Rules 2005, Rule 31.35 of which actively encourages judicial case management and full court control of expert evidence, by empowering the court to direct the manner in which expert evidence is to be given. Among other things, this includes the ability to direct that experts be sworn immediately after one another, so that where directed to they can give their opinion of the evidence or other experts, ask questions of other experts and be cross-examined in a way appropriate to that arrangement.

Hot tubbing is frequently used in international arbitration hearings. Given the more flexible and informal nature of international arbitration, it is probably better suited to arbitral proceedings than traditional litigious methods of calling expert evidence. While there is no specific provision for it in the IBA Rules on Evidence, article 6.6 does provide for tribunal-appointed experts to be questioned by party-appointed experts during the hearing in relation to matters raised during the parties' submissions or in party-appointed expert reports. Similarly, in the CIArb Protocol there is no direct provision for hot tubbing, although the manner in which an expert gives testimony is to be as directed by the arbitral tribunal.[22] Further, the expert's testimony is to be given with the purpose of assisting the

[22] Article 7.1.

arbitral tribunal to narrow the issues between the experts and to understand and efficiently use the expert evidence.[23]

One drawback to be aware of, however, is that in the context of arbitration, hot tubbing is often used for the presentation not only of expert but also of factual evidence. By calling factual evidence in panel format, witnesses run the risk that their own recollections will be influenced (albeit unintentionally) by the evidence of their fellow witnesses. It is important, therefore, that hot tubbing be employed only where it is appropriate to the circumstances of the case, and by an experienced tribunal. In the case of expert witnesses, the general approval of the courts and tribunals which have already implemented this procedure indicates that it has the potential to add tremendous value to arbitral proceedings in terms of time and cost savings.

VI. 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.

(a) Evidence by Leave

The notion of 'evidence by leave' refers to the practice, adopted in some situations by certain Australian 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. Rule 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 him or herself. 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 and the NSW courts have adopted similar provisions.[24]

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:

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[23] Article 7.1.

[24] Uniform Civil Procedure Rules 2005 (NSW), Rule 31.19; 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.

- the need for the tribunal to understand sufficient of the issues to make a judgment. 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 constitute preventing a party to present its case so as to prejudice potential enforceability under the New York Convention;[25] and
- the requirements of the Model Law and UNCITRAL (and other institutional) Arbitration Rules that a party be given a 'full'[26] or 'reasonable'[27] 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 going so far as to require that leave be given before any expert evidence may be adduced. It should be noted, however, that the CIArb Protocol requires the parties to obtain the permission of the arbitral tribunal before adducing expert evidence. The tribunal must then direct whether expert evidence shall be adduced, the issues in respect of which expert evidence shall be adduced, the number of experts in respect of each issue, the identity of the experts, and what tests or analyses shall be required.[28]

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.

(b) A Clear Statement of Independence

This is where the international arbitral process is distinctly lacking. There is no 'earthing' of the duty of the expert. From where is it to be derived? Although

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[25] 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).

[26] *See e.g.*, UNCITRAL Arbitration Rules 1976, art. 15(1); ICC Rules of Arbitration 1998, art. 15(2); ACICA Arbitration Rules 2005, art. 17.1.

[27] *See e.g.*, LCIA Arbitration Rules 1998, art. 14.1(i); ICC Rules of Arbitration 1998, art. 15(2); Rules of the Arbitration Institute of the Stockholm Chamber of Commerce 1999, art. 16(2).

[28] Article 3.

there are ethical rules which some experts, such as accountants, bring with them, these rules are geographic and their enforceability is unrelated to the arbitral process.

As noted above, article 6.2 of the IBA Rules on Evidence provides for a statement of independence to be submitted by all *tribunal*-appointed experts before accepting an appointment, but no such provision exists in relation to *party*-appointed experts. The CIArb Protocol fills this gap by requiring an expert's written opinion to contain an expert declaration in the form set out in Article 8.[29] This declaration includes:

- acknowledgement that the expert's duty in giving evidence is to assist the arbitral tribunal to decide the issues in respect of which expert evidence is adduced, and that the expert has complied with, and will continue to comply with, that duty;
- confirmation that the expert is independent of the appointing party;
- confirmation that their opinion is independent, objective and unbiased, and has not been influenced by the pressures of the dispute resolution process or by any party to the arbitration;
- confirmation that all matters upon which the expert has expressed an opinion are within the expert's area of expertise;
- confirmation that the expert has referred to all matters which the expert regards as relevant to the opinions the expert has expressed and has drawn the attention of the arbitral tribunal to all matters, of which the expert is aware, which might adversely affect the expert's opinion;
- confirmation that the expert considers the opinion to be complete and accurate and constitute the expert's true, professional opinion; and
- confirmation that if the expert subsequently considers that the opinion requires any correction, modification or qualification, the expert will notify the parties to the arbitration and the arbitral tribunal forthwith.

The creation of a Statement of Independence submitted to the tribunal, and a clear requirement, acknowledged by both parties at the outset, that this be adhered to, is one of the key elements necessary for the independence of the expert. In order to be effective, such a statement should be made broadly applicable to arbitrations internationally and sanctions clearly spelt out regarding the admissibility and weight of evidence adduced in breach of the requirement. The CIArb Protocol is admirable in requiring the expert to affirm his or her independence and in outlining the expert's duty to the arbitral tribunal. Further, it attaches consequences to breaches by providing that if the arbitral tribunal is satisfied that either or both of the written opinion or testimony of an expert is not in accordance with the expert declaration, then it shall disregard the expert's

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[29] Article 4.5(n).

written opinion and testimony unless, in exceptional circumstances, the arbitral tribunal determines otherwise.[30]

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 and another* v. *Secretary for Transport*[31] 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 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.

(c) Transparency

Is there to be some rule regarding the exposure to disclosure of communications between lawyers and their experts? There is also the question of the extent to which communications can, in the normal course, be exposed and how this may be done.

Opinion over the desirability of such a rule in litigious proceedings, and the extent to which communications should be revealed, is divided. It is likely that a court or arbitral tribunal would benefit from greater transparency as to how experts came to develop their opinion. This would enable the court or tribunal to make a fully informed determination and to better weigh the evidence of

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[30] Article 7.4.
[31] CACV 81 of 2003, 6 April 2004.

opposing experts. Moreover, ensuring that all communications between him or herself and the party by whom he or she is appointed are made available may be a good way to remind the expert that their overriding duty is to the court or tribunal and not to that party.

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. In *Report 109: Expert Witnesses*,[32] 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.

Under the CIArb Protocol, the instructions or appointment of the expert are capable of disclosure, either through disclosure of relevant documents or questioning of the expert, if the arbitral tribunal is satisfied that there is good cause.[33] However, drafts, working papers and any other documentation produced by an expert for the purposes of providing expert evidence is privileged from production and disclosure.[34]

(d) Processes for Conformance of Views

This would involve a clear identification, as part of the process accepted by both parties at the commencement of the arbitration, of the processes by which experts are not committed at the outset to firm views but rather are required to confer, and only after conferring, to identify areas of agreement and disagreement.

(e) Single and Court-appointed Experts

The replacement of multiple, opposing, party-appointed experts with a single, neutral expert was first advocated in the Woolf Report. His Lordship argued that a single witness, appointed by the parties jointly or by the court, would enhance the objectivity of expert evidence and save time and money by significantly reducing the duration of proceedings. Accordingly, Lord Woolf recommended that a single expert should be preferred to multiple experts wherever possible.

This recommendation is given form in Rule 423 (Chapter 11, Part 5, Division 1) of the Uniform Civil Procedure Rules 1999 of the Supreme Court of Queensland, subparagraph (b) of which states that one of the main purposes of the Part is to ensure that expert evidence be given by a single expert wherever practicable, provided that it does not compromise the interests of justice. Subparagraph (d) confirms this, providing that more than one expert should be

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[32] NSW Law Reform Commission, *Report 109: Expert Witnesses* (June 2005).
[33] Article 5.1.
[34] Article 5.2.

permitted to give evidence on a particular issue 'if *necessary* to ensure a fair trial' (emphasis added). Further, Rule 429H (in Division 3 of the same Part) stipulates that where an expert is appointed jointly by the parties after proceedings have commenced, that expert is to be the only expert permitted to give evidence on that particular issue, unless the court otherwise orders.

Supreme Court of Queensland Practice Direction 2 of 2005 (Expert Evidence) interestingly emphasises that cost sanctions may apply under Rule 429D to parties who are found to have needlessly retained multiple experts on a particular issue, although the Direction gives no guidance as to how this is to be assessed.

Certainly the use of a single expert would remove the risk of that expert seeing him or herself as the 'hired gun' of a particular party, and from a practical perspective it would also save time. However, the original motivation set out in the Woolf Report for enhancing time and cost savings should be borne in mind: access to *justice*. It is by no means certain that the appointment of a single expert enables parties to access a just result more easily than the appointment of multiple, opposing ones. Moreover, it is telling that most Australian jurisdictions have failed to follow the lead of the Queensland Supreme Court. On the contrary, the measure has been met by significant opposition. Similarly, the CIArb Protocol is not intended to cover joint single or tribunal-appointed experts.

Those opposed to single experts argue that differing views on a particular question will not always be the result of bias, but may instead be validly held and reflective of a genuine divergence of opinion within the expert's field. Thus, the argument runs that the adversarial treatment of opposing experts is necessary to ensure that all views are presented on the matter in question, enabling the court or arbitral tribunal to come to a more informed opinion. A further argument[35] against single experts is that it may actually *add* to, not reduce, the time and cost of proceedings, as parties may appoint 'shadow experts' where they do not agree with the opinion of the official expert, or where they wish to determine what they should tell the single expert. Thus, rather than having two experts under the original system, under a 'single expert' system it is possible there will in fact be three. Where the single expert has been appointed by the court or tribunal, and not by the parties, a further risk is that the court/tribunal will be more inclined to accept the evidence of the expert which it appointed.[36]

Clearly a key difficulty with regard to the independence of expert witnesses is balancing the need for the full range of opinions to be made available against concerns of time, cost and efficiency. It is arguable that other methods, such as joint conferences and hot tubbing, are sufficient.

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[35] *See generally*, S. Drummond, 'Firing the hired guns' (11 March 2005), available at www.lawyersweekly.com..au/articles.

[36] *Ibid.*

VII. CONCLUSION

The foregoing discussion highlights some of the key issues with respect to expert witnesses in international arbitration. These concerns have been the subject of much debate and discussion in the context of traditional common law litigation. The problems centre largely on the independence and impartiality of experts, and the need for arbitrators to engage actively in management of expert evidence by directing experts to limit their differences before and/or during the proceedings.

Where experts are called sparingly and used with integrity, they can add enormous value to complex proceedings, and can greatly assist the tribunal in coming to a decision. The uncontrolled use of experts, on the other hand, has the potential to subvert the proceedings, and preclude any chance of settlement.

The various reforms described above can add greatly to the efficient and effective use of experts in international arbitration, by enhancing the impartiality of experts, reminding them that their paramount duty is to the tribunal and streamlining the issues of contention to be dealt with in the hearing.

Although many of the court approaches and reforms have now infiltrated the arbitral process in one way or another, uniformity and structure is lacking. 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 CIArb Protocol is a step in the right direction.