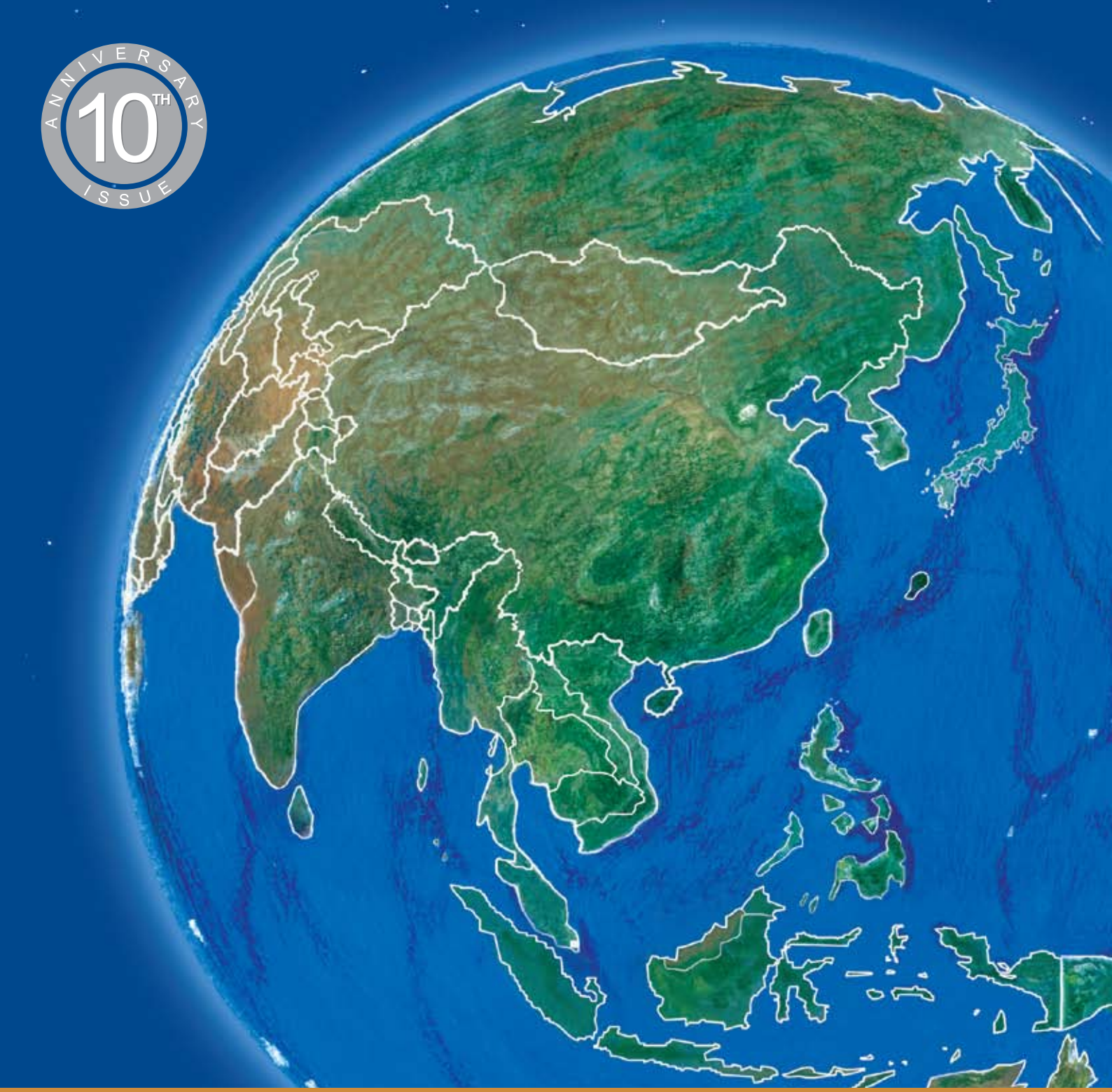

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Challenges for International Dispute Resolution in the Global Financial Crisis, Part II

This article is an edited version of a presentation to the Chartered Institute of Arbitrators (East Asia Branch) delivered in Hong Kong on 4 May 2009. In this part of the article, the author discusses improvements to the international arbitral process to make it more responsive to the needs of users and to challenges arising from the changing international economic environment. Part I appeared in the July 2009 issue.

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Reform of international arbitration processes

Given the increasing utilisation of arbitration and constant developments in technology, inefficiencies in international arbitral processes are becoming increasingly evident. With these developments in mind, reform of these processes is critical to arbitration's success. Jean-Claude Najar, a former Vice President of the LCIA Court of Arbitration, recently discussed international arbitration from a user's perspective. He explained that although arbitration is widely used, it

"is no longer fulfilling the basic need of business customers for early and efficient resolution of disputes. We are increasingly turning elsewhere, to mediation and other forms of ADR." [1]

This consideration, together with the effects of recent developments and trends, reflect a general consensus that some areas within the international arbitration process need improvement to enable it to run more efficiently.

The following five issues require particular attention. The first four are currently being considered as part of the reform of the IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999 Edn) ('the IBA Rules'):

- Management of the process
- Document disclosure
- Use of experts and witnesses
- Innovative procedures: witness conferencing
- Award delays

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Management of the process

The arbitration landscape is changing, as are users' expectations of the arbitral process. A fundamental part of meeting expectations is to establish a framework to ensure that the arbitration process is adequately managed. Jean-Claude Najar comments that:

"… [A]rbitral institutions should develop processes for measuring themselves and their arbitrators in the area of case management just as many courts do. There is a greater need for transparency and information flow." [2]

There are a number of ways in which the international arbitration process can be broadly improved. These include increased transparency, greater efficiency, case management mechanisms and ensuring flexibility of the process to cater for the needs of different jurisdictions.

Efficiency is probably the most widely recognised issue. Many of the major arbitral institutions have developed accelerated or 'fast track' arbitration procedures which may, for instance, apply strict time limits, condense proceedings and provide for decision by a sole arbitrator. Given that accelerated arbitration relies on party co-operation, however, it would take a rare commercial relationship to ensure the process did not encounter some form of delay. Notwithstanding this, expedited arbitration rules, such as those implemented by the Australian Centre for International Commercial Arbitration (ACICA)[3], are a step in the right direction for international arbitration. They mark a move away from strict adversarial and litigation-like procedures and a move back towards the roots of arbitration, where efficiency is a priority.

Document disclosure

This issue has been at the forefront of debate in recent times, largely due to technological developments and the growing use of electronically stored

information. The reason why this issue is contentious is because the growing amount of information increases the burden and strain on resources in terms of document discovery. Large amounts of electronically stored information may lead to a long and drawn out discovery stage and thus may increase the length of arbitral proceedings. The continual development of technology requires an answer to the question: what is the appropriate process for document disclosure when dealing with electronically stored information?

Most international arbitration rules and conventions require that the parties be treated equally and fairly in case presentation and empower arbitral tribunals to order the production of evidence. These include, for example, art V(1)(b) and (d) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ('the New York Convention') and art 18 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Arbitration ('the Model Law'). Electronically stored information quite often falls within the ambit of 'evidence' for the purposes of these instruments. There are, however, no guidelines regulating the procedure for handling such information.

Both the New York Convention and the Model Law are silent on electronic information. This is because it is a relatively new development. The IBA Rules, by contrast, deal with this issue. The definition of "document" in the IBA Rules makes it clear that they apply to both hard copy and electronic information. Article 3 of the Rules requires parties to disclose to both the tribunal and the opposing party any information that they rely on in their case. Further, if a party wishes to seek documents from the opposing parties, it is required to submit a 'Request to Produce'.

The IBA Rules are certainly a step in the right direction. Guidelines in this area still require improvement, however, so as to avoid potential increased cost and delay in international arbitration proceedings, whilst still allowing parties to present their case fairly[4]. Whilst the disclosure of electronic documents is a relatively new and seemingly unresolved issue, it is manageable and "should not threaten to overwhelm or undermine arbitration".[5]

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Use of experts and witnesses

The use of party-appointed expert witnesses in international arbitration is increasingly being re-examined in light of the sea change occurring in litigation in many common law jurisdictions. These changes are in response to concerns about the high costs and delay involved in litigation and aim to minimise the way expert evidence contributes to these problems.

The methods of enhancing and preserving the independence of expert witnesses in litigious proceedings can be applied equally to international arbitration proceedings. Indeed, the IBA Rules provide for this to a certain extent. Article 6.2, for example, requires all tribunal-appointed experts to submit a statement of independence to both the tribunal and the parties before accepting an appointment. The independence of the expert is further assured by the timing of this statement: by submitting it before looking at the issues, the expert's mind is focused upon his paramount duty to the court before he 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 court.

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 litigation, it would be useful for international arbitration to draw upon the practice of the courts by safeguarding the impartiality of party-appointed experts in the same manner as tribunal-appointed experts. 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 evidence must advance that party's case.

Perhaps it is time to revisit the IBA Rules in the light of developments since their introduction. One possible means of improving the use of expert witnesses in international arbitration is to adopt a model that permits only single and tribunal-appointed experts.

The replacement of multiple, opposing, party-appointed experts with a single, neutral expert was first advocated in the Woolf Report[6]. Lord Woolf 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, he recommended that a single expert should be preferred to multiple experts wherever possible.

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

on a particular issue "if necessary to ensure a fair trial". Further, Rule 429H (in Part 5, Division 3) 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.

The Supreme Court of Queensland Practice Direction 2 of 2005 (Expert Evidence)[7] 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.

The use of a single expert would certainly remove the risk of that expert seeing himself as the 'hired gun' of a particular party and, from a practical perspective, would also save time. The original motivation set out in the Woolf Report for enhancing time and cost savings should, however, 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.

It is, however, 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. 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, 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 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.[8] 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 that it appointed.[9]

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[10]. It is arguable that other methods, such as joint conferences and 'hot tubbing', would be sufficient.

> **"… [I]t is probably more important to ensure the independence of … [party-appointed experts] 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 evidence must advance that party's case."**

Innovative procedures: witness conferencing

Court-ordered conferences before trial between the opposing experts of the parties are another way of limiting differences of expert opinion on a given question. The New South Wales Supreme Court's Practice Note SC Gen 11 (Joint Conferences of Expert Witnesses) (2005) states[11] that the objectives of joint conferences include:

(1) the just, quick and cost effective disposal of proceedings;
(2) the identification and narrowing of issues in the proceedings at the preparation and discussion stages of the conference;
(3) a shortened trial and greater prospects of settlement;
(4) informing the court of the issues to be determined;
(5) 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 an expert tries to assert an opinion other than that to which he agreed to be bound); and
(6) 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 that the joint conference experience had been "entirely positive" because:

(1) the non-confrontational environment made it easier to concede a point than it would be under the pressure of a trial;
(2) 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;
(3) 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
(4) the meeting could lead to a fuller revelation of facts to the expert, which (depending on the facts of the case) might have an impact upon the view held by the expert.[12]

In England & Wales, 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. Lord Woolf's view 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. Lord Woolf 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. Following recommendations in the Woolf Report, most Australian courts have overcome the potential for joint conferences to be undermined by expressly prohibiting experts from receiving instructions to withhold agreement.[13] Experts are of course free to disagree, but such disagreement must arise from the exercise of their independent expert judgment.

Thus, the Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia (2008) ('the Guidelines') 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 opposing side's experts 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 on genuinely contentious issues and enabling experts to reach agreement as to others. Where experts have effectively been directed 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.

Article 6 of the Chartered Institute of Arbitrators' Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration (2008) ('the Protocol') requires party-appointed experts to meet with a view to identifying the key issues and to seek to reach agreement on those issues before preparing reports that are to be provided to the arbitral tribunal, identifying matters of agreement and disagreement and, in the case of the latter, reasons for disagreement. The Protocol also provides for the possibility of the experts giving evidence together.

> **"Experts [in joint conferences] are of course free to disagree, but such disagreement must arise from the exercise of their independent expert judgment."**

The prospect of expert and factual witnesses giving evidence together is an exciting one. Such procedures do require a much greater degree of initiative by the tribunal than is usual in common law proceedings. Although increasingly common with party-appointed experts, this is less common with factual witnesses. It does provide an opportunity to shorten substantially factual hearings and effectively to juxtapose, and in some instances reconcile, competing factual recollections.

Award delays

The design and implementation of ways to ensure the efficient and cost effective disposition of arbitral proceedings needs to be combined with the outcome of the proceedings being available to the parties as soon as possible after their conclusion. Unfortunately this is not always the case.

A combination of busy arbitrators and three-person tribunals can lead to significant and unacceptable delay in the provision of arbitral decisions to the parties after their conclusion. It is suggested that there are several ways of alleviating this problem.

Firstly, parties and arbitrators should be transparent about anticipated hearing dates and time limits for awards. Although the former are often discussed, the latter, in the author's experience, are not. There are several sets of arbitral rules that provide for time limits within which proceedings should be concluded, of which the ICC Rules of Arbitration (1998 Edn) are an example. This six-month period applies to the time between commencement and conclusion of the proceedings, but is extended regularly as a matter of form, thus making no real contribution to addressing the problem of delayed awards. If parties were to require arbitrators to deliver awards within agreed periods after the conclusion of proceedings, there might develop a greater focus by arbitrators on expeditious delivery of awards.

Secondly, real 'project management' by arbitrators on award preparation and delivery should be possible. Just as case management of proceedings can deliver procedures that are timely and cost effective, project management of the award preparation process can ensure timely delivery of awards. In the case of three-person tribunals, there are predictable stages of award preparation, namely deliberation, preparation of a draft by one or more members of a tribunal, agreement upon the terms of the draft, and the settlement and proofing of the award. Each of these stages takes time that ideally should be planned for and allocated, at least provisionally, from an early stage of the proceedings. Unfortunately this is not often the case, and a tribunal of three busy arbitrators with full diaries is often left to find the necessary time after conclusion of the proceedings. Busy arbitrators sometimes object to setting aside time for deliberations and award finalisation at an early stage of proceedings, on the basis

that if the matter settles they will have declined remunerative work for the period set aside. Assuming, however, an obligation by arbitrators to deliver awards in a timely fashion, it is suggested that the setting aside of appropriate time to complete awards is just as important as the reservation of dates for hearing, which usually can be and are reserved from an early stage of those proceedings.

It is suggested that greater transparency regarding project management of award delivery would assist all concerned. Transparency regarding arbitrators' track records in timely award delivery would also possibly assist parties when choosing arbitrators.

Conclusion

Arbitration needs to adapt in order to keep up with the fast-changing economic climate and to grasp growing opportunities for business that result. In particular, arbitral procedures must improve to suit the changing needs of its users.

Notwithstanding the hype and pessimism surrounding the global financial crisis generally, the changing economy presents a unique opportunity to arbitration practitioners. The boom in arbitration demonstrated by the figures given in Part I of this article[14] demonstrates not only an increased demand for ADR but also highlights potential 'gaps' in the arbitral system that may appear in future years.

The virtues of arbitration have been extolled for many years. Practitioners must, however, strive to ensure that these perceived advantages remain credible. Arbitration should remain efficient and cost effective and care must be taken not to take it down the road of international litigation.

In the short term, the current arbitral framework will cope with the increasing caseload. In the longer term, however, reform is necessary and practitioners must consider how to improve and manage the process and to increase the efficiency of arbitration.

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1 *User's View on International Arbitration* (Clayton Utz/University of Sydney International Commercial Arbitration Lecture, Sydney, 6 November 2008).
2 *Ibid.*
3 ACICA Expedited Arbitration Rules (2008 Edn).
4 The Chartered Institute of Arbitrators, for example, has made a positive contribution through its Protocol for E-Disclosure in Arbitration (2008).
5 Troy L Harris, *Disclosure of Electronic Documents: The Issues and Guidelines in International Construction Arbitration* (2009) 26 Int'l Const LJ 161 at 162.
6 *Access to Justice – Final Report* (1996).
7 http://www.courts.qld.gov.au/PracticeDirections/Supreme/SC-PD-2of2005.pdf.
8 See generally, S Drummond, *Firing the hired guns*, www.lawyersweekly.com..au/articles (11 March 2005).
9 *Ibid.*
10 This is another area in which the Chartered Institute of Arbitrators has made a significant contribution by the issuance of its Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration (2007) - http://www.ciarb.org/information-and-resources/The%20use%20of%20party-appointed%20experts.pdf. This Protocol is discussed at length by the author in *Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last* (2008) 24 Arb Int'l 137.
11 At para 5.
12 Justice J Wood, *Expert Witnesses – The New Era* (a paper presented at the 8th Greek Australian International Legal & Medical Conference, Corfu, 2001).
13 See, for example (i) Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia (2008) - http://www.fedcourt.gov.au/how/prac_direction.html; (ii) South Australia Supreme Court, Supreme Court Practice Directions (2006), direction 5.4.7 - http://www.courts.sa.gov.au/lawyers/practice_directions/2006-SC-pd/SC-PDs-am11.pdf; (iii) New South Wales Supreme Court, Practice Note SC Gen 11 (Joint Conferences of Expert Witnesses) (2005) - http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/991e2f2f3bcd8289ca2572ed000cec4b?OpenDocument..
14 See [2009] Asian DR 91 at 92 (Table 2), 94 (Table 3) and 95 (Annex B).