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# Use of Experts in Arbitration; Independent Experts - The Common Law Approach
## by D. Jones

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# Use of independent experts in arbitration

# Independent experts - the common law approach


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# Independent experts - the common law approach[1]

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## 1. Introduction

In order to understand the approach of common law practitioners to the use of expert evidence in international arbitration, it is necessary to look at common law court approaches to the issue. It is from their court practices that common lawyers import attitudes and practices into international arbitration.

This paper examines a sea change sweeping through the English and Australian court systems which is having a marked effect on the manner of use of experts and which can confidently be predicted to influence the approach of common law arbitrators and counsel to the use of experts in international arbitration.

## 2. The Woolf report

In 1996, Lord Woolf in the UK produced a report[2] 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.

2 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. 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

[1] The author gratefully acknowledges the assistance provided in the preparation of this paper by Samantha Landsberry, Legal Assistant, Clayton Utz.

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

have been retained. It may also produce injustice where an extreme but more convincingly portrayed view is preferred by an arbitrator, even though it may not be a genuine or accurate reflection of expert opinion in the relevant area. Second, this leads to a focus on quantity, 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/she is retained. In furtherance of this basic premise, his 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 is to apply to all steps taken 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 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).

2.2 *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 too grapple with delay and its associated costs, thereby ensuring greater access to justice for all parties.

Co-incidentally with the English reforms and recommendations with respect to expert witnesses, 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.

## 3. The independence of experts

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.

It is easy to see how an expert who has been appointed and is being remunerated by a particular party for his/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*, 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

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

addressed to the court and not to the parties would be an effective way of reminding the expert to whom their duty was directed first and foremost. Similarly motivated was the recommendation that all experts be required to sign a declaration expressly stating that the expert understands that his/her primary duty 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:

- **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/she is retained.

  In some courts, such as the NSW and Victorian Supreme Courts, the rules are annexed to the Court Rules[4] 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, the mere fact of focusing the mind of the expert upon his/her duties and role may at least prevent unconscious bias, although it is unlikely to have any effect on experts who are overtly and consciously partial.

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

- **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.

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 more 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 he/she maybe 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 and emphasise that the overriding duty of the expert is to the court and not to the party by whom they have 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:

- His/her qualifications, and any other material or literature which has been used to prepare the report[5] - This ensures that the court knows the extent of expertise of the witness, and the information upon which his/her opinion is based.

- Reasons for each opinion stated[6] - 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 dig into the technical issues of the case.

- The issues which he/she has been asked to address when giving evidence, the alleged facts upon which the opinion is based and any other materials which he/she has been instructed to consider[7] - 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 prepares his/her report in a manner which is likely to be of most 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.

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

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

[6] Above n 5, para 2.5.

[7] Above n 5, para 2.7.

fundamental premise that the duty of the expert is to the court and not to the parties.

3.2 *The IBA Rules*

The methods of enhancing and preserving the independence of expert witnesses in litigious proceedings can be applied with success to international arbitration proceedings.

Indeed, the *IBA Rules on the Taking of Evidence in International Commercial Arbitration*,[8] which were adopted in 1999, already provide for this to a certain extent. Article 6.2 of the rules, for example, requires all tribunal-appointed experts to submit a statement of his/her independence to both the tribunal and the parties *before* accepting an appointment in the proceedings. 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 focussed upon his/her paramount duty to the court before he/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 court.

Notably however, there is no like provision in the Rules with respect to party-appointed experts. As there is just a 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/her evidence must advance that party's case.

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

3.3 *Queensland reforms*

The reforms adopted in the Federal and Supreme Courts have, for the most part, been generally accepted and are fairly uncontroversial. However, certain

[8] Hereinafter the *IBA Rules on Evidence*.

reformative measures adopted in the Supreme Court of Queensland with regards to expert witnesses are perceived in other jurisdictions to be a little more extreme.

(a) 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, sub paragraph (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. Sub paragraph (d) confirms this, providing that more than one expert should be permitted to give evidence on a particular issue "if *necessary* to ensure a fair trial" (emphasis added). Further, Rule 429I (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.

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 to make a more informed opinion.

A further argument[9] 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 2 experts under the original system, under a "single expert" system it is possible there will in fact be 3.

Where the single expert has been appointed by the court, and not by the parties, a further risk is that the court will be more inclined to accept the evidence of the expert which it appointed.[10]

George Hampel QC, former Victorian Supreme Court Judge and now a Professor at Monash University Faculty of Law, argues that the current practices being employed in other courts (namely the exchange of draft reports, joint conferences and hot tubbing) are sufficient to narrow the issues before the court[11] and that education and culture change are more effective means of enhancing and ensuring the independence and impartiality of experts.

Clearly a key difficulty with regards to the independence of expert witnesses is balancing the need for the full range of opinion to be made available against concerns of time, cost and efficiency.

(b) Discoverability of instructions and draft reports

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[9] See generally, S Drummond, "Firing the hired guns", 11 March 2005; available at: www.lawyersweekly.com..au/articles.

[10] S Drummond, above n 9.

[11] Section 4, below.

Another unusual feature of the expert witness procedure in the Supreme Court of Queensland relates to the transparency of proceedings. That court is currently the only Australian court in which instructions issued to experts with respect to the preparation of their report, and draft reports prepared by the expert, are discoverable.

This has potentially significant implications for the parties to a proceeding, as draft reports may contain differing opinions to those finally developed by the expert. The complete transparency of instructions was supported by Lord Woolf, who recommended that expert evidence should not be admissible unless all written and oral instructions were detailed and provided along with it.

It is likely that the court would benefit from greater transparency as to how experts came to develop their opinion. This would enable the court to make a fully informed determination and to better weigh the evidence of opposing experts. Moreover, ensuring that all communications between him/herself and the party by whom he/she is appointed are made available to the court may be a good way to remind the expert that their overriding duty is to the court and not to that party.

## 4. Limiting the differences

In addition to enhancing the independence of experts, the Federal and Supreme Court reforms 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 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, to which the practice of international arbitration is equally amenable.

### 4.1 *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, expert witnesses are covered by Part 31, Divisions 2 and 3 of the new *Uniform Civil Procedure Rules 2005*, which came into effect on 15 August 2005 (replacing the *Supreme Court Rules 1970*). The rules provide for party and court appointed experts, and include an Expert Witness Code of Conduct. Under Rule 31.18, 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.

The ACT *Supreme Court Amendment Rules 2004 (No 3)* contain a similar provision in relation to medical evidence. Under Rule 49B, an expert must file his/her written report as soon as practicable once he/she has been appointed, and must provide the other parties with a copy within 7 days of filing it. 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.[12]

4.2 *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:[13]

- 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

[12] *Rules of the Supreme Court 1971* (WA), Order 36A, Rule 3(4).

[13] NSW Supreme Court *Practice Note SC Gen 1*, para 5.

expert tries to assert an opinion other than that to which he/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[14] that the joint conference experience had been "entirely positive" because:

- The non confrontationist 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;

- 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 2 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.

[14] Justice J Wood, "Expert Witnesses – The New Era" (Paper presented at the 8th Greek Australian International Legal & Medical Conference, Corfu, 2001).

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.[15] 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 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.

Division 2, Rule 31.25 of the NSW *Uniform Civil Procedure Rules 2005* grants Courts the power to order experts to confer with a view to reaching agreement either 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.

[15] 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).

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.

In Victoria *Practice Note No 4 of 2004 (Commercial List)* states in relation to expert evidence (paragraph 11) that the freedom of experts in a joint conference to identify and acknowledge matters upon which they agree should not be restricted by the parties or their legal representatives. There are provisions in the Queensland *Uniform Civil Procedure Rules 1999* to similar effect in Rule 429 (Chapter 11, Part 5, Division 2). Paragraph 11.5 of the Victorian Supreme Court Practice Note also specifies that experts will be required to confer before trial "almost invariably" where the expert evidence in question is contentious.

4.3 *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. 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.

## 5. 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",[16] 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/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;
- 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

[16] See generally A Stephenson, "Experts ease their tensions in the hot tub", Clayton Utz Projects Insights Newsletter, 5 May 2005; available at http://www.claytonutz.com.

- 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 No 4 of 2004 (Commercial List)*.

Most recently, the Supreme Court of NSW has provided for the hot tub approach in the new *Uniform Civil Procedure Rules 2005*, Division 2, Rule 31.26 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.

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. However, 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.

## 6. Conclusion

The forgoing 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 around 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 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.

As discussed above, many of these measures are already employed in arbitration to a certain extent. 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.