

Public Consultation on proposed Guidelines for Witness Conferencing in International Arbitration

10 December 2018

Consultation

The Singapore Branch of the Chartered Institute of Arbitrators (“CI Arb”) invites arbitrators, private practitioners, in-house counsel, expert witnesses and other users of international arbitration to provide comments, corrections and other feedback on draft *Guidelines for Witness Conferencing in International Arbitration*. The Guidelines are intended to be adopted or used as guidance by parties and tribunals in proceedings where witness conferencing is being contemplated or agreed.

Please send all feedback to CI Arb’s sub-committee on witness conferencing at consultation@ciarb.org.sg, or at the address below, indicating your name and the organisation you represent (if any) as well as your email address and/or telephone number to enable us to follow up with you if necessary.

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Please send your feedback by **Friday 1 February 2019**.

CI Arb intends to launch the finalised Guidelines at the Chartered Institute of Arbitrators Asia Pacific Regional Conference which will be held in Singapore on 23 April 2019.

Background to witness conferencing

Witness conferencing can be described as any evidence-taking process whereby two or more witnesses give evidence concurrently before a tribunal. A more precise definition of the phrase might mistakenly convey the impression that it describes a single established process. However, witness conferences may take many forms. They may concern the evidence of factual or expert witnesses, or both. They can be conducted by the tribunal, the witnesses or parties’ counsel, or any combination of them. The proposed guidelines recognise the diversity of approaches that can be adopted without seeking to restrict the ability and imagination of tribunals and parties to shape a conference most suited to any given dispute.

Witness conferencing has in recent years become a popular means of taking evidence particularly from expert witnesses in international arbitration. The process is not only encountered in arbitration. For example, the courts of Australia, England and Wales and Singapore have also institutionalised the process to a greater or lesser degree in their procedural rules. This popularity stems from a number of perceived advantages.

First, a conference can be a more effective means of receiving evidence than consecutive examination of witnesses by parties' counsel. The side-by-side presentation of evidence can make it easier to compare witnesses' different views on an issue, and for the witnesses to challenge each other's views with direct responses or rebuttals. Second, the quality of evidence may be improved. For example, expert witnesses may be less willing to make incredulous or technically incorrect assertions in front of a peer who can supply an immediate rebuttal. Third, the process can promote efficiency at an evidentiary hearing, as the tribunal can hear evidence from all the witnesses on the issues at once, rather at different stages of a hearing as the parties present their cases.

At the same time, witness conferencing gives rise to other considerations. For example, whilst taking evidence in conference may lead to shorter hearings than where evidence is taken consecutively, the time and costs for preparing a witness conference beforehand may be higher. The quality of evidence may also be affected, and proceedings disrupted, where witnesses in conference prove to be unfriendly, hostile or even rude to each other, or where one witness is more reticent giving evidence in the presence of another, for example due to cultural factors or some pre-existing professional or personal relationship between them.

The Guidelines

The Guidelines aim to assist tribunals, parties and experts to achieve an effective and efficient witness conference and to minimise the risks of the process going awry. They recognise that different factors will come to bear on the decision whether or not to hold a witness conference, and on the format of such a conference.

The Guidelines comprise a Checklist, a set of Standard Directions and a Set of Specific Directions, with accompanying Explanatory Notes.

- The **Checklist** provides arbitrators and advisers with a convenient list of matters to consider when determining the possibility of holding a witness conference.
- The **Standard Directions** provide a general framework for witness conferencing to be incorporated as part of an initial procedural order issued by a tribunal for the conduct of the arbitration.
- The **Specific Directions** are to be issued once the tribunal and the parties have determined to hold a witness conference. The Specific Directions provide three possible procedural frameworks for a conference, depending on whether it is to be conducted by the tribunal, the witnesses (who will usually be expert witnesses), or counsel for the parties. In some cases, the tribunal and the parties will use a combination of the three approaches reflected in the procedural options.

Feedback

CIArb welcomes feedback on both the form and content of the Guidelines. The sub-committee on witness conferencing is presently considering whether to include, in an appendix, a sample procedural timetable for tribunals and parties to use, setting out the various steps for the parties to complete to prepare for a witness conference. The sub-committee invites views as to whether such a sample timetable would be beneficial.

About the Chartered Institute of Arbitrators

The Chartered Institute of Arbitrators lies at the forefront of thought leader in dispute resolution. As the foremost professional body for dispute resolution, the institute seeks to advance and promote research, academic thought and new professional policy and practices concerning dispute resolution as a Learned Society. It works closely with academic institutions and other professional bodies across the world. Among many other activities, it seeks to promote greater understanding and use of alternative dispute resolution methods and works closely with professional organisations throughout the world and involves its local members heavily in its projects and activities.

The sub-committee on witness conferencing responsible for drafting the Guidelines was established by the Singapore branch of CIArb in 2017. It comprises arbitrators, private practitioners, expert witnesses and in-house counsel from common and civil law traditions with wide experience in commercial and investor-state arbitration.