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HEATED DEBATES: GIVING CONCURRENT EVIDENCE IN THE HOT TUB

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I. Overview

1 Witness conferencing, sometimes colloquially known as hot-tubbing, has grown enormously in popularity as a means of taking evidence in international arbitration proceedings. In appropriate cases, the process can promote the effective and efficient resolution of disputes. The forthcoming Chartered Institute of Arbitrators ("CIArb") Guidelines for Witness Conferencing in International Arbitration ("Guidelines") provide a framework for arbitrators, parties and experts to determine whether, and if so how, to conduct a successful conference.[1]

II. What is witness conferencing?

2 "Witness conferencing can be described as any evidence-taking process whereby two or more witnesses give evidence concurrently before a tribunal."[2] It is not a single defined procedure, but rather a flexible process that can be adapted to suit the nature of the dispute, the types of issues involved and even the witnesses themselves. Witness conferencing is mostly, but not exclusively, used as a means of taking opinion evidence from expert witnesses. In the sphere of international arbitration, it is a process recognised in (among other things) the International Bar Association Rules on the Taking of Evidence in International Arbitration, and the International Chamber of Commerce Commission Report on Controlling Time and Costs in Arbitration. It is also encountered in the courts of Australia, England and Wales, and Singapore, which have explored or adopted the process to a greater or lesser degree.

3 The increased popularity of taking evidence concurrently stems from a number of perceived advantages. Evidence given in

1 The Chartered Institute of Arbitrators ("CIArb") Guidelines for Witness Conferencing in International Arbitration will be launched on 23 April 2019 at the CIArb Asia-Pacific Regional Conference 2019 <http://www.ciarb-apacconf2019.com/> (accessed 10 April 2019).

2 Chartered Institute of Arbitrators, *Guidelines for Witness Conferencing in International Arbitration (draft)* at p 4.

conference is often presented on an issue-by-issue basis: rather than each party's counsel cross-examining the opposing party's witness on a given topic when each party presents its case, the witnesses themselves may respond to their counterparts' views as they are presented, allowing differences to be articulated and tested on the spot. This side-by-side presentation of evidence makes it easier to compare the witnesses' different positions.[3] It can also lead to a more rigorous inquiry into the evidence, since witnesses can hear each other's opposing views and challenge those views with direct responses or rebuttals immediately or shortly thereafter. This may be particularly helpful when dealing with an area requiring detailed specialist knowledge, with which counsel may not have sufficiently deep experience.[4]

4 Having witnesses give evidence and face questions concurrently may also improve the quality of witness testimony.[5] Some attribute this to the fact that witnesses do not appear alone, which creates a more relaxed environment in which people feel more comfortable giving evidence. In addition, expert witnesses are likely to be more reluctant to make technically incorrect statements or implausible assertions in the presence of a peer who can provide an immediate rebuttal.[6] On the other hand, the quality of evidence may also be adversely affected, and proceedings disrupted, where witnesses in conference prove to

3 See, for example, Michael Hwang, "*Witness Conferencing*" *in Guide to the World's Leading Experts in Commercial Arbitration* (James McKay ed) (Legal Media Group, 2008) at p 4.

4 As Yong Pung How CJ once observed (albeit in a different context, but with the same underlying rationale), "[w]e often enough tell doctors not to play god; it seems only fair that, similarly, judges and lawyers should not play at being doctors". See *Khoo James v Gunapathy d/o Muniandy* [2002] 1 SLR(R) 1024 at [3].

5 Steven Rares, "Using the "Hot Tub" – How Concurrent Expert Evidence Aids Understanding Issues", presented at the New South Wales Bar Association Continuing Professional Development seminar (23 August 2010).

6 Hilmar Raeschke-Kessler, "Chapter 29 – Witness Conferencing" in *Leading Arbitrators' Guide to International Arbitration* (Lawrence W Newman & Richard D Hill eds) (JurisNet LLC, 3rd Ed, 2014) at p 704; Chartered Institute of Arbitrators, *Guidelines for Witness Conferencing in International Arbitration (draft)* at p 4.

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 differing levels of experience in giving evidence, cultural factors or some pre-existing professional or personal relationship between them.[7]

5 Witness conferencing may also lead to improved efficiency of the evidence-taking process. Although this view is not universally shared, some take the view that the process saves on the overall time and costs of a hearing, citing the ability to present evidence on issues in a logical and consistent manner by the witnesses (as opposed to issues being addressed multiple times by different witnesses). Others, however, take the view that the time and cost savings may only be in respect of actual time spent in the hearing, whereas the witnesses may need to engage in lengthier pre-hearing preparation in anticipation of the conference.

III. How witness conferencing compares to cross-examination

6 Cross-examination remains the most common method of taking evidence in international arbitration proceedings. Witness conferencing can be contrasted with that process in two broad respects. The first is that by being placed in conference together, witnesses will inevitably interact with each other in a way that does not occur when witnesses are cross-examined consecutively. Second, the balance of control that parties' counsel has over the taking of evidence in cross-examination can be different when witnesses give evidence concurrently.

7 We turn first to the interactions between witnesses in conference. The concurrent attendance at a hearing means that interaction between the witnesses will be unavoidable. Arbitrators, parties and experts should be aware of the dynamics

7 Michael Hwang, "Witness Conferencing" in *Guide to the World's Leading Experts in Commercial Arbitration* (James McKay ed) (Legal Media Group, 2008) at p 5; Chartered Institute of Arbitrators, *Guidelines for Witness Conferencing in International Arbitration (draft)* at p 4.

between the witnesses. Sometimes, unfriendliness or hostility among witnesses may affect their presentation of evidence. In extreme cases, a witness might audibly scoff at another's evidence, or the witnesses may even exchange insults. A numerical imbalance of witnesses giving evidence on behalf of the parties may also create or appear to create an advantage for the group of witnesses that outnumbers the others.

8 There are also other less obvious ways in which witness interactions may affect the evidence given, such as when a naturally charismatic witness dominates the discussion, whose evidence is not properly substantiated, but which is not rebutted by a less charismatic or confident witness. Another situation that may arise is when one witness exerts a certain amount of influence over another. This dynamic, often subtle and not always easily discernible by a tribunal, can arise from a variety of relationships, whether due to cultural factors, a pre-existing professional relationship between the witnesses, or otherwise. Tribunals and parties need to be aware of how these dynamics can affect the evidence given by the witnesses.

9 The second aspect of witness conferencing that differs from cross-examination is the process itself. Whereas parties' counsel dictate the direction and pace in the testing of evidence in traditional cross-examination, the witnesses and the tribunal may be able to exert a greater degree of control in a witness conference. This would be the case where the tribunal, or sometimes the witnesses themselves, lead the process. The presence of multiple witnesses also generates a higher degree of unpredictability in that exchanges between witnesses can cause the direction of questioning to unfold in ways that counsel cannot control as readily. The freer flow of competing views in concurrent evidence therefore often requires greater interaction from the tribunal (or exercise of control) than during cross-examination. For example, the tribunal may have to intervene to rein in unruly/hostile witnesses, or to steer the line of questioning/witness testimony in a certain direction if witnesses digress from the topic in question.

IV. When witness conferencing can be used

10 As discussed above, witness conferencing is predominantly undertaken with respect to expert witnesses. The use of witness conferencing for factual witnesses is far less common. The facts advanced in a dispute are often binary, either correct or incorrect, owing to differing but honest recollections, or where one or more witnesses are advancing a knowingly untruthful account. In contrast, opinion evidence is subject to interpretations, assumptions and unknowns permitting a range of reasonable conclusions to be drawn.

11 Where the outcome is binary, and particularly where the factual witnesses are invested in the incident which has given rise to the dispute, there is a risk that conferencing may prove too confrontational. This risk, amongst others, must be weighed against the potential benefits of witness conferencing before engaging in a factual, or indeed expert, witness conference.

12 In order to assess whether factual or expert evidence can usefully be tested concurrently, arbitrators and parties are required to carefully consider the content of the evidence which has been filed and the nature of the witnesses who have submitted the evidence. The relationship between concurrent witnesses, for example, is one of many factors that may be important in determining whether to take evidence concurrently.

13 Another factor (alluded to above) might be contrasting cultural backgrounds. For example, "in some cultures the seniority (in terms of office, age or both) of a person will affect how another more junior person will interact with them. It may be considered inappropriate for a junior to contradict his or her senior; deference may be the cultural norm. Conversely, a more senior person may consider it unnecessary to justify their views to someone more junior; he or she may even take offence if asked to do so. In some cultures, open confrontation is not normal nor is it expected when expressing differences of opinions. In other

cultures, open disagreement on issues is not be considered to be unusual".[8]

14 However, care also needs to be taken not to permit parties to identify differences for the sake of avoiding a witness conference. A tribunal will need to determine in each case whether the benefits of hearing evidence concurrently outweigh the risk that such perceived differences may adversely affect the quality of evidence given.

15 The opportunity to hear evidence on an issue-by-issue basis with the witnesses being able to comment and respond immediately can be a considerable benefit to the evidence-taking process, and this can be the case with respect both to expert and factual witnesses. This is particularly true of complex issues comprised of many parts that may be difficult to extricate from the witness statements, expert reports and cross-examination alone.

V. Forms of witness conferencing

16 The process undertaken in witness conferencing is flexible, and there is no "one size fits all" approach. However, in general, there are three broad ways to conduct a conference. These approaches are characterised by the person or persons primarily leading the taking of the evidence: the tribunal, the witnesses themselves or counsel.

(a) **Tribunal-led conference:** the tribunal guides the questioning of the witnesses. This style of conference bears some similarity to inquisitorial processes found in civil law systems.

(b) **Witness-led conference:** the conference is led by the witnesses themselves, with the interaction between the witnesses being free-flowing (with minimal input from the tribunal or counsel). This approach is suitable

8 Chartered Institute of Arbitrators, *Guidelines for Witness Conferencing in International Arbitration (draft)* at p 17.

for expert witnesses experienced in giving opinion evidence. Typically, the evidence will be given by witnesses of the same discipline. The process bears some resemblance to meetings that take place between expert witnesses to discuss their evidence in advance of preparing a joint report to a court or tribunal.[9]

(c) **Counsel-led conference:** each party's counsel lead the questioning of the other party's witness. This process is similar to the procedure of cross-examination typical in common law systems; however, counsel may invite their own party's witness to respond to the opposing witness's answers.

17 Depending on the facts of the case, the tribunal and the parties may wish to combine some (or all) of the above approaches to create a bespoke process that suits the case at hand. As between the three broad approaches outlined above, the key difference lies in the varying levels of control that counsel and witnesses can exercise. For example, where the tribunal or witnesses lead the conference, the parties' counsel will have a more limited role than is typically experienced in common law adversarial proceedings.

18 A further adjustment to the approach relates to the number of witnesses being examined, and the number of conferences convened. A tribunal could hold successive witness conferences on different issues, with the conference comprising those witnesses whose evidence relates to the issues in question. Another approach is for the tribunal to convene a single witness conference where all witnesses appear concurrently.[10]

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9 Chartered Institute of Arbitrators, *Guidelines for Witness Conferencing in International Arbitration (draft)* at p 32.

10 Some practitioners consider that witness conferencing should involve all witnesses (expert or factual) who would be called during an arbitration since each witness's testimony is closely linked to the testimony of another witness, and temporary tangential evidence from another witness may need to be adduced to address certain issues. See Peter Wolfgang, "Witness 'Conferencing" (2002) 18(1) *Arbitration International* 47, especially at 48.

19 Whichever approach is adopted, the tribunal maintains ultimate control of the procedure and must monitor the progress of the conference and adjust the questioning and the process dynamically as best suits the circumstances of the case.

VI. Chartered Institute of Arbitrators Guidelines for Witness Conferencing in International Arbitration

20 The Guidelines were conceived as a response to the growing popularity of witness conferencing. They were drafted on the recommendation of the Sub-Committee for Witness Conferencing in International Arbitration that was established by CIArb Singapore in late 2017. They will be published on 23 April 2019. Surprisingly little has been written about conferencing, and very little exists by way of guidance for arbitrators, practitioners or expert witnesses on whether it would be appropriate in a given case to take concurrent evidence and, if so, how such a conference should be organised. The Guidelines were not designed to address a particular criticism or weakness that has generally been identified. Rather, they are intended to help tribunals, parties and experts achieve an effective and efficient witness conference and to minimise the risks of the process going awry. In particular, they recognise the diversity of approaches that can be adopted when holding a witness conference without seeking to restrict the ability and imagination of tribunals and parties to shape the process to suit any given dispute. They can serve as an *aide-memoire* for those experienced in witness conferencing. For those with less experience, the Guidelines provide a framework for navigating the process with confidence.

21 At the outset of the Sub-Committee's work on witness conferencing, there was some discussion as to whether there was a need for any guidelines at all. Some practitioners and arbitrators have raised concerns that when guidelines have been produced or proposed in the past the "soft law" embodied in such guidelines can crystallise into hard law, thereby introducing into proceedings procedural commitments to which parties have not consented. This argument can be persuasive where

a guideline is premised on perceived assumptions of what is prevalent in practice. However, such "soft law" can assist tribunals given that they may be more comfortable adopting a procedural course where it appears in an independent set of guidelines. In determining that a set of guidelines would be of assistance for the arbitration community, the Sub-Committee determined that such guidelines should not be prescriptive, but should facilitate discussions between the tribunal and parties as to whether to hold a conference and, if so, what the most efficient and effective format for the conference would be bearing in mind the circumstances of the case.

VII. What is in the Guidelines?

22 The Guidelines consist of three parts. The first is a checklist of matters to consider when determining the possibility of holding a witness conference. It covers two broad lines of enquiry. The first is "whether witness conferencing would be an appropriate meaning of taking evidence. Some of the factors set out in the checklist will militate in favour of a conference, whereas others may detract. Other items on the checklist assume that a conference will take place and are to be considered in determining what form the conference should take. Not all of the items in the checklist will be relevant in all cases".[11]

23 The second part of the Guidelines is a "proposed set of standard directions that 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 directions provide a set of applicable principles in the event the tribunal subsequently orders some of the witness evidence to be taken concurrently".[12] By including the standard directions into a procedural order, the parties are not taken to have dispensed with the taking of consecutive evidence.

11 Chartered Institute of Arbitrators, *Guidelines for Witness Conferencing in International Arbitration (draft)* at p 5.

12 Chartered Institute of Arbitrators, *Guidelines for Witness Conferencing in International Arbitration (draft)* at p 5.

24 The second part of the Guidelines also provides for certain specific directions 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 in the majority of cases will 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. The tribunal may draw on different directions from among the three frameworks or may incorporate other directions to arrive at an appropriate procedural order. Which parts of the directions will be most suitable as a starting point for crafting an appropriate order will depend on the needs of the case at hand".[13]

25 Finally, the Guidelines are accompanied by explanatory notes that provide detailed discussion of the items in the checklist and the standard and specific directions.

VIII. Conclusion

26 The adoption of witness conferencing as a tool for taking evidence in international arbitration proceedings and litigation is testament to its effectiveness. A well-planned conference can yield the evidence required by a tribunal to determine the issues before it in an orderly and efficient manner. It is hoped that the CIArb Guidelines for Witness Conferencing in International Arbitration will serve as a useful tool for tribunals and parties when considering how to take evidence in international arbitration.

13 Chartered Institute of Arbitrators, *Guidelines for Witness Conferencing in International Arbitration (draft)* at p 5.