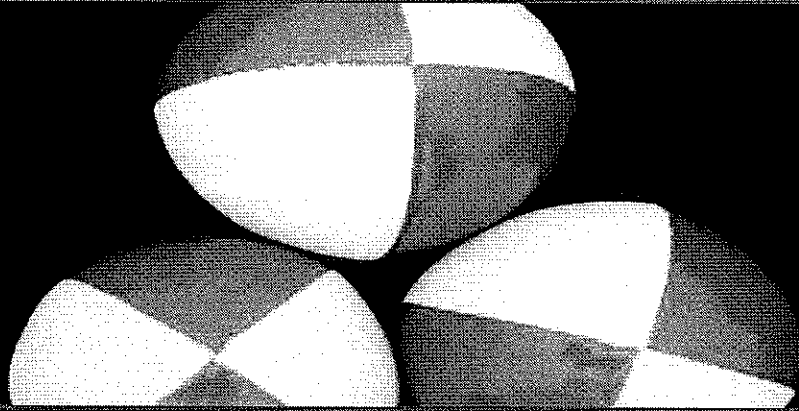


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**Experts in
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Methodology

Welcome to the 2008 *Guide to the World's Leading Experts in Commercial Arbitration*, the international legal market's leading guide to the top practitioners advising on commercial arbitration law.

When first published in 1994, the Expert Guides were the first-ever guides dedicated to leading individuals in the legal industry. Since then we have continued to focus on individuals considered by clients and peers to be the best in their field.

The guides for each practice area are updated every two years. Our research process involves sending over 4,000 questionnaires to senior practitioners or in-house counsel involved in each practice area in over 60 jurisdictions, asking them to nominate leading practitioners based on their work and reputation. The results are analysed and screened for firm, network and alliance bias. The list of experts is then discussed and refined with advisers in legal centres worldwide.

Our researchers have compiled a list of specialists in 46 jurisdictions for this guide. These specialists have been independently offered the opportunity to enhance their listing with a professional biography. The biographies give readers valuable, detailed information regarding each lawyer's practice and, if appropriate, their work and clients.

We owe the success of this guide to all the in-house counsel and firms that completed questionnaires and met our researchers. Thank you. We hope you find the guide to be a useful tool.

Jamie McKay
Editor

Witness conferencing



Michael Hwang SC
Singapore

Witness conferencing is a novel evidentiary process, in which witnesses testifying on a common issue sit together and give evidence in a panel discussion led by the tribunal. It allows multiple witnesses to give testimony simultaneously, and counsel and witnesses are able to pose questions to other witnesses. Witness conferencing is commonly used for gathering oral testimony from expert witnesses, but it has been gradually extended to deal with oral testimony from factual witnesses.

Witness conferencing is a flexible procedure that can be conducted in many ways. The following two examples reflect the different approaches that a tribunal may adopt.

- The first method involves a mix of traditional cross-examination and panel discussion. The witnesses give evidence together in the same session. Counsels can cross-examine the opposing witnesses first and then turn to their own witnesses for rebuttal. Counsels can frame their next questions to opposing witnesses according to what their own witnesses have said. The process will repeat itself until the entire process of cross-examination by counsel is complete. The tribunal may intervene for clarification but will generally save its questions till after counsel has concluded its examinations.
- The second method is a more novel and free-flowing style of oral examination. The tribunal acts as chair of a panel discussion involving the witnesses on a common issue. It takes the lead in controlling the flow of the discussion with counsel having liberty to intervene and ask questions, either during or after the tribunal's questions. The entire process continues until all parties are satisfied with the evidence obtained.

In both examples, cross-examination merges into re-examination so that no separate session for dedicated re-examination of a single witness is needed. Witness conferencing has been available for some time, but little was published about its use in arbitration until the well-known Swiss arbitrator, Wolfgang Peter, popularised the idea in a seminal article entitled "Witness Conferencing" (2002). It was so well received that Peter published a follow-up article, "Witness Conferencing Revisited", in 2004.

Witness conferencing is commonly used for expert witnesses because they are more likely to be familiar with the panel discussion format. If an opposing expert witness, rather than an opposing counsel, challenges the views of an expert witness, the evidentiary process becomes more efficient, since counsels are unlikely to be more conversant with technical issues than their own expert witnesses.

The institutionalisation of witness conferencing in the Australian courts is perhaps a testimony to the merits of the process over traditional cross-examination. The reason for the adoption of hot-tubbing (as witness conferencing is popularly called) is explained by the Australian Law Reform Commission in its report, "Managing Justice: A Review of the Federal Civil Justice System":

It has been claimed that the manner of presentation of expert evidence, through examination and cross-examination, may be confusing and unhelpful to judges... Present hearing practices do not always allow experts to fully communicate their opinions to the decision maker. In many cases, experts complain that they are not given a chance to explain their written reports, but are exposed immediately to cross-examination by lawyers who have no interest in assisting the judge to understand the experts' views and may have an active interest in obscuring such views. Experts express frustration that they cannot put relevant information before the court.

The Administrative Appeals Tribunal (AAT) of Australia has conducted a study in the use of witness conferencing for expert witnesses. In a report entitled "An Evaluation of the Use of Concurrent Evidence in the Administrative Appeals Tribunal", the AAT noted that, out of 59 survey participants that were members of the AAT, 94.1% found witness conferencing an effective process. This AAT survey clearly indicates the strength of the procedure's merits.

The following features of witness conferencing are unique.

Free flowing

There is no fixed approach to organising a witness conference. Article 19 of the Uncitral Model Law gives the parties and the tribunal the flexibility to organise the evidentiary taking process in a manner best suited to their case. In addition, article 8.2 of the IBA Rules on Taking of Evidence in International Commercial Arbitration states:

The Arbitral Tribunal, upon request of a Party or on its own motion, may vary this order of proceeding, including the arrangement of testimony by particular issues or in such a manner that witnesses presented by different Parties be questioned at the same time and in confrontation with each other. The Arbitral Tribunal may ask questions to a witness at any time.

Credibility of evidence

It is more difficult for an expert witness to make incorrect statements regarding his specialism in front of another expert witness. This is because expert witnesses know that other experts will be able to expose the flaw of their statements with sound arguments if they say something wrong. In addition, the feeling of respect that experts within the same discipline generally have for each other militates against the likelihood of an expert witness making a patently false statement.

Effectiveness

Counselors are unlikely to know more about a technical issue than their own expert witnesses. Cross-examination is therefore not as effective as witness conferencing because counselors may not be able to propose or respond to a point in dispute more effectively than their own expert witnesses. The evidence presented during witness conferencing will therefore be more sophisticated than evidence presented in the course of cross-examination. In addition, since the response on any point in dispute by expert witnesses to opposing expert witnesses is contemporaneous, the tribunal can better recall and understand the evidence presented than having to wait for opposing witnesses to be cross-examined, which can be weeks (sometimes months) away if the case is heard over different tranches.

Savings

As a result of the effectiveness and contemporaneity of witness conferencing, the time taken to examine the evidence of multiple witnesses is less than the time that traditional processes of cross-examination and re-examination take. This is because the simultaneous examination of the expert witnesses diminishes the need to repeat the same question to each expert witness during cross-examination, when each witness is examined in turn. In the following two examples, witness conferencing has resulted in substantial savings of time and costs.

- Watson Farley & Williams have written on two complex technical arbitrations involving the installation of alleged defective power stations. Witness conferencing was employed in one case but not the other. The arbitration where witness conferencing was employed was concluded within three weeks; the arbitration that used traditional techniques of witness examination took 44 days.
- Professor Hilmar Raeschke-Kessler took over as sole arbitrator from another arbitrator in a multi-party arbitration where the evidentiary hearing lasted six days. Even then, the cross-examination was not completed. Professor Hilmar brought in witness conferencing, and the entire process of taking evidence was completed in two-and-a-half days.

An aspect of witness conferencing that distinguishes it from traditional cross-examination is that it requires extensive preparation by the tribunal. The tribunal has to maintain control of the flow of discussion during witness conferencing to ensure that it is intellectual rather than emotional, so that the tribunal can understand the experts' disagreements and extract maximum benefit from the confrontation. The tribunal must

therefore have a good working knowledge of the technical issues. It is better for the tribunal to open the discussion by identifying the principal areas of dispute between the expert witnesses and guide the discussion accordingly. To ensure that the witness conference gets to the point, the tribunal can summarise the main evidence and highlight the topics that remain for discussion. The ideal situation resembles a dialogue between experts at a seminar moderated by a neutral chair.

Witness conferencing requires experienced arbitrators who are able to control the discussion's flow. If the process is not properly managed, it may waste the time and money of the parties. It follows that witness conferencing would best be attempted when at least one member of the tribunal has experience in the process.

As witness conferencing is still not considered a mainstream part of the evidentiary process, counsels unfamiliar with the procedure may object on the grounds that the enforceability of the award could be jeopardised by its unique nature. This argument was raised to oppose a suggestion that I had made for witness conferencing in an arbitration. Counsel cited no supporting authorities to say that the enforceability of an award might be put at risk if witness conferencing was used. To allay counsel's fears that the tribunal might hijack their cross-examination, the tribunal allowed both sides to use the traditional form of oral cross-examination followed by witness conferencing. To avoid such problems, the tribunal should discuss and familiarise the parties with witness conferencing during the preliminary meeting to allay concerns that counsel may have.

There is no reason why witness conferencing cannot extend to factual witnesses. This has been a growing trend. Witness conferencing for factual witnesses is typically used for large project disputes where there may be multiple witnesses for any issue in dispute. In this context, witness conferencing will be a confrontation between the factual witnesses from one side against the factual witnesses from the other. If witnesses' credibility is in such doubt that they need to be individually examined, the cross-examinations can take place in a separate session.

In addition, traditional cross-examination will involve counsel asking a factual witness questions to which that witness may not be best qualified to answer. That witness can pass it on to another. In contrast, the process of a team confrontation in witness conferencing ensures that the witness most qualified to deal with the question speaks up. This avoids the inefficiency of having to cross-examine factual witnesses whose experience is peripherally related to the question asked and have a *Brown v Dunn* point being taken against counsel. It is a common law rule that if allegations against witnesses are not put to them in cross-examination, the same allegation cannot be raised later in submissions.

Still, care must be taken when the process is used for factual witnesses. Because factual witnesses are more intimately involved in the events than expert witnesses, they may become more agitated than expert witnesses, possibly with several people speaking at the same time or interrupting witnesses from the other side. The tribunal will need to be especially firm in maintaining order during the evidentiary hearing.

Another potential drawback is the possibility of the dominating presence of a witness's superior on the same team as the witness. The witness may feel intimidated and be tempted to skew evidence in a manner acceptable to the superior. Such events can fetter the spontaneity of response that is a main feature of witness conferencing. Nevertheless, experience shows that the inter-witness feedback and the presence of opposing witnesses who have contemporaneous knowledge of the events helps mitigate such a risk. In addition, the tribunal can intervene and direct specific questions to witnesses who appear to be unusually quiet. Spontaneous replies to a general question by more than one witness are often powerful evidence of the credibility of the answers.

Witness conferencing is now recognised as a legitimate technique of witness examination. When properly used it leads to savings in time and costs, better understanding of the issues, and (arguably) a more effective determination of the merits of the disputed issues.