

Witness Conferencing: new CI Arb Guidelines

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Witness conferencing, a process whereby two or more witnesses give evidence simultaneously, is increasingly popular in international arbitration. Despite this, there has until now been very little practical guidance on the topic.

Recognising this, the Chartered Institute of Arbitrators has recently published its “Guidelines for Witness Conferencing in International Arbitration” (the “**Guidelines**”). These are intended to provide practical, non-prescriptive guidance to tribunals, parties and counsel involved in arbitration proceedings, both in determining whether witness conferencing is appropriate, and in setting appropriate directions governing its use.

What is ‘witness conferencing’?

As the Guidelines observe, witness conferencing is not a “single established process”. The term ‘witness conferencing’ refers to any procedure for taking evidence where two or more witnesses give evidence concurrently. This is in contrast to the typical approach where evidence is taken consecutively with a witness testifying on an issue and submitting to cross-examination before the other side’s witness gives evidence and is cross-examined separately. Witness conferencing takes a wide range of different forms, and may be led by the tribunal, the parties’ counsel or by the witnesses themselves, or a combination of these approaches. As the Guidelines highlight, witness conferencing, whilst typically used in relation to expert evidence, can also be used for witnesses of fact.

The Guidelines: Contents

The Guidelines are made up of three parts:

- (i) A non-exhaustive “Checklist” of matters for tribunals and parties to consider in determining whether to conduct witness conferencing and, if so, what procedure will best suit the circumstances of the case;
- (ii) “Standard Directions” intended for incorporation in an initial procedural order, which provide a framework of general principles to be applied in the event that the tribunal decides to take concurrent evidence in relation to certain issues; and
- (iii) “Specific Directions” to be issued once the parties have agreed (or the tribunal has ordered) that there should be witness conferencing. The Specific Directions are produced as three separate versions, depending on whether the conference is to be led by the tribunal, the witnesses themselves; or counsel.

In addition, the Guidelines contain “Explanatory Notes”, which provide a commentary on the Checklist, Standard Directions, and Specific Directions.

The Guidelines: practical considerations on witness conferencing

As noted, the Guidelines provide participants with a practical checklist to help determine whether witness conferencing may be appropriate in a particular case.

The Checklist draws upon both the perceived advantages as well as the potential disadvantages of witness conferencing. For example, where there is conflicting fact or expert evidence on a topic that requires testing, witness conferencing can provide a useful opportunity to see witnesses directly engage with each other, which may help to identify areas of agreement and / or narrow the issues in dispute. It may permit a more efficient comparison of witnesses’ conflicting perspectives. Witnesses may also be less inclined to put forward bold or inaccurate claims when faced with the prospect of contemporaneous rebuttal.

However, as the Explanatory Notes to the Checklist explain, witness conferencing may prove challenging in circumstances where there are significant differences between the witnesses in terms of culture, language, experience or seniority, or if there are logistical hurdles to be overcome, e.g. where video conferencing or simultaneous / sequential interpretation is required.

The Explanatory Notes also highlight another important consideration in determining whether witness conferencing is appropriate, namely the personalities of each party’s witnesses. This can have a significant impact on how effective witness conferencing may be. Witnesses with a forceful demeanour may overshadow witnesses that are knowledgeable, but are more reserved in nature. Parties and counsel should be mindful of this in assessing the suitability of witness conferencing and tribunals bear the responsibility of monitoring the conference to ensure that all witnesses are given an opportunity to present their position.

Commentary

The drafters of the Guidelines explain that they are intended to serve as an “aide-memoire” to more experienced practitioners and as guidance for those with more limited experience of the witness conferencing process, including potentially the witnesses themselves, who may be encountering witness conferencing, or even dispute proceedings, for the first time.

The Guidelines’ express objective is to “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.” Thus, the Guidelines use non-mandatory language, and set out non-prescriptive and flexible frameworks, maintaining the discretion of tribunals and legal counsel to craft bespoke procedures tailored to the requirements of the dispute in question.

The Guidelines also recognise the complexity of factors which will feed into the decision as to whether or not witness conferencing will be appropriate and effective. In particular, recognising that in the majority of cases, it is likely to be in relation to expert evidence, and not witnesses of fact, that conferencing will be a suitable method.

In the right circumstances, and with appropriate directions and participation from a tribunal, witness conferencing can be a powerful tool enabling an expeditious and cost-effective hearing of contested witness evidence, especially on matters of expert opinion. The Guidelines act as a very useful compendium of practical issues and suggested approaches which tribunals, parties and their counsel should weigh in considering witness conferencing. They also sketch out framework directions which will offer participants a useful starting point for developing an approach suitable to the circumstances of their particular dispute.

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