

Chartered Institute of Arbitrators

# Guidelines for Witness Conferencing in International Arbitration

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## Foreword

The Chartered Institute of Arbitrators (Singapore) Guidelines on Witness Conferencing in International Arbitration are offered as a practical document for use by parties, arbitrators and experts in the preparation for and presentation of evidence by witnesses in conference. The Guidelines provide, first, a non-exhaustive checklist of factors to consider in determining a procedure that will further the efficient and effective taking of evidence, and second, a framework procedural order that may be used as a basis for crafting appropriate directions for witness conferencing.

It is hoped that the checklist and the framework provide arbitrators, parties and their professional advisers with the means to plan and execute effective witness conferences tailored to the needs of the particular case in question.

[ ]

## Introduction

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. These 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 —but not exclusively— from expert witnesses in international arbitration. The process is not, however, encountered only 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.

## How to Use these Guidelines

These 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. Experienced arbitrators and advisers may find some aspects of these Guidelines to be self-evident; nevertheless, it is hoped that they will prove a useful *aide-memoire*; for others, particularly those with limited experience of witness conferencing, the Guidelines will help to navigate the tribunal, parties and experts through the process and achieve an efficient and effective conference.

The **Checklist** provides arbitrators and advisers with a convenient list of matters to consider when determining the possibility of holding a witness conference. The Checklist 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.

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. These directions provide a set of applicable principles in the event that the tribunal subsequently orders some of the witness evidence to be taken concurrently. Inclusion of the Standard Directions into a procedural order does not displace the taking of consecutive evidence.

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 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.

The **Explanatory Notes** provide detailed discussion of the items in the Checklist and the Directions.

## The Guidelines

## The Checklist

*A practical checklist of matters for tribunals and parties to consider in determining whether to conduct a witness conference (\*) and, if so, what form that conference may take (†)*

### Matters in issue

- 1\*† There is conflicting factual evidence of two or more witnesses that requires testing
- 2\*† There is conflicting opinion evidence on a specialist topic that requires testing
- 3\*† The credibility of a witness is in issue

### Witnesses

- 4\*† The relationship between witnesses is one of:
  - contrasting experience giving evidence before tribunals
  - contrasting cultural background
  - present or former colleagues
  - close personal friendship or enmity
- 5† The composition of the conference by reference to:
  - The number of witnesses
  - The issues to be addressed

### Pre-Hearing

- 6† Reports of expert witnesses
- 7† A chronology of facts
- 8† Allocation of time among the witnesses
- 9† Presentations and demonstrables

### Logistics

- 10\*† One or more witnesses is to give evidence by video conference
- 11† Simultaneous or sequential interpretation is required for one or more witnesses
- 12† Sufficient physical space is required at the venue of the hearing for multiple witnesses to give concurrent evidence
- 13† Seating arrangement of witnesses
- 14† Stenographic, recording and/or audio amplification is required for multiple witnesses to give concurrent evidence
- 15† Audio-visual equipment is required for giving evidence

## The Standard Directions

*The Standard Directions may be adopted as part of a tribunal's initial procedural order*

- 1 The tribunal in consultation with the parties shall determine which witnesses will give concurrent oral evidence and on what issues. The witnesses shall give evidence on such issues in such conference or conferences at such date and time as the tribunal directs.
- 2 Witnesses giving concurrent evidence on the same issue or issues shall jointly prepare a schedule containing a list of areas on which the witnesses agree and disagree and a summary of the witnesses' views on those areas of disagreement (“**Schedule**”).
- 3 The tribunal may direct that the parties or the witnesses who are to give concurrent evidence will agree a chronology of agreed facts that relates to such evidence (“**Chronology**”).
- 4 For the purpose of preparing a Schedule or Chronology:
  - (i) The witnesses may hold discussions with each other by such means and for such period as the tribunal shall direct.
  - (ii) The contents of the discussions between the witnesses shall [not] be “without prejudice”.
  - (iii) *either* [Counsel shall not be involved in discussions between the witnesses]  
*or* [Counsel's involvement in discussions between the witnesses shall be limited to *[to be agreed between parties]*. Any such discussions between witnesses and counsel shall be subject to privilege.]
  - (iv) The witnesses may at any time jointly seek directions from the [*parties / tribunal*].
- 5 Any presentation materials and demonstrables used in conjunction with a presentation by a witness shall be provided to the tribunal prior to the presentation.
- 6 At any witness conference, the tribunal may at any time at its own discretion:
  - (i) ask questions of any witness.
  - (ii) order that a witness be recalled for further questioning.
  - (iii) vary the procedures for taking concurrent evidence as it considers necessary for the efficient and effective conduct of the proceedings.



## The Specific Directions

*Three procedural frameworks for witness conferences led by (a) the tribunal; (b) the witnesses; and (c) counsel*

### **OPTION A: TRIBUNAL-LED CONFERENCE**

- A1** Witnesses shall [not] be sequestered prior to giving evidence.
- A2** At the beginning of any conference, the tribunal shall administer an oath or take an affirmation from each witness.
- A3** Each witness shall confirm that the written evidence submitted by them is their own and shall identify any corrections that they wish to make.
- A4** Each witness shall give an oral presentation of their position. The tribunal shall, in consultation with the parties, determine the length of the presentations and the order in which the witnesses shall make them.
- A5** The tribunal will question the witnesses in relation to the areas of disagreement set out in the Schedule and on any other matter it considers appropriate. The tribunal will ask each witness to express their views on each of the areas and why they disagree with the views of the other witness(es). The tribunal shall give each witness the opportunity to respond to the evidence of another.
- A6** After the tribunal has completed its questioning, each party's counsel may question the witness(es) of the other party/parties and may invite their own party's witness to respond to the opposing witness's answers.
- A7** The tribunal may at any time permit or invite discussion between the witnesses, or any of them, of any area of disagreement set out in the Schedule and on any other matter it considers appropriate.

## **OPTION B: WITNESS-LED CONFERENCE**

- B1** Witnesses shall [not] be sequestered prior to giving evidence.
- B2** At the beginning of any conference, the tribunal shall administer an oath or take an affirmation from each witness.
- B3** Each witness shall confirm that the written evidence submitted by them is their own and shall identify any corrections that they wish to make.
- B4** Each witness shall give an introductory oral presentation of their position. The witnesses (or in the absence of agreement between them, the tribunal) shall determine the length of the presentations and the order in which the witnesses make them.
- B5** The witnesses shall address in turn each area of disagreement in the Schedule as follows.
- (i) The witnesses shall set out their respective positions in relation to the area of disagreement using such presentation materials and demonstrables as they deem appropriate.
  - (ii) The witnesses shall ask each other questions in order to clarify their respective views on that area, to determine the bases on which they disagree with each other's views and to test the relative strengths and weaknesses of the witnesses' views.
  - (iii) The tribunal may intervene in the discussion between the witnesses at any time in order give each witness the opportunity to present their views and to respond to the views of the other witness(es), and to ensure the orderly and efficient conduct of the conference.
  - (iv) After the witnesses have concluded their discussions, the tribunal may ask further questions of any of the witnesses on the area of disagreement.
  - (v) After the tribunal has completed its questioning, each party's counsel may question the witness(es) of the other party/parties and invite his own party's witness to respond to the opposing witness's answers.

### **OPTION C: COUNSEL-LED CONFERENCE**

- C1** Witnesses shall [not] be sequestered prior to giving evidence.
- C2** At the beginning of any conference, the tribunal shall administer an oath or take an affirmation from each witness.
- C3** Each witness shall confirm that the written evidence submitted by them is their own and shall identify any corrections that they wish to make.
- C4** The tribunal shall, in consultation with the parties, determine the order in which witnesses will be questioned.
- C5** Each party's counsel may question the witness(es) of the other party/parties and may invite his own party's witness to respond to the opposing witness's answers. After being questioned by counsel for the opposing party, counsel may ask a witness of his own party to clarify any matter that arose out of that questioning.

## Explanatory Notes

### *General Note*

Throughout the Explanatory Notes, reference is made to matters that the tribunal will need to consider, or decisions that the tribunal may need to make. Such formulations are not intended to convey that the parties are not to be involved in decisions concerning witness conferencing. In many cases, the parties will agree on many or even all aspects of witness conferencing. The formulation aims to reflect that matters of procedure are ultimately for the tribunal to determine, subject to any agreement between the parties and any provisions of applicable mandatory law.

# The Checklist

## *Introduction*

The Checklist provides arbitrators and parties with a practical list of matters to consider in determining whether to take concurrent evidence from witnesses and, if so, what form the witness conference should take. Matters that should be considered in determining the suitability of taking evidence concurrently concern the witnesses themselves and their evidence, and are marked in the Checklist with an asterisk (\*). Matters that can determine or influence the form of a witness conference are marked with an obelisk (†). Not all of the items in the Checklist will be relevant in all cases.

The Checklist is divided into four sections. The first section concerns the matters in issue between the parties that may impact the decision whether or not to hold a witness conference. Arbitrators and parties should consider what evidence has been filed, or the areas on which evidence is to be filed and assess whether that evidence could usefully be tested concurrently. The second section of the Checklist considers factors affecting the dynamics that arise when witnesses give evidence together. For the most part, these factors address the form that a conference may take, although the relationship between concurrent witnesses will also be relevant when determining whether to take evidence in conference. The third and fourth sections concern case management matters to consider in preparing for and holding a witness conference.

## *Matters in Issue*

### **1<sup>\*†</sup> There is conflicting factual evidence of two or more witnesses that requires testing**

1.1 Although witness conferencing is often associated with taking expert evidence, the process can also be suitable for disputes among witnesses of fact. In making a finding of fact based on competing witness evidence, a tribunal will typically consider a number of factors, such as the nature of the disputed issue, the comparative quality of competing evidence of the witnesses in question, whether there is any evidence to corroborate one or more of the witnesses' accounts (and if so the quality of that other evidence), and so on. Sometimes the differing accounts given by witnesses is not supported by other corroborating evidence. This situation is encountered where, for example, witnesses disagree on what transpired at a meeting. A party may allege that one witness made an actionable representation, or that the witnesses concluded an oral contract, or that other assertions were made or assurances given. Testing such instances of 'he says, she says' concurrently can yield a different quality of evidence than when witnesses are questioned consecutively. Witnesses who can discuss their respective recollections may have their memories refreshed or corrected in such exchanges. Although the witnesses may not reach a consensus, their interactions with each other, as well as their answers to questions from counsel or the tribunal, may provide a tribunal with a clearer picture of what transpired than when weighing up responses given by the same witnesses when questioned individually.

- 1.2 Sometimes a tribunal will need to assess whether witnesses dispute an issue because of their differing but honest recollections, or whether one or more witnesses are advancing a knowingly untruthful account. In such circumstances, a conference to explore that issue can be a useful means of evaluating evidence. The demeanour of a deliberately untruthful witness and the evidence he or she gives can be markedly different and revealing when given in the presence of another witness who can immediately contradict them, as opposed to when they provide responses to questions from counsel or the tribunal. A witness conference can therefore be a useful tool to explore evidence where the honesty of an account is in question.
- 1.3 When considering evidence from witnesses of fact, the tribunal may hold a conference as the primary means of taking all evidence (in other words, not just those areas where witnesses give conflicting accounts) from those witnesses. Alternatively, a tribunal may wish to hold a conference after witnesses have already been questioned consecutively and it transpires that the witnesses have not resiled from those parts of their evidence that conflict with each other. The subsequent conference would focus on those areas of contradictory evidence. Standard Direction 6 preserves procedural flexibility to account for such contingencies.
- 1.4 In most cases, a tribunal or counsel should lead a conference with witnesses of fact, in order to ensure that the witnesses focus on giving evidence relevant to the issues in dispute. Witnesses of fact are less likely to have sufficient familiarity with taking evidence to guide the process in a way that will assist the tribunal.
- 1.5 Where witnesses of fact give evidence in conference, the tribunal needs to be vigilant to ensure that each witness is given an opportunity to give their evidence and respond to the other evidence that is given. It will need to take special care where witnesses become defensive or hostile, particularly in situations where they are directly challenged by another witness. The tribunal may consider adjourning or dispensing with a conference where it forms the view that the witnesses have become uncooperative or unable to provide probative evidence.

## **2\*† There is conflicting opinion evidence on a specialist topic that requires testing**

- 2.1 Witness conferencing is commonly experienced when witnesses give their expert opinion on a matter. Such conferences are commonly led by tribunal, the experts or counsel, or some combination of the three. Conferencing is well suited to many types of expert evidence. However, the tribunal and the parties will need to consider the circumstances of the particular case at hand to determine whether or not to hold a conference.
- 2.2 Witnesses of fact may sometimes give opinion evidence which can be considered in lieu of independent expert testimony. Such evidence can also be taken in conference, although in such cases the parties and the tribunal will need to consider whether it would be preferable for the conference to be led by the tribunal or counsel rather than the witnesses.
- 2.3 The nature of the issues may influence the form of a conference. Where the tribunal has particular experience or expertise of an issue, a tribunal-led conference of the

witnesses may prove to be the most efficient and effective means of testing the expert witnesses' evidence. For example, where the tribunal or one of its members is an engineer, or qualified in a particular law whose application is in issue, the engineering or legal experts could give concurrent evidence led by the tribunal. Where a party-appointed arbitrator is to participate in the questioning, care must be taken to ensure that that arbitrator does not conduct or contribute to the process in such a way as to question their impartiality or give rise to complaints about due process. Even where a tribunal does not have particular expertise of an issue, it may nevertheless consider a conference to be the better way to proceed and either direct the questioning itself in order to gain the understanding and receive the evidence it needs to make its determination, or it could propose that the experts or counsel to lead the conference.

### **3<sup>\*†</sup> The credibility of a witness is in issue**

- 3.1 Credibility of expert witnesses may be challenged on the basis of a lack of independence or bias, or on the basis that the witness lacks relevant qualifications, expertise or experience. The nature of the challenge to a witness's credibility may be a factor that militates against holding a witness conference since the evidence of one expert witness may not be helpful in testing another's lack of independence or lack of qualifications, experience or expertise.
- 3.2 Issues of credibility need not discount holding a witness conference altogether. The issue may go to the whole of the expert's evidence, or to part of it (for example where the expert has opined on matters spanning more than one discipline). Where part of the evidence is unaffected by the allegation of credibility, the tribunal can take at least that part of the evidence concurrently. Where all of an expert's evidence is potentially affected, the issue of credibility can be dealt with by the tribunal in the conference itself, or through separate questioning. The tribunal could hold a conference and direct that the experts do not address the issue of credibility, which would be explored among the witnesses by the tribunal or counsel (or a combination of both). Another possibility is for the tribunal to address the issue through questioning of the impugned expert only (by the tribunal, counsel or both) prior to holding a conference on the matters of substance. In such situations, the tribunal and parties will need to consider whether the other experts giving evidence on the subject matter to be sequestered while the impugned expert is questioned. After the issue of credibility has been tested, the tribunal may convene a conference on the substantive areas of evidence, or it may direct that the expert witnesses be questioned consecutively by counsel. The tribunal may wish to decide on the preferred approach only after hearing evidence on credibility. Direction 9 ensures procedural flexibility to allow the tribunal to make appropriate directions when required.
- 3.3 Where an issue of credibility arises in the course of an expert witness conference, the tribunal may nevertheless proceed with the conference and direct that the issue be explored among the witnesses through questions from the tribunal or counsel only, or direct that the issue of credibility be tested separately.

**4\*† The relationship between witnesses**

- 4.1 The inevitable interactions between witnesses in a conference produce interpersonal dynamics that do not arise when witnesses give evidence alone. These dynamics can have a subtle or sometimes overt effect on the evidence given by one or more of the witnesses. The tribunal and the parties should consider the witnesses' respective backgrounds, and whether the witnesses have a pre-existing relationship. Both can affect how the witnesses give evidence together and, in some circumstances, may cause a tribunal to conclude that witness conferencing is not suitable for those witnesses. Some common situations are set out below. They are not intended to be exhaustive of all circumstances.
- 4.2 Any number of factors may determine how individual witnesses give testimony. Some witnesses will be more forthcoming than others. Some witnesses may express their views more effectively in a lecture style, or a question and answer format, whereas others will prefer to engage in direct dialogue or debate. A tribunal will need to monitor these dynamics to determine whether one or more witnesses is dominating a discussion, or is remaining taciturn. A tribunal may wish to intervene in a discussion to ensure that all witnesses are given the opportunity to present evidence. In some cases it may be helpful for the tribunal to impose time limits or a chess-clock procedure to regulate the amount of time given to the witnesses to speak.

*Contrasting experience giving evidence before tribunals*

- 4.3 The tribunal should be aware of the prior experience the witnesses have giving evidence both in witness conferences and in common-law style cross examination. Professional expert witnesses, for example, are more likely to be comfortable in conferences and may appear to present more persuasive evidence when contrasted with a witness with no or comparatively less experience appearing before tribunals. The difference in experience may be a function of seniority among professional expert witnesses (and therefore a difference in testifying experience) or because one witness is a professional expert witness with some testifying experience, whereas another witness has the requisite expertise to give evidence on an issue but does not habitually present expert testimony.
- 4.4 In these sorts of circumstances, the demeanour of a witness who appears less confident could be explained by a relative lack of experience in giving evidence as opposed to the quality of evidence that is given; similarly, an apparent reluctance to engage may not be reflective of the quality of evidence that a witness gives.
- 4.5 Contrasting experience between witnesses is less likely to be important when considering a conference with witnesses of fact.
- 4.6 A tribunal ought to consider modifying the mode of witness conferencing where it appears that an interpersonal dynamic may be affecting the quality of evidence. Where, for example, a conference is to be led by expert witnesses and the quality of evidence is affected by the sort of factors mentioned here, the tribunal may need to intervene and propose instead that the tribunal itself or counsel lead the conference.



### *Contrasting cultural background*

- 4.7 The tribunal and the parties must be sensitive to contrasting cultural backgrounds of the witnesses in a conference. At the other extreme, care needs to be taken not to apply cultural stereotypes. When witnesses from contrasting cultural backgrounds appear together, those backgrounds may influence how they give evidence. Contrasting cultural factors may impact conferences of experts and witnesses of fact. A witness conference may not always be preferable where such cultural difference exist.
- 4.8 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 unusual. Tribunals need to take particular care where one or more witnesses from different backgrounds act in accordance with their own cultural norms so that the evidence taken may have been materially affected.
- 4.9 Sometimes it may not be possible to anticipate how a witness presents evidence until the conference itself. A tribunal may need to adapt to circumstances and modify the form of the conference or, in an appropriate case, dispense with it and direct that evidence be taken consecutively.

### *Present or former colleagues*

- 4.10 Various factors will determine whether and how concurrent evidence can be taken from witnesses who are colleagues. Decisions regarding witness conferencing are unlikely to be affected where professional expert witnesses are former colleagues. Where the witnesses giving expert evidence are present or former colleagues but do or have not worked for professional services firms as expert witnesses, a tribunal will need to consider the witnesses' respective positions, for example whether one of them is or has been superior to the other, and whether their working relationship may affect the evidence that the witnesses may give. The same considerations will apply for witnesses of fact who were formerly colleagues (or, less commonly, remain colleagues).

### *Close personal friendship or enmity*

- 4.11 A tribunal will need to determine whether a witness conference is suitable where the witnesses are in a close personal friendship or enmity exists between them. It will need to consider whether the witnesses are likely to be able to give evidence unaffected by their relationship. As a generalisation, this may be more likely in the case of experts than with witnesses of fact.
- 4.12 A tribunal may wish to explore the issue of friendship or enmity at the outset of a conference, or possibly separately with each witness in the absence of the other, and

then direct either that the conference may proceed, or that evidence be taken consecutively.

- 4.13 Where the tribunal directs evidence to be given in conference, it must remain vigilant to the possibility that the conference has ceased to be a useful means of taking evidence and either vary the form of the conference in some way, or adjourn or conclude the conference. This may become necessary where, for example, one or both witnesses are reluctant to challenge the other's evidence, or where the witnesses become uncooperative, hostile or rude.

## **5<sup>†</sup> The composition of the witness conference(s)**

### *The issues to be addressed*

- 5.1 Although the Guidelines refer to a witness conference in the singular, it may often be desirable to have more than one conference, bearing in mind the nature of the issues and the number of witnesses to give evidence. Depending on the circumstances of the case, a tribunal may want to have one conference to address certain issues with witnesses of fact, and another conference for expert witness testimony. Where expert evidence encompasses multiple areas of expertise, a tribunal may direct separate conferences.
- 5.2 Where multiple conferences are to be held, the sequence of the conferences should be determined by taking into account the most efficient and effective means of taking evidence. In some cases, it may be preferable for evidence on factual issues to be heard first, followed by expert evidence.
- 5.3 Another approach is for a tribunal to hold successive witness conferences by reference to the parties' claims. This approach may be attractive in matters with large amounts of discrete factual and expert evidence. For example, in building and construction cases, it may be most effective and efficient for all relevant witnesses (possibly including fact and expert witnesses, and experts across different disciplines) to give evidence on a claim-by-claim basis with respect to each defect (or class of defect) or each extension of time.
- 5.4 A tribunal may wish to consider the composition of witness conferences involving expert witnesses at the time it makes directions in relation to a schedule of matters that are agreed and not agreed, for which see the Explanatory Notes to Direction 4.

### *The number of witnesses*

- 5.5 The simplest form of a witness conference will be between two witnesses whose evidence covers the same areas. Where there are multiple areas of evidence to be covered, possibly by witnesses across different disciplines, the tribunal and parties will need to consider whether one or more conferences would be most appropriate.
- 5.6 Where one party presents a single expert to give evidence on multiple disciplines, whereas another party presents different witnesses to cover the different disciplines, the tribunal will need to consider whether to hold a single conference with all the

experts together, or multiple conferences composed of one party's sole expert giving evidence in each conference with the other party's respective witnesses. In such a situation, where the evidence for each discipline may be lengthy, and is minimally impacted (or not impacted at all) by the evidence of other disciplines, separate conferences may be preferable.

- 5.7 A witness conference in principle can be held with any number of witnesses. In most cases, the nature of the evidence and the issues in dispute will guide the tribunal on how many witnesses should give evidence. Conferences with five, ten or conceivably more witnesses can be held with the right degree of planning by the tribunal and the parties.

### *Pre-hearing*

#### **6<sup>†</sup> Reports of expert witnesses**

- 6.1 Expert witness reports, including any joint reports, must be made available to the tribunal prior to the conference as they are likely to be referred to in the conference.
- 6.2 A tribunal will often find it beneficial for expert witnesses to prepare a joint report. It may contain, among other things, a list of areas where the experts agree or disagree. The tribunal should direct a deadline by which the experts are to produce a joint report. Where a joint report is to be produced, the parties and tribunal should consider agreeing the following:
- Mode of communications between witnesses (for example by e-mail, telephone, video conference or face-to-face meetings)
  - Use of interpreters if one or more witnesses do not speak the language(s) of the arbitration
  - The extent to which members of a professional expert's team may be involved in discussions and the drafting of the joint report
  - Whether witnesses might jointly seek directions (from counsel or from the tribunal) prior to or during discussions
  - Whether the contents of discussions should be treated as "*without prejudice*" and not subject to any adverse inference by the tribunal
  - Whether counsel can be involved in the discussions. The level of involvement may vary. Counsel might not be involved at all; they might be updated on the contents of the discussions periodically, or after their conclusion; they might provide limited assistance with, for example, drafting. Where counsel is to communicate with witnesses, the parties should consider and agree on whether these communications should be subject to privilege, and not subject to any adverse inference by the tribunal.
- 6.3 The parties should brief witnesses on how discussions should be conducted and how the information they have obtained from these discussions might or might not be used.

- 6.4 Where experts do not prepare a joint report, a tribunal may direct that the experts agree a schedule setting out areas of their evidence where they agree and disagree (“**Schedule**”). The tribunal, parties or experts may use such a Schedule as an agenda for a witness conference. Less commonly, factual witnesses might be called upon to create such a list where there are involved factual issues, or where the evidence of fact witnesses differ on technical factual issues.
- 6.5 Where witnesses are to draw up a list of agreed and unagreed issues, the tribunal should direct how and by when the witnesses must do so. The parties should also consider the list of practical matters set out above with respect to joint reports.

## **7<sup>†</sup> A chronology of facts**

- 7.1 Tribunals commonly direct parties to prepare a chronology (in agreed form if possible) of the dispute. Where witnesses of fact give concurrent evidence, a chronology of the issues on which they are to give evidence may be of additional assistance to the tribunal, particularly in cases of considerable factual complexity. A chronology of facts in agreed form is a useful framework document for the tribunal, the parties and the witnesses when taking concurrent evidence, particularly from witnesses of fact. It may also be helpful for expert witnesses where a sequence of events relates to their evidence. Where a chronology cannot be agreed, one that highlights disputed facts may nevertheless be of assistance where the disputed fact impacts the expert evidence given.
- 7.2 The tribunal will need to determine whether the parties should compile such a chronology, or whether the witnesses themselves should do so. Where witnesses are to draw up a chronology, the tribunal should direct how and by when this must be done. The parties should also consider the list of practical matters set out with respect to joint reports in Checklist 6 above (save for that relating to professional experts’ teams).

## **8<sup>†</sup> Allocation of time among the witnesses**

- 8.1 The tribunal and parties should determine how much time should be allocated to the examination of factual and expert witnesses. The allocation of time should be monitored by the tribunal to ensure that each party has sufficient time to advance its case. The time required to take evidence will be influenced by a number of factors, such as the number of witnesses to be examined, the extent of agreement and disagreement between the witnesses and the manner in which the witness conference will be conducted (*i.e.* whether it will be led by the tribunal, counsel, the witnesses, or some combination of the three). The tribunal will also need to make allowance, depending on who leads the conference, for questions from the tribunal and counsel.
- 8.2 The tribunal should consider whether each witness will be allocated a specific amount of time to speak, and whether specific time may be allocated for questions from the tribunal and counsel. The fluid nature of a witness conference, particularly where witnesses engage in lengthy discussions, can make a strict allocation of time impractical. Although the tribunal should ensure that all witnesses are given a fair

opportunity to give evidence, it does not follow that each witness must be accorded the same amount of time in the conference. The tribunal must be guided by the circumstances of the case on what is the proper time to be given to the witnesses.

- 8.3 The tribunal may track time according to a chess-clock procedure or in some other way. The tribunal may itself keep time, or require this to be done by the parties or a tribunal secretary.

## **9<sup>†</sup> Presentations and demonstrables**

- 9.1 The parties may agree or the tribunal may direct that the witnesses make presentations or use demonstrables during a witness conference. Such aids when giving evidence can be particularly helpful where the issues in dispute are technical or complex, or there are aspects of the evidence that are easier to visualise with diagrams, animations or models.
- 9.2 The tribunal may direct that the witnesses prepare their own presentations or, in certain circumstances, that they prepare a single presentation setting out their areas of agreement and disagreement. Presentations and descriptions of demonstrables may be exchanged by the parties before the witness conference; otherwise, copies of presentations should be made available for parties and the tribunal at or immediately after the conference.
- 9.3 The tribunal may determine that presentations and demonstrables should refer only to evidence on record or such other additional evidence that the parties agree to produce for the purpose of the presentation or demonstrable. This can avoid complaints that a party has sought to introduce fresh evidence at or on the eve of an evidentiary hearing.

### *Logistics*

## **10\*<sup>†</sup> One or more witnesses is to give evidence by video conference**

- 10.1 There may be circumstances when a witness is unable to attend at the hearing venue for a conference but may be able to give evidence by video. The dynamics and ease of communication of witnesses giving evidence side by side are likely to be adversely altered when they are physically dislocated. A witness conference in such circumstances may be undesirable save where the tribunal considers that time or other constraints prevail over the limitations of concurrent evidence being given from different locations.
- 10.2 A tribunal should consider whether a witness conference can be held where all the witnesses are to give evidence from a location other than hearing venue. In such circumstances, the witnesses will not be physically dislocated from each other, but from the tribunal, counsel and others present at the hearing venue.
- 10.3 Where a witness is to give evidence by video conference, the tribunal should consider issuing directions addressing the following matters:

- provision by the party presenting such witness of details of the video conferencing service to the tribunal and all parties in advance of the hearing to allow the other parties to observe tests of the service provider's video conferencing capabilities between the venue of video conference and the venue of the hearing
- details of the time and venue of the video conference
- the presence of a duly empowered legal representative of the party presenting such witness at the venue of the video conference. The party presenting such witness shall inform the tribunal of the identity of such representative and provide his/her curriculum vitae prior to the hearing
- the presence of a duly empowered legal or other representative of the other parties should they wish at the venue of the video conference. Where another party chooses to have such a representative present, it shall inform the tribunal and all other parties of the identity of such representative and provide his/her curriculum vitae prior to the hearing
- where such witness is to give evidence in a language other than the language of the arbitration, the party presenting the witness shall engage a qualified and experienced interpreter, who shall be present in person with the witness at the venue of the video conference
- provision and access at the venue of the video conference to all documentation produced in the proceedings relevant to such witness's evidence

**11<sup>†</sup> Simultaneous or sequential interpretation is required for one or more witnesses**

- 11.1 There may be instances where a witness is unable to speak the language in which the arbitration is conducted or is not confident doing so. The tribunal should give directions for a qualified and experienced interpreter to provide simultaneous or consecutive interpretation of questions to and answers from for the witness.
- 11.2 The tribunal should consider what impact interpretation may have on the timing of a conference, including how it may allocate time among the witnesses.

**12<sup>†</sup> Sufficient physical space is required at the venue of the hearing for multiple witnesses to give concurrent evidence**

- 12.1 The parties should ensure that there is sufficient space at the venue for the witness conference. The hearing venue will need to be able to accommodate the witnesses sitting comfortably together (including any translators) to be able to interact with the tribunal, counsel and each other. They will each need sufficient space to access and review documentation, including any reports and other evidence relevant to their evidence.

**13<sup>†</sup> Seating arrangement of witnesses**

- 13.1 The parties should consider the proposed seating arrangements for witnesses in advance of the hearing. For conferences with two or three witnesses, the arrangements are likely to be straightforward. For larger conferences, witnesses who will naturally be responding to each other's evidence ought to be grouped together. The witnesses ought not to be too distant from either the tribunal or counsel.
- 13.2 Where witnesses may give more discursive evidence, for example in an expert-led conference, less room may be needed to accommodate voluminous documentation. Witnesses may require more space in conferences with more inquisitive questioning among themselves, counsel and the tribunal to allow access to their documents in the course of giving evidence.

**14<sup>†</sup> Stenographic, recording and/or audio amplification is required for multiple witnesses to give concurrent evidence**

- 14.1 The parties should ensure that the venue for the conference contains the necessary layout and equipment to ensure witnesses can give evidence concurrently and be heard by the tribunal and counsel. In most cases, the tribunal and the parties will want real time transcription services to record the evidence of all the witnesses. Parties should consult with professional stenography service providers to ensure that they can accommodate transcription of concurrent evidence, particularly where there may be a large number of witnesses giving evidence.

**15<sup>†</sup> Audio-visual equipment is required for giving evidence**

- 15.1 Audio-visual equipment may be required for a witness conference. A witness may wish to give a presentation using a slideshow, animations or other digital means. Parties should ensure that the hearing venue can accommodate such requirements.

# The Standard Directions

## *Introduction*

The Standard Directions provide tribunals and parties with a procedural framework for witness conferencing. They are intended to be included in a tribunal's initial procedural order in arbitration proceedings that establishes the procedure for the arbitration as a whole. Once the issues to be determined and the identities of the witnesses (and possibly their evidence) have crystallised, the tribunal decides whether to hold a witness conference. If so, it can issue further specific directions, as set out in Part III, and a procedural timetable for the various steps required to prepare the conference. Where a tribunal has not issued the Standard Directions in an initial procedural order, they should be incorporated into a subsequent order together with the appropriate Specific Directions.

The Standard Directions establish the ground rules for witness conferencing. They provide that the tribunal may take concurrent evidence from witnesses as it considers appropriate in due course, and stipulate what steps the parties and witnesses must take to prepare for the conference.

**1 The tribunal in consultation with the parties shall determine which witnesses will give concurrent oral evidence and on what issues. The witnesses shall give evidence on such issues in such conference or conferences at such date and time as the tribunal directs.**

1.1 This Direction confirms that the tribunal may take concurrent witness evidence in relation to such issues as it considers appropriate. It does not preclude the taking of consecutive evidence from the same or other witnesses on other issues. The Direction anticipates that at a future point in the proceedings the tribunal shall direct who will give evidence in conference and on what issues.

1.2 In some cases, that future direction will simply confirm that a witness for each party will give (for example) expert witness evidence together. In other cases, the tribunal may issue (or may ask the parties to agree) a schedule that sets out which witnesses will give concurrent evidence and on which issues in which conference. This will be necessary where, for example, witnesses have given written evidence relevant to a number of issues and those issues might be addressed in more than one witness conference with different permutations of witnesses. A tribunal may also need to articulate the issues to be tested in conference where some parts of a witness's evidence will be tested through concurrent evidence, and other aspects through consecutive evidence.



**2 Witnesses giving concurrent evidence on the same issue or issues shall jointly prepare a schedule containing a list of areas on which the witnesses agree and disagree and a summary of the witnesses' views on those areas of disagreement ("Schedule").**

2.1 This Direction provides that the witnesses to give evidence in conference prepare a Schedule setting out the areas where they agree and disagree. Where the witnesses are to give expert evidence, the contents of the Schedule could be drawn from a joint report, if the witnesses are going to produce one. The tribunal and the parties ought therefore to consider this Direction in the context of any directions given in the same procedural order for the preparation of reports by expert witnesses. This Direction anticipates that the tribunal will subsequently direct the date by which a Schedule must be prepared.

2.2 This Direction may not be necessary or suitable if the conference is to be with witnesses of fact. In such cases where a Schedule is to be prepared, it will usually be preferable for the parties (rather than the witnesses themselves) to prepare the Schedule. The Direction should be modified accordingly.

2.3 A Schedule prepared pursuant to this Direction can serve as an agenda for the witness conference.

**3 The tribunal may direct that the parties or the witnesses who are to give concurrent evidence will agree a chronology of agreed facts that relates to such evidence ("Chronology").**

3.1 As set out in the explanatory notes to Checklist 7, a tribunal may wish for witnesses giving concurrent evidence to prepare a chronology of agreed facts. This Direction provides that the tribunal may order the parties to arrange for such a chronology to be prepared. It anticipates that the tribunal will subsequently direct the date by which such a Chronology must be prepared.

**4 For the purpose of preparing a Schedule or Chronology:**

**(i) The witnesses may hold discussions with each other by such means and for such period as the tribunal shall direct.**

4.1 This Direction provides for the witnesses to hold discussion in order to agree a Schedule or Chronology. In some cases, the tribunal will specifically direct the mode of discussions, such as by email, telephone or in-person meetings. It may also provide a timeframe in which those discussions are to take place, although in practice this is likely to appear in a subsequent procedural order.

**(ii) The contents of the discussions between the witnesses shall [not] be “without prejudice”.**

4.2 Many common law systems of law protect communications between parties or their witnesses to a tribunal where it has been agreed that the communications are without prejudice to their legal rights. Under these common law rules, such “without prejudice” communications are not admissible before a court or tribunal. This Direction provides that discussions between the witnesses concerning a Schedule or Chronology are [not] to be “without prejudice”. The tribunal and the parties must ensure that the witnesses understand the implications of this Direction and how the contents of the witnesses’ discussions may or may not be used in the course of a witness conference session, or more generally at the hearing.

**(iii) either [Counsel shall not be involved in discussions between the witnesses] or [Counsel’s involvement in discussions between the witnesses shall be limited to *[to be agreed between parties]*. Any such discussions between witnesses and counsel shall be subject to privilege.]**

4.3 The parties should consider whether and to what extent counsel should be involved in discussions to agree a Schedule or Chronology. It might be agreed that counsel is not to be involved at all. Alternatively, counsel could be involved to a limited extent, and assist (for example) in only the drafting of the Schedule or Chronology. Parties could agree that counsel may receive an update from the witnesses at an agreed point in the discussions, or after they have concluded. The parties may agree on other conditions of counsel’s involvement.

4.4 If counsel is involved in discussions, the parties should also consider whether some form of privilege, as understood in common law systems of law, should apply to discussions between counsel and their witnesses as well as the other party’s witnesses. However the parties and the tribunal determine the level of counsel’s involvement, the effect of this Direction must be explained clearly to the witnesses.

**(iv) The witnesses may at any time jointly seek directions from the *[parties or the tribunal]*.**

4.5 This Direction provides that witnesses may jointly seek directions to the parties or the tribunal. This may be necessary where the witnesses have encountered difficulties in the course of preparing a Schedule or Chronology. They may seek clarification as to whether they are permitted to take certain further steps, or they may require the tribunal to give further directions.

**5 Any presentation materials and demonstrables used in conjunction with a presentation by a witness shall be provided to the tribunal prior to the presentation.**

5.1 This Direction anticipates that the tribunal will make a direction for the production of presentation materials and demonstrables prior to the presentation to which it relates.

In many cases it will be sufficient for the materials to be provided immediately before the presentation, but depending on the nature of the materials or demonstrable, the tribunal may wish to direct that they be provided at an earlier date. See also the explanatory notes to Checklist 9.

**6 At any witness conference, the tribunal may at any time at its own discretion:**

**(i) ask questions of any witness.**

6.1 This Direction ensures that the tribunal may ask questions of any witness at any time, regardless of who leads the witness conference so that it can inquire further into any area of evidence.

**(ii) order that a witness be recalled for further questioning.**

6.2 Sometimes a witness who has completed giving evidence may need to be recalled as a result of some other evidence or issue that arises later in the proceedings. This Direction clarifies that the tribunal may order recall of a witness despite the fact that he or she has given evidence concurrently with another witness who has given evidence on a common issue. The tribunal may order that all witnesses who have given concurrent evidence previously are to be recalled to give further evidence, either concurrently or consecutively.

6.3 Practical difficulties may arise when one or more witnesses are recalled. In most instances, recall as soon as possible will be desirable, especially where witnesses may have travelled any distance to give evidence, and in any event may have other commitments. The tribunal and the parties should consider whether it would be appropriate for a recalled witness to give evidence by video conference; see also the explanatory notes to Checklist 14.

**(iii) vary the procedures for taking concurrent evidence as it considers necessary for the efficient and effective conduct of the proceedings.**

6.4 The Standard Directions seek to address the most common situations relating to witness conferencing but they cannot and do not purport to account for every eventuality. The Standard Directions will likely be issued early in the proceedings where it may have little insight into the form or even desirability of holding a witness conference. Circumstances may change after the issue of the Standard Directions, and indeed the Specific Directions, which require the tribunal to reassess and vary the procedures it had previously ordered for witness conferencing. For example, it may only transpire during the witness conference itself (perhaps due to a particular or evolving dynamic between the witnesses) that the form of the conference needs to be adapted, or that the conference may need to be concluded.

6.5 How the tribunal may vary the conferencing procedure will depend on the circumstances as they arise, although the tribunal must take the parties' views into account in determining how best to proceed.

# The Specific Directions

## *Introduction*

The Specific Directions provide three frameworks for taking concurrent evidence at the evidentiary hearing. The frameworks approach witness conferencing from the perspectives of those leading the conference: the tribunal, the witnesses or the parties' counsel. The Specific Directions may be used to create a standalone procedural order concerning witness conferencing or be included in a wider order. In practice, the tribunal and the parties will not be in a position to agree what Specific Directions will be best suited to the case until the issues for determination have been crystallised, the parties have exchanged evidence and the identities of the witnesses have been confirmed.

The three frameworks set out in the Specific Directions will be suitable for many cases with little or no alteration. Alternatively, the tribunal and the parties may wish to combine the approaches of some or all of the different frameworks to create a bespoke process that suits the case at hand.

### *Option A: Tribunal-led Conference*

A0.1 A witness conference conducted under this framework will be controlled by the tribunal. With the tribunal guiding the questioning of the witnesses, this style of conference bears some similarity to inquisitorial processes found in civil law systems. In practice, where a tribunal leads the conference, parties' counsel have a more limited role than is typically experienced in common law adversarial proceedings.

#### **A1 Witnesses shall [not] be sequestered prior to giving evidence.**

A1.1 The question of sequestering witnesses typically arises when those witnesses give consecutive evidence. The concern that sequestering seeks to address is that a witness, upon hearing the evidence of another, may consciously or subconsciously alter the evidence they will give on that subject. This issue will not arise as between witnesses giving evidence concurrently. However, it may be desirable for those witnesses nevertheless to be sequestered as regards the evidence of other witnesses.

A1.2 Where witnesses are to give evidence in multiple conferences, or both in conference for some issues and alone for others, a tribunal will need to consider whether some or all of the witnesses should be sequestered. The direction for sequestration may need to account for the fact that a witness may give evidence in one conference (or alone) and then wait until a later part of the hearing before giving evidence again.

A1.3 Although this Direction is framed broadly to relate to all witnesses, a tribunal may need to make directions for sequestration in relation to specific witnesses or groups of witnesses.

A1.4 Where the tribunal directs that some or all of the witnesses are to be sequestered, it should consider whether to make a supplementary direction that the party who is

presenting that witness shall not provide a transcript of the evidence of other witnesses to the sequestered witness(es).

**A2 At the beginning of the conference, the tribunal shall administer an oath or take an affirmation from each witness.**

A2.1 This Direction is optional. Different jurisdictions have varying practices on whether arbitrators may administer oaths and affirmations. Giving false testimony under oath or affirmation may cause the witness to face criminal penalties. Some legal systems require evidence in arbitration to be given under oath or affirmation. At the other end of the spectrum, some legal systems do not permit evidence in arbitration to be given under oath at all. Somewhere in between are those jurisdictions that permit, but do not require, arbitrators to administer oaths and affirmations.

**A3 Each witness shall confirm that the written evidence submitted by them is their own and shall identify any corrections that they wish to make.**

A3.1 In common law systems, witnesses in civil proceedings typically provide evidence by way of written statements. They replace oral testimony that would formerly have been given in response to questions from the representative of the party presenting the witness, after which the witness's evidence would be tested in cross examination. Thus, in modern common law proceedings, a witness is typically asked by the presenting party to confirm the correctness of their written statement before being cross examined. This Direction is included to ensure that witnesses confirm that the written evidence they offer is their own evidence, and to give them the opportunity of correcting it as necessary.

**A4 Each witness shall give an oral presentation of their position. The tribunal shall, in consultation with the parties, determine the length of the presentations and the order in which the witnesses shall make them.**

A4.1 This Direction is optional. The tribunal may find an oral presentation from expert witnesses helping in understanding their respective positions. Presentations from witnesses of fact may be less useful. A tribunal will need to consider the particular circumstances of the case when considering whether to make this Direction.

A4.2 Where the witnesses are to provide presentations, the tribunal should consider whether each witness should present separately, or whether they should jointly present a summary of the areas on which they agree, followed by separate presentations from each witness on the areas of disagreement. The tribunal should also direct how long the presentations should be. The length and order of presentations may be indicated by amending the second sentence of this Direction, or by subsequent procedural order.

**A5 The tribunal will question the witnesses in relation to the areas of disagreement set out in the Schedule and on any other matter it considers appropriate. The tribunal will ask each witness to express their views on each of the areas and why they disagree with the views of the other witness(es). The tribunal shall give each witness the opportunity to respond to the evidence of another.**

A5.1 This Direction lies at the heart of the tribunal-led conference. The tribunal will ask the witnesses questions usually by reference to the Schedule that has previously been prepared and agreed by the witnesses. The tribunal may also seek the witnesses' views on other matters that it feels would assist in resolving issues in dispute. The tribunal may ask questions on an issue-by-issue basis, seeking each witness's views on an issue before moving onto the next issue. Alternatively, the tribunal may adopt some other structured approach to taking the evidence.

A5.2 One of the advantages of taking concurrent evidence is to hear immediate responses and rebuttals to competing evidence. The witnesses may engage in dialogue as they explain their positions and justify why they do not agree with other evidence. A tribunal will need to be mindful that in the course of such exchanges that all of the witnesses are given the opportunity to present their position and to offer reasons why their evidence is to be preferred over that of the other witnesses.

A5.3 The tribunal should monitor the conference to ensure that all the witnesses are given the opportunity to present their positions and explain why the other witnesses' evidence is not to be preferred. Equally, the tribunal will need to exercise control over the dialogue that may develop between the witnesses so that sufficient time is devoted to each area of disagreement.

**A6 After the tribunal has completed its questioning, each party's counsel may question the witnesses of the other parties and may invite their own party's witness to respond to the opposing witness's answers.**

A6.1 This Direction allows parties to question witnesses on matters that may not have been addressed during the conference, or where a party wishes a witness to clarify their evidence. It ensures that parties have the opportunity to present their own witnesses' evidence and to test the evidence of other parties' witnesses, to the extent that this has not already taken place during the tribunal's conduct of the conference.

A6.2 Before counsel questions the witnesses, the tribunal may wish to summarise its understanding of the witnesses' evidence, either on an issue-by-issue basis as the conference unfolds, or at the conclusion of the tribunal's questioning. This may not be practicable where the evidence is detailed.

A6.3 This Direction provides that counsel may "question" another party's witness. This questioning could take various forms. For example, the tribunal should consider whether it is necessary or appropriate to clarify whether such questioning is to be in the form of closed questions, akin to cross examination as encountered in common law jurisdictions. If so, it may be appropriate to direct that opposing counsel may thereafter ask supplemental open questions of the witness, akin to common law re-examination.

- A6.4 Another means by which counsel may ask supplemental questions of the witnesses is for counsel to ask all of the witnesses a common question, and allow each of them to answer. If desirable, the witnesses may discuss and debate the question posed.
- A6.5 When all the witnesses have had an opportunity to speak, the tribunal may ask counsel to move onto the next question. Once one party's counsel has asked all the questions they wish to ask, opposing counsel would be given the same opportunity to ask questions. This approach to questioning could, alternatively, be modified such that after the witnesses have given evidence in response to a question, the tribunal invites other parties' counsel to ask any further questions that arise from the evidence before questions on another topic are asked.
- A6.6 Whichever way counsel asks supplemental questions, the tribunal must ensure that the parties have an opportunity to present their case. It should be alert to the need for the witnesses to present their positions but at the same time ensure that witnesses do not unnecessarily repeat their evidence and compromise the efficiency of the process.
- A7 The tribunal may at any time permit or invite discussion between the witnesses, or any of them, of any area of disagreement set out in the Schedule and on any other matter it considers appropriate.**
- A7.1 This Direction clarifies that the tribunal may allow or ask the witnesses to discuss a particular area in dispute, in addition to asking questions directly of the witnesses. Such free form discussions can be of considerable assistance in understanding why the witnesses hold different views on an issue, or can even lead to consensus once the witnesses have been able to discuss and debate their respective positions.

*Option B: Witness-led Conference*

- B0.1 A witness conference conducted under this framework is led by the witnesses. The interaction between the witnesses is free-flowing with minimal input from the tribunal or counsel. This approach is suitable for expert witnesses providing opinion evidence. It is unlikely to be appropriate where witnesses of fact give concurrent evidence. 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.
- B0.2 Conferences led by witnesses are particularly suitable where the witnesses give expert evidence in the same discipline. Where the witnesses are experienced in giving expert evidence, they are likely to be able to prepare joint and individual presentations, and to discuss the differences in their evidence, in a manner that is efficient and effective. There will also be instances where experts of different disciplines can usefully lead a single conference, particularly where their evidence is complementary or where their collective evidence is relevant to a particular issue.
- B0.3 Although the witnesses will determine the agenda (often by reference to a Schedule previously agreed between them) and presentation of evidence at the conference, the tribunal will need to monitor the progress of such a conference closely and intervene in appropriate circumstances to ensure that the experts have had an opportunity to present their respective positions in relation to each issue, and to explain why they disagree with each other. A tribunal may also need to assume control of a witness-led conference where the process proves to be ineffective, for example where the discussions prove to be unstructured, where witnesses do not engage meaningfully or where the dynamic between the witnesses proves to be unproductive.
- B1 Witnesses shall [not] be sequestered prior to giving evidence.**
- B1.1 See the Explanatory Notes to Specific Direction A1 above.
- B2 At the beginning of the conference, the tribunal shall administer an oath or take an affirmation from each witness.**
- B2.1 See the Explanatory Notes to Specific Direction A2 above.
- B3 Each witness shall confirm that the written evidence submitted by them is their own and shall identify any corrections that they wish to make.**
- B3.1 See the Explanatory Notes to Specific Direction A3 above.



**B4 Each witness shall give an introductory oral presentation of their position. The witnesses (or in the absence of agreement between them, the tribunal) shall determine the order in which the witnesses make their presentations.**

B4.1 A presentation is a useful means of introducing each witness's evidence to the tribunal. The presentation can provide an overview of areas of agreement and disagreement between the witnesses and identify any important differences in approach, methodology or interpretation of relevant facts. The presentations may include the use of demonstrables or other aids, such as presentation software, flip charts, product samples, prototypes, scale models and so on. See also Checklist 9 in relation to presentations and demonstrables. The tribunal will usually allot equal time to the witnesses to deliver their presentations, although it should be guided by the circumstances of the case.

**B5 The witnesses shall address in turn each area of disagreement in the Schedule as follows.**

B5.1 This Direction proceeds on the basis that the witnesses will use the Schedule as the basis for an agenda for the conference. The witnesses give evidence, exploring each area of disagreement in turn adopting the following structured approach. The tribunal or the witnesses themselves may wish to determine in advance how much time should be allotted to the various areas of disagreement.

**(i) The witnesses shall set out their respective positions in relation to the area of disagreement using such presentation materials and demonstrables as they deem appropriate.**

B5.2 For each area, the witnesses explain their respective positions to the tribunal, using presentation aids and demonstrables as appropriate. They may expand on the points that have already been set out in written evidence.

**(ii) The witnesses shall ask each other questions in order to clarify their respective views on that area, to determine the bases on which they disagree with each other's views and to test the relative strengths and weaknesses of the witnesses' views.**

B5.3 After the presentations, the witnesses ask questions about each other's evidence. Where there are more than two witnesses giving concurrent evidence, the witness asking a question should indicate whether the question is being asked of a particular witness, or all the witnesses. The witnesses should consider who will ask questions first and, if required, seek directions from the tribunal. The witnesses should avoid becoming advocates for their instructing parties' positions; a witness-led conference should not become a cross examination of one witness by another.

B5.4 The tribunal should monitor the progress of the conference to ensure that all the witnesses are given the opportunity to present their positions and explain why the other witnesses' evidence is not to be preferred. Equally, the tribunal will need to exercise control over the dialogue that may develop between the witnesses so that

sufficient time is devoted to each area of disagreement. The tribunal should have regard to the dynamics between the witnesses, and consider the matters set out in Checklist Items 4 and 5.

**(iii) The tribunal may intervene in the discussion between the witnesses at any time in order to give each witness the opportunity to present their views and to respond to the views of the other witness(es), and to ensure the orderly and efficient conduct of the conference.**

B5.5 This Direction provides that the tribunal can intervene in the conference in appropriate circumstances. Examples where the tribunal may intervene include: ensuring that all witnesses are given the opportunity to present their evidence; seeking a response from a witness who avoids answering a question, or who refuses to engage in a meaningful manner with their counterpart; informing the witnesses where the discussion has strayed away from the area of disagreement or does not otherwise assist the tribunal; adjourning (or if necessary concluding) the conference for a short break where one or more experts becomes hostile, aggressive or uncommunicative.

**(iv) After the witnesses have concluded their discussions, the tribunal may ask further questions of any of the witnesses on the area of disagreement.**

B5.6 The tribunal may wish to ask questions as the witnesses discuss their views. It can also ask questions once the witnesses have finished discussing an area of disagreement. Questions can be posed to one or more witnesses. In appropriate circumstances, where the tribunal has asked one witness a question, it may wish to seek the views of the other witnesses on that question to ensure that all viewpoints have been taken into account.

**(v) After the tribunal has completed its questioning, each party's counsel may question the witness(es) of the other party/parties and invite his own party's witness to respond to the opposing witness's answers.**

B5.7 See the Explanatory Notes to Specific Direction A6 above.

*Option C: Counsel-led Conference*

- C0.1 A witness conference led by counsel is similar to the procedure of cross examination typical in common law systems, the key difference being that one or more other witnesses may respond to evidence given by the witness being questioned.
- C0.2 Using this conference framework allows each party through their counsel to retain a high degree of control over the taking of evidence. Counsel can question a witness and can invite their own (and/or other) witnesses to reply to the answers given. This approach may be an appropriate course to adopt where, for example, the tribunal or the parties have identified that a certain dynamic between the witnesses, such as close personal friendship or enmity, requires careful control in order for the process to be conducted efficiently and effectively.
- C0.3 These framework directions anticipate that counsel will approach the conference in a manner that most suits their respective parties' cases. It may not therefore be necessary for the witnesses to give a presentation of the areas of difference between them. The tribunal and the parties should consider whether such a presentation would be desirable. Similarly, whilst the witnesses would likely have prepared a Schedule, counsel may or may not use this as an agenda for the conference.

**C1 Witnesses shall [not] be sequestered prior to giving evidence.**

- C1.1 See the Explanatory Notes to Specific Direction A1 above.

**C2 At the beginning of the conference, the tribunal shall administer an oath or take an affirmation from each witness.**

- C2.1 See the Explanatory Notes to Specific Direction A2 above.

**C3 Each witness shall confirm that the written evidence submitted by them is their own and shall identify any corrections that they wish to make.**

- C3.1 See the Explanatory Notes to Specific Direction A3 above.

**C4 The tribunal shall, in consultation with the parties, determine the order in which witnesses will be questioned.**

- C4.1 The tribunal will need to consider the circumstances of the case at hand to determine the order of witnesses. In adversarial proceedings, the usual approach is for the claimant to present its witnesses to give evidence first in such order as it chooses fit, followed by the presentation of the respondent's witness. Sometimes, a different approach can be adopted, for example where an issue turns on the defence raised and evidence filed by the respondent or where a jurisdictional objection is raised by the respondent (where it may be preferable for the respondent's witnesses to be questioned first), or in the case of multiple claimants and respondents (where the

claimants' witnesses may give evidence first followed by the respondents', or some other order, depending on the nature of the issues and evidence).

C4.2 The tribunal should consider whether consecutive evidence from all the parties should be heard before concurrent evidence. This is often the preferable course to adopt where witnesses of fact are to give evidence consecutively and expert witnesses concurrently. Where some witnesses of fact are to give evidence consecutively and others concurrently, it may also be preferable to hear the consecutive evidence first. The tribunal will take into account the parties' preferred order of witnesses, bearing in mind that when witnesses give evidence concurrently, this may affect the sequence of evidence typically seen in adversarial proceedings. For example, where a respondent's counsel has questioned a claimant's witness in the presence of the respondent's witness, it will generally be more efficient for the claimant's counsel to question the respondent's witness immediately thereafter.

**C5 Each party's counsel may question the witness(es) of the other party/parties and may invite his own party's witness to respond to the opposing witness's answers. After being questioned by counsel for the opposing party, counsel may ask a witness of his own party to clarify any matter that arose out of that questioning.**

C5.1 This Direction envisages that counsel for one party will question witnesses for the other parties to test the evidence they have given in their written statements.

C5.2 In adversarial proceedings conducted in common law jurisdictions, witnesses typically confirm the written evidence they have already filed, and are then questioned by counsel for the opposing party. After cross examination, the witness can be re-examined by the counsel for that witness's party. This common law format of evidence-in-chief (sometimes referred to as direct evidence), cross examination and re-examination (or re-direct examination) needs to be modified in a witness conference led by counsel because the other party's witnesses will be giving evidence concurrently.

C5.3 The tribunal should consider whether, prior to questioning under this Direction, a witness should be permitted to provide supplemental evidence upon questioning by counsel for the party presenting that witness, in the same way that a witness may provide additional 'direct' evidence through examination-in-chief in common law jurisdictions. This is useful when a development has occurred since the witnesses prepared their written evidence, and they have not had a chance to explain how that development may affect their views. When the tribunal decides to receive such supplemental evidence, it should consider whether it should receive such evidence from all the witnesses in the conference at once by asking all of the witnesses about the development, before questioning from an opposing party's counsel begins. The advantage of doing so is to receive all new evidence from all the witnesses on the development in question before one witness is questioned by counsel.

C5.4 The Direction provides that counsel may call upon his or her own party's witness to respond to the opposing witness's answers. There is therefore a balance to be struck between evidence challenged through counsel's questions and through dialogue and debate among the experts. It will generally be a matter for counsel to decide whether

or not to call on their own witness to respond to evidence. This is always subject to the tribunal's ability to intervene at any time to ask questions of any witness, as set out in Standard Direction 6.

C5.5 The second sentence of this Direction also provides that counsel can ask clarifying questions of his or her own witness following their questioning by opposing counsel, akin to re-examination of witnesses in common law jurisdictions. The need for such clarifying questions may be limited, given that the witness may have discussed the issue in question with other witnesses in the conference and therefore already explained his view. However, there may be (for example) situations where the witnesses engaged in limited discussion with each other, or where counsel otherwise considers that the witness was not given an opportunity to express a view, in which case counsel can ask the witness to clarify the position.