

INTERNATIONAL ARBITRATION PRACTICE GUIDELINE

**Party-appointed and Tribunal-
appointed Experts**

Chartered Institute of Arbitrators

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TABLE OF CONTENTS

Members of the drafting committee	
Introduction	1
Preamble.....	1
<i>Articles and commentaries</i>	
Article 1 — Powers to appoint an expert	2
Commentary on Article 1	2
Article 2 — Assessing the need for expert evidence.....	3
Commentary on Article 2	3
Article 3 — Methods of adducing expert evidence.....	6
Commentary on Article 3	6
Article 4 — Procedural directions for the expert(s)	7
Commentary on Article 4	8
Article 5 — Testing of the experts' opinions	9
Commentary on Article 5	9
Conclusion.....	11
Endnotes.....	12
Appendix I.....	13

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Party-appointed and Tribunal- appointed Experts

Introduction

This Guideline sets out the current best practice in international commercial arbitration on the appointment and use of party-appointed and tribunal-appointed experts. It provides guidance on:

- i. Powers to appoint an expert (Article 1);
- ii. Assessing the need for expert evidence (Article 2);
- iii. Methods of adducing expert evidence (Article 3);
- iv. Procedural directions for the expert(s) (Article 4); and
- v. Testing of the experts' opinions (Article 5).

This Guideline should be read in conjunction with the *CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration* (Appendix I) which details a regime designed to govern the use of party-appointed experts in international arbitration in an efficient and economic manner. It addresses matters such as independence and privilege, as well as detailing what should be included in a written expert report. Parties may adopt the Protocol either in whole or in part, or arbitrators may use it as guidance as to the directions required to manage expert evidence taking into account the particular circumstances of each arbitration.¹

Preamble

The resolution of many disputes referred to international commercial arbitration frequently involves deciding complex technical issues which may require specific knowledge or experience. To address this need, the parties may decide to appoint arbitrator(s) with the requisite expertise. Alternatively, or in addition to, (1) each party may wish to appoint their own experts; (2) parties may jointly agree to appoint a single expert; (3) arbitrators may wish to appoint a single expert instead of the parties doing so; and/or (4) arbitrators may wish to appoint a tribunal-appointed expert in addition to the party-appointed expert(s).

The first of these methods is the most frequently used in practice as the parties' right to appoint an expert witness is an integral part of their right to submit evidence and to be heard. The appointment of a single joint is rare as the parties will not have any basis on which to challenge the expert opinion, if it is unfavourable to them. In any event, par-

ties should be directed to restrict expert evidence to that which is reasonably required to resolve the issue or issues in dispute by being given detailed directions regarding the precise manner in which such evidence should be adduced before the arbitrators and tested by the opposing party.

The calling of expert evidence can result in considerable expense and lead to the arbitrators having the difficult choice between the opposing views of party-appointed experts. To avoid conflicting expert evidence and to reduce the costs and speed up the process arbitrators may recommend that the parties should instead jointly appoint a single expert or propose that the arbitrators would appoint a single expert instead. If deemed necessary and appropriate, arbitrators may choose to appoint their own tribunal-appointed expert in addition to the parties' expert(s). An advantage of appointing a single joint expert is that it may be a more cost-effective method of adducing expert evidence which makes it particularly attractive in cases where the cost and delay of resolving competing expert opinions would be disproportionate to the sums in dispute. Furthermore, instructing a tribunal-appointed expert in addition to the party-appointed experts will generally add to the cost of the arbitration and may possibly delay the proceedings. However, this may be considered appropriate where the arbitrators require assistance to decide differences of opinion between the party-appointed experts, particularly on complex technical issues.

This Guideline addresses the issues that arbitrators should take into account when considering how to deal with expert evidence.

Article 1 – Powers to appoint experts

Arbitrators should satisfy themselves, at the outset, that expert evidence is admissible pursuant to the arbitration agreement, including any applicable rules and/or the *lex arbitri*.

Commentary on Article 1

Parties' right to appoint experts

Many national laws and arbitration rules give parties the right to adduce independent expert evidence in writing, without first obtaining the arbitrators' permission to do so.

Even in the absence of express provisions in the laws and/or the rules, it is widely accepted that a party's right to be given a fair opportunity to present their case includes a right to call independent experts to give evidence in appropriate circumstances when such evidence is necessary for the resolution of an issue or issues in dispute. However, in most jurisdictions the arbitrators' directions are usually required to determine whether expert witnesses will be required to give evidence in person.²

Arbitrators' power to appoint their own expert

Many national laws and arbitration rules give express powers to arbitrators to appoint their own expert on their own motion or upon a party's request. In the absence of express provisions and, provided that there is no prohibition under the arbitration agreement, including the applicable arbitration rules and/or the *lex arbitri*, arbitrators may conclude that they have an implied power to appoint their own expert under their broad discretion to adopt procedures for the conduct of the proceedings suitable to the circumstances of the particular case.

Article 2 - Assessing the need for expert evidence

Arbitrators should, in consultation with the parties, consider at the outset of the arbitration, and keep under review during the course of the arbitration, whether expert evidence is needed to resolve any specific issues in dispute.

Commentary on Article 2

Timing

The need for expert evidence should be determined at an early stage of the arbitration. It is good practice to ask the parties whether they consider that there is any need for expert evidence in preparation for the case management conference. As it is not always possible at the outset of the arbitration to anticipate exactly how the arbitration will proceed, the question of whether expert evidence is needed and if so, the manner in which to present such evidence, may be revisited at a later stage.

Defining the issue or issues on which expert evidence is needed

When considering whether expert evidence is necessary, in consultation with the parties, arbitrators should first identify precisely what issue or issues the proposed experts

will be asked to express an opinion on and then consider whether the additional probative value of experts' opinions on that issue or issues is required to enable them to determine the dispute. Once a specific issue or issues have been identified and defined and the parties have agreed on the number of experts and form of presenting expert evidence, arbitrators should make a procedural order recording this, thereby reducing the risk of the expert(s) dealing with irrelevant issues or matters that are for the arbitrators to decide.

Nature of the expertise required

The choice of the expert or experts will be driven by the nature of the issue or issues on which expert opinion is sought. Such issues may be of technical, scientific, legal, financial or other specialist nature. Arbitrators should consider including in their procedural order the name(s) of the expert(s), if identified, or identify the nature of the particular expertise required by reference to the issue or issues on which expert opinion is sought.

Use of the arbitrators' own expertise

Arbitrators are often chosen, in part, because of their expertise in the subject matter, *lex arbitri* or the substantive law of the contract (*lex causae*) and, in such circumstances, expert evidence may be unnecessary. However, care should be taken by arbitrators when basing their arbitral award on their own individual analysis, because in some jurisdictions this could result in a challenge on the ground that arbitrators have overreached their powers, if such analysis has not been raised, and/or discussed, previously with the parties.

Experts on the law

Factors to be taken into account when considering the benefit of adducing expert opinion on the law include (1) the degree of familiarity of the arbitrators with the applicable law and/or similar system(s) of law; (2) the degree of counsel's competence in and familiarity with the applicable law and/or similar system(s) of law; (3) the extent to which the application of the law will impact on that issue and the likely effect this will have on the case; and (4) whether it involves general legal principles or some unique aspects of the applicable law. The need for expert evidence on the law is more obvious if counsel for the parties lack the necessary expertise and/or competence to address the applica-

ble law issues which are distinctive and/or crucial for the resolution of the case.

It is common practice in international arbitration for the arbitrators to seek submissions on the applicable foreign law by advocates qualified in that country rather than to seek expert evidence on that law.

Assessors

In certain jurisdictions, arbitrators may appoint assessors to assist them with the review and assessment of substantial amounts of very detailed data as, for example, in certain arbitrations arising out of construction and/or engineering contracts.³ The advantage is that considerable time and expense can be saved by employing an industry expert, such as a quantity surveyor, an engineer or a programmer, to review and assess such data. Even though assessors are engaged to evaluate and/or interpret evidence rather than provide expert evidence themselves, it is considered good practice that their appointment and remuneration basis be approved by the parties. However, unless decided otherwise by the arbitrators, the work of an appointed assessor is not disclosable to the parties unlike the report and evidence of any expert appointed. In any event, arbitrators considering appointing an assessor should always check whether they have the power to do so under the arbitration agreement, including the applicable arbitration rules and/or the *lex arbitri*.

Number of experts

The number of experts permitted will depend on the particular circumstances of the case, the complexity of the issues on which expert evidence is required and the sums in dispute. However, given the additional costs and possible delay associated with the use of several experts, it is prudent for the arbitrators to consider alternative arrangements, including authorising an expert to consult other specialist(s) provided that their report clearly identifies which part is based on their own personal opinion and which part is based on opinions provided by experts in other fields. The potential disadvantage of that procedure is that the consulted expert is not as available for cross-examination or questions of the tribunal.

Article 3 – Methods of adducing expert evidence

Having determined that expert evidence will be adduced, arbitrators should discuss with the parties the precise manner in which such evidence should be adduced, bearing in mind the need to conduct the arbitral proceedings in an efficient and cost-effective manner.

Commentary on Article 3

Party-appointed experts

If it is decided that each party should appoint their own expert, then each party is responsible for the selection and appointment of their own expert without the need to consult with the other party or the arbitrators. It is for the appointing party to agree with the expert the precise manner in which they will address the defined issue or issues, and make any relevant arrangements for the presentation of expert evidence as well as the remuneration of experts, subject to any directions given by the arbitrators (see Article 4 below). The experts should be instructed by the parties that their overriding duty is owed to the tribunal and not to the instructing party.⁴

Single joint expert

If it is decided that a single joint expert is to be appointed, the parties will be jointly responsible for the selection, appointment and remuneration of that expert. The parties should endeavour to agree on who to appoint and give jointly agreed instructions to the expert appointed. In the event of a failure to agree, the arbitrators should determine how to proceed.

Tribunal-appointed experts

If it is decided that an expert will be appointed by the arbitrators, the arbitrators should usually invite the parties to participate in the selection and designation of the tribunal-appointed expert and/or request them to comment on any candidate who may be suggested to be appointed. It is essential to obtain the parties' agreement to the expert selected by the arbitrators in order to reduce the risk of later challenges to the expert, their expert report and/or any award relying on it. Once a tribunal-appointed expert is appointed, the arbitrators may also ask the parties, within a specified time limit, to send comments on the expert's assignment, including any questions which the parties consider necessary to be addressed.

Selection and appointment of tribunal-appointed experts

As arbitrators may not have sufficient information available to them as to the issue or issues on which expert opinion is sought and/or may not know where to look for appropriate candidates, they may order the parties to produce a list of criteria, including a definition of the relevant qualifications and experience they consider the tribunal-appointed expert should possess. The arbitrators may then prepare a shortlist of possible candidates whom they consider have the requisite qualifications and expertise and invite the parties to comment on their suitability within a specified time limit. Alternatively, arbitrators may request the parties for an agreed shortlist from which to select the tribunal-appointed expert.

Qualities for tribunal-appointed experts

Prior to confirming the appointment of any tribunal-appointed expert, arbitrators should be satisfied that the expert (1) has the relevant qualifications and expertise; (2) is independent and impartial; (3) is able to devote sufficient time to the arbitral proceedings and to complete their report in an efficient and timely manner; and (4) is available to attend pre-hearing meetings and hearings. For these purposes, arbitrators should require expert candidate(s) to provide, prior to accepting their appointment, a declaration of independence and impartiality and a statement of their availability as well as a copy of their resume. All such information should be disclosed to the parties and they should be given an opportunity to provide any comments within a specified time limit.

Experts' fees and expenses for tribunal-appointed experts

The fees and expenses of a tribunal-appointed expert form part of the procedural costs and should be added to the arbitrators' expenses. It is good practice for arbitrators to include specific provisions in relation to the payment of expert fees and expenses when giving their directions.

Article 4 – Procedural directions for experts

Depending on the method chosen, arbitrators should set out the precise procedure for the collection, giving and testing of expert evidence in a procedural order.

Commentary on Article 4

Matters to include

Arbitrators should provide clear directions, following consultation with the parties, as to the expert's assignment. Matters to consider including are: (1) a list of issues on which the expert is requested to express an opinion; (2) a protocol for communication with the parties, and with any experts appointed by the parties, and the arbitrators; (3) instructions concerning examinations, tests, experiments and site visits, if any; (4) the timeframe within which to complete the expert report; (5) the method of exchange of expert reports; (6) the procedure following the exchange of the expert report; (7) the procedures for testing the expert evidence, including any requirement to attend a meeting and/or a hearing as well as the relevant arrangements for such meetings and/or hearings; (8) and any other relevant matters.

In the case of tribunal-appointed experts, the assignment should also include the terms of remuneration of that expert.

Party-appointed experts

It is for the party appointing an expert to direct its own appointee as to their assignment and to instruct them on any directions given by the arbitrators concerning the exchange of views and any meetings to be held with their counterparty expert. This may include directions for the experts to meet in order to seek to narrow any differences of opinion and to prepare a joint report identifying the issues on which they have agreed and the issues on which they disagree with an explanation as to how the differences arise. The issues on which agreement has not been reached will normally be dealt with by cross-examination of the two experts simultaneously, known as witness conferencing, to be followed by questions put by the arbitrators. The parties are afforded a right to ask further questions of the experts following the arbitrators questioning of the experts.

Specific matters concerning tribunal-appointed experts

Communication protocol

Arbitrators should establish a communication protocol setting out a clear procedure with regard to: (1) the manner in which the arbitrators should communicate with the tribunal-appointed expert; (2) the manner in which that expert should contact the parties and/or

the arbitrators; and (3) the manner in which the parties should submit documents and other relevant material to the tribunal-appointed expert. In any event, arbitrators should direct that any written communication with the expert should be at the same time copied to the opposing party or parties and the arbitrators so as to ensure that everyone involved in the arbitral proceedings knows precisely what is going on and/or what material has been provided to the expert.

Materials to be furnished to the tribunal-appointed expert

Arbitrators should also include clear provisions requiring each party to provide the tribunal-appointed expert with any information and/or to produce any documentation or material which the expert may require in order to prepare their report and/or to provide the expert with access to any relevant goods or other property for inspection or testing. Such inspections and/or testing should be carefully planned in advance, with appropriate protocols in place. These will usually take place in the presence of all parties and any party-appointed experts.

Article 5 – Testing expert opinions

- 5.1 Arbitrators should give directions as to how expert opinions should be tested. Some directions in relation to this are usually given in anticipation of receiving the expert report, but arbitrators may also give further directions as to the testing of expert's opinion once the reports have been exchanged.
- 5.2 When drafting their final award, arbitrators should provide reasons for relying on and/or preferring an expert's opinion or specific aspects of it in order to show that they have given proper consideration to any opinions proffered.

Commentary on Article 5.1

Review of party-appointed expert reports

After the experts' reports have been submitted, the arbitrators may consider giving further procedural directions to refine any disagreement as between experts and to reduce the time and costs of handling experts' reports. Arbitrators may, for example, order experts to meet prior to any scheduled hearing in order to identify areas of agreement and disagreement including the reasons for such disagreement and to prepare a joint report recording what was discussed between them. Alternatively, arbitrators may also order experts to submit written replies or comments on each other's reports.

Review of tribunal-appointed expert reports

The usual procedure to be followed in the case of a tribunal-appointed expert is for the arbitrators to provide the parties with a copy of the expert's report once it is received and to invite them to make any comments or observations thereon and to ask any further questions within a specified time limit. This ensures that parties are given an opportunity to review and comment on the expert's report and ask any further questions that arise from the expert's initial opinions. Arbitrators may, on their own motion and/or at the parties' request, seek clarifications, in writing, of a particular aspect or aspects of the report. If the expert is requested to attend a hearing, arbitrators should ensure that the parties receive a copy of the report sufficiently in advance of any scheduled hearing.

Experts and hearings

Arbitrators may, on their own motion, or at the request of either party, request an expert to attend a hearing to present their report and to answer questions with relation to it.

Party-appointed experts and cross-examination

An expert may be called to participate at a scheduled hearing. There are various ways in which to organise a hearing where experts' opinions are presented. A commonly adopted procedure is for the arbitrators to direct that the report of an expert is to stand as evidence in chief after confirmation of the report, and any corrections to be made. If that procedure is adopted the next step is to proceed to cross-examination. The arbitrators may raise questions during cross-examination and when cross-examination is complete the expert will be re-examined by its appointing counsel in respect of answers given during cross-examination or questioning by the tribunal. The arbitrators are at liberty to ask any further questions arising during that procedure.⁵

Expert witness conferencing

Where two or more experts of the same discipline are used, it is possible to direct a 'witness conferencing'⁶ so that the experts can be simultaneously examined in relation to the same issue or issues in dispute. Such a procedure is likely to reduce time and cost.

Commentary on Article 5.2

Assessing and weighing of expert opinion

Mindful of the fact that the experts' role is merely to produce an opinion on a specific issue or issues in a written report which is to guide and to assist arbitrators in reaching their decision, arbitrators should carefully examine the assumptions, reservations and reasoning underlying the experts' opinion and consider it together with the rest of the evidence submitted by the parties. Arbitrators should not simply adopt an expert's opinion as this may result in a challenge on the ground that they have failed to make the decision and have delegated their decision-making responsibilities to the expert.⁷ Equally, arbitrators should give careful consideration to the tribunal-appointed expert's opinion to ensure that the latter is not considered to usurp the arbitrators' role as decision makers.

Conclusion

The selection and appointment of expert(s) may have significant impact on the cost and duration of an arbitration. Therefore, careful consideration should be given when determining the most appropriate method for appointing experts. This Guideline seeks to highlight the factors that need to be taken into account when selecting and appointing an expert and summarises the matters that arbitrators should consider including when issuing instructions to the appointed expert(s).

Arbitrators should be mindful of the dangers of private communications and/or private conversations and/or any form of deliberation with an expert as they may all provide grounds for a challenge on the grounds of lack of due process and/or lack of independence and impartiality. Accordingly, it is considered best practice to conduct all communications in a transparent manner by copying to all of the parties all communications concerning the arbitration with the expert and to conduct all conversations with the expert in the presence of all parties. The risk of a challenge associated with an expert being involved in deliberations is most likely to arise with Arbitrator appointed experts, so particularly care should be taken in that situation.

NOTE

The Practice and Standards Committee (PSC) keeps these guidelines under constant review. Any comments and suggestions for updates and improvements can be sent by email to psc@ciarb.org

Endnotes

1. For ease of reference the *CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration* has been reproduced in Appendix I of this Guideline.
2. See eg., Article 25(3) ICC Rules; Article 27 UNCITRAL Rules (2010/2013). See also, Article 5 IBA Rules on the Taking of Evidence in International Arbitration.
3. See e.g., section 37 English Arbitration Act 1996. See also, section 54 Hong Kong Arbitration Ordinance.
4. See Article 4 *CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration* which deals with the independence and duty of a party-appointed expert as well as the matters to include in a written expert opinion. See also, Article 8 *CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration* which includes a sample declaration that an expert can use.
5. See also, Article 7 CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration.
6. This is also often sometimes referred to as ‘hot-tubbing’.
7. For further guidance, see CIArb Guideline on Drafting Arbitral Awards – Part I.

INTERNATIONAL ARBITRATION PROTOCOL

Annex I

**Protocol for the Use Party-appointed
Expert Witnesses in International
Arbitration**

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TABLE OF CONTENTS

Members of the drafting committee	
Foreword	1
Preamble.....	1
<i>Articles and commentaries</i>	
Article 1 — Definition	2
Article 2 — Use of Protocol.....	3
Article 3 — Tribunal’s Directions.....	3
Article 4 — Expert Opinions	4
Article 5 — Privilege	5
Article 6 — Expert Testimony	7
Article 8 — Expert Declaration	8

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**Protocol for the Use Party-Appointed
Expert Witnesses in International
Arbitration**

Foreword

The Chartered Institute of Arbitrators Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration (the ‘CIArb Protocol’) has been prepared by the Practice and Standards Committee of the CIArb.

The CIArb has issued this protocol so that parties and arbitrators can use it when party-appointed experts are needed to give evidence in arbitration proceedings.

The CIArb Protocol applies only to party-appointed experts. It is not intended to cover tribunal-appointed experts or single-joint experts.

It has been structured along similar lines to the IBA Rules on the Taking of Evidence in International Arbitration (‘IBA Rules’) and has been aligned with those parts of the IBA Rules which deal with party-appointed experts.

The CIArb Protocol expands upon the IBA Rules in that, amongst other things, it caters for tests and analyses to be conducted, it gives more detailed guidance as to what should (and should not) be in an expert’s written opinion and it deals with independence and privilege. It only differs from the IBA Rules in providing for experts’ meeting before reports are produced.

The CIArb Protocol can be used in its entirety by the arbitral tribunal directing (or the parties agreeing):

“Expert Evidence shall be adduced in accordance with the CIArb Protocol”.

Alternatively, the CIArb Protocol can be used in part or as a guideline for developing procedures to be adopted.

Preamble

1. This Chartered Institute of Arbitrators Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration is intended to govern in an efficient and economical manner the preparation and giving of expert evidence in international arbitrations, particularly those between Parties from different legal traditions. It is designed to

supplement the legal provisions and the institutional or ad-hoc rules according to which the Parties are conducting the Arbitration.

2. Parties and Arbitral Tribunals may adopt the Protocol in whole or in part or may use it as a guideline in developing their own procedures for the preparation and giving of expert evidence. The Protocol is not intended to limit the flexibility that is inherent in international arbitration, and Parties and Arbitral Tribunals are free to adapt it to the particular circumstances of each arbitration.

3. Each Arbitral Tribunal is encouraged to identify and establish with the Parties, as soon as it is appropriate in the Arbitration, the issue or issues in respect of which it considers expert evidence to be appropriate.

4. The preparation and giving of expert evidence in accordance with this Protocol is intended to give effect to the following principles:

- i. each Party is entitled to know, reasonably in advance of any Evidentiary Hearing, the expert evidence upon which the other Parties rely;
- ii. experts should provide assistance to the Arbitral Tribunal and not advocate the position of the Party appointing them;
- iii. these principles should be established before any Evidentiary Hearing, to the greatest possible degree of agreement between experts.

Article 1 – Definitions

In the Chartered Institute of Arbitrators Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration:

- i. **“Arbitral Tribunal”** means a sole arbitrator or a panel of arbitrators.
- ii. **“Arbitration”** means the arbitration in respect of which the Arbitral Tribunal has been appointed.
- iii. **“Evidentiary Hearing”** means any hearing in the Arbitration whether or not held on consecutive days, at which the Arbitral Tribunal receives oral evidence.
- iv. **“General Rules”** means the institutional or ad-hoc rules according to which the Arbitration is being conducted.
- v. **“Party”** means a party to the Arbitration, and “Parties” shall be construed accordingly.

- vi. “**Protocol**” means this Chartered Institute of Arbitrators Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration.

Article 2 – Use of Protocol

2.1 The Protocol shall govern the preparation and giving of expert evidence:

- a) whenever the Parties agree that it shall do so; or
- b) upon application by one or more Parties for party-appointed expert evidence to be adduced in the Arbitration, and the Arbitral Tribunal, after consultation with the Parties, directs that the Protocol shall apply.

2.2 In the event of a conflict between any provision of the Protocol and any mandatory provision of the law agreed by the Parties or determined by the Arbitral Tribunal to be applicable to the Arbitration, the mandatory provision of that law shall prevail.

2.3 In the event:

- a) of a conflict between the Protocol and the General Rules;
- b) that the Protocol and the General Rules are silent on matters concerning the preparation and giving of expert evidence; or
- c) that there is a dispute as to the meaning of the Protocol;

the Arbitral Tribunal shall, after consultation with the Parties, make any necessary interpretations and shall give any directions appropriate for the preparation and giving of expert evidence in the Arbitration.

Article 3 – Tribunal’s Directions

3.1 Where the Protocol is to apply, the Arbitral Tribunal shall, in consultation with the Parties and in timely fashion, direct:

- a) the issue or issues on which evidence shall be adduced in the Arbitration;
- b) the number of experts in respect of each issue that shall be permitted to give evidence in the Arbitration;
- c) what tests or analyses shall be required.

3.2 Expert evidence shall be adduced in the manner provided for in Articles 6 and 7.

Article 4 – Expert Opinions

4.1 An expert's opinion shall be impartial and objective.

4.2 Payment by the appointing Party of the expert's reasonable professional fees for the work done in giving such evidence shall not, of itself, vitiate the expert's impartiality.

4.3 An expert's duty, in giving evidence in the Arbitration, is to assist the Arbitral Tribunal to decide the issue or issues in respect of which expert evidence is adduced.

4.4 An expert's written opinion should:

- a) contain the full name and address, background, qualifications, training and experience of the expert;
- b) state any past or present relationship with any of the Parties, the Arbitral Tribunal, counsel or other representatives of the Parties, other witnesses and any other person or entity involved in the Arbitration;
- c) contain a statement setting out all the instructions the expert has received from the appointing Party and the basis of remuneration of the expert;
- d) only address the issue or issues in respect of which the Arbitral Tribunal has provided directions for expert evidence to be adduced;
- e) state which facts, matters and documents, including any assumed facts or other assumptions, have been considered in reaching the opinion;
- f) state which facts, matters and documents, including any assumed facts or other assumptions, the opinion is based upon;
- g) state the opinion(s) and conclusion(s) that have been reached and a description of the method, evidence and information used in reaching the opinion(s) and conclusion(s);
- h) state which matters the expert has been unable to reach an opinion on;
- i) state which matters (if any) are outside the expert's area of expertise;
- j) adequately reference all documents and sources relied upon;
- k) contain a declaration in the form set out in Article 8; and
- l) be signed by the expert and state its date and place.

Article 5 – Privilege

5.1 All instructions to, and any terms of appointment of, an expert shall not be privileged against disclosure in the Arbitration. The Arbitral Tribunal shall not, in relation to the instructions or terms of appointment:

- a) order disclosure of the instructions or appointment or any document relating thereto; or
- b) permit any questioning of the expert about such instructions or appointment

unless it is satisfied that there is good cause.

5.2 Drafts, working papers or any other documentation created by an expert for the purposes of providing expert evidence in the Arbitration shall be privileged from production and shall not be disclosable in the Arbitration.

Article 6 – Expert Evidence

6.1 Within the time ordered by the Arbitral Tribunal, and save where the Arbitral Tribunal directs otherwise, expert evidence shall be adduced using the following procedure:

- a) The experts appointed by the Parties on a related expert issue or issues shall hold a discussion for the purpose of:
 - i. identifying and listing the issue or issues upon which they are to provide an opinion;
 - ii. identifying and listing any tests or analyses which need to be conducted; and
 - iii. where possible, reaching agreement on the issue or issues, the tests and analyses which need to be conducted and the manner in which they shall be conducted.
 - iv. if the Arbitral Tribunal so directs, the experts shall prepare and exchange draft outline opinions for the purposes of these meetings, which opinions shall be without prejudice to the Parties' respective positions in the Arbitration and privileged from production to the Tribunal.
- b) Following such discussion, the experts shall prepare and send to the Parties and to the Arbitral Tribunal a statement setting out:
 - i. those issues upon which they agree and the agreed opinions they have reached on those issues;

- ii. those tests and analyses which they agree need to be conducted and the agreed manner for conducting them;
 - iii. those issues upon which they disagree and a summary of their reasons for disagreement; and
 - iv. the tests and analyses in respect of which agreement has not been reached as to whether they shall be conducted and/or the manner in which they should be conducted, and a summary of their reasons for disagreement.
- c) Following such statement:
 - i. any agreed tests and analyses shall be conducted in the agreed manner;
 - ii. any agreed tests and analyses in respect of which the manner of conduct has not been agreed shall be conducted in such manner as each expert considers appropriate in the presence of the other expert(s); and
 - iii. any test and analyses which have not been agreed shall be conducted in such manner as the expert requiring them to be conducted considers appropriate in the presence of the other expert(s).
- d) Following such statement, and such tests and analyses (if any), each expert shall produce a written opinion in accordance with the provisions of Article 4 dealing only with those issues upon which there is disagreement.
- e) Such written opinions shall be exchanged simultaneously.
- f) Following such exchange, each expert shall be entitled, should the expert so wish, to produce a further written opinion dealing only with such matters as are raised in the written opinion(s) of the other expert(s).
- g) Such further written opinions shall be exchanged simultaneously.
- h) Each expert who has provided a written opinion in the Arbitration shall give oral testimony at an Evidentiary Hearing unless the Parties agree otherwise and the Arbitral Tribunal confirms that agreement.
 - i. If an expert who has provided an opinion in the Arbitration does not appear to give testimony at an Evidentiary Hearing without a valid reason, unless the Parties agree otherwise and the Arbitral Tribunal confirms that agreement, the Arbitral Tribunal shall disregard the expert's written opinion unless, in exceptional circumstances, the Arbitral Tribunal determines otherwise.

6.2 The contents of the discussion referred to in Article 6.1(a) shall be without prejudice to the Parties' respective positions in the Arbitration and, unless all the

Parties agree otherwise, and save as provided in Article 6.1(b), the content of that discussion shall not be communicated to the Arbitral Tribunal.

6.3 Any agreement by the Parties pursuant to Article 6.1(h) that an expert need not give oral testimony at an Evidentiary Hearing shall not constitute agreement with, or acceptance by a Party of, the content of the expert's written opinion.

Article 7 – Expert Testimony

7.1 The expert shall give testimony in the manner as directed by the Arbitral Tribunal. The expert's testimony shall be given with the purpose of assisting the Arbitral Tribunal to narrow the issues between the experts and to understand and efficiently to use the expert evidence.

7.2 The Arbitral Tribunal may at any time, up to and during the hearing, direct the experts to confer further and to provide further written reports to the Arbitral Tribunal either jointly or separately.

7.3 The Arbitral Tribunal may at any time hold preliminary meetings with the experts.

7.4 If the Arbitral Tribunal is satisfied that either written opinion or testimony of an expert is not in accordance with the expert declaration contained in Article 8 of the Protocol, the Arbitral Tribunal shall disregard the expert's written opinion and testimony either in whole or in part, as it considers appropriate in all the circumstances.

Article 8 – Expert Declaration

The expert declaration referred to in Article 4.4(k) shall be in the following form:

- a) “I understand that my duty in giving evidence in this arbitration is to assist the arbitral tribunal decide the issue or issues in respect of which expert evidence is adduced. I have complied with, and will continue to comply with, that duty.
- b) I confirm that this is my own, impartial and objective, opinion.
- c) I confirm that all matters upon which I have expressed an opinion are within my area of expertise.
- d) I confirm that I have referred to all matters which I regard as relevant to the opinions I have expressed and have drawn to the attention of the arbitral tribunal all matters, of which I am aware, which might adversely affect my opinion.
- e) I confirm that, at the time of providing this written opinion, I consider it to be

complete and accurate and constitute my true, professional opinion.

- f) I confirm that if in the course of this arbitration I consider that this opinion requires any correction or modification I will notify the parties and the arbitral tribunal forthwith.”