

INTERNATIONAL ARBITRATION PROTOCOL

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

Chartered Institute of Arbitrators

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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-
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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.”