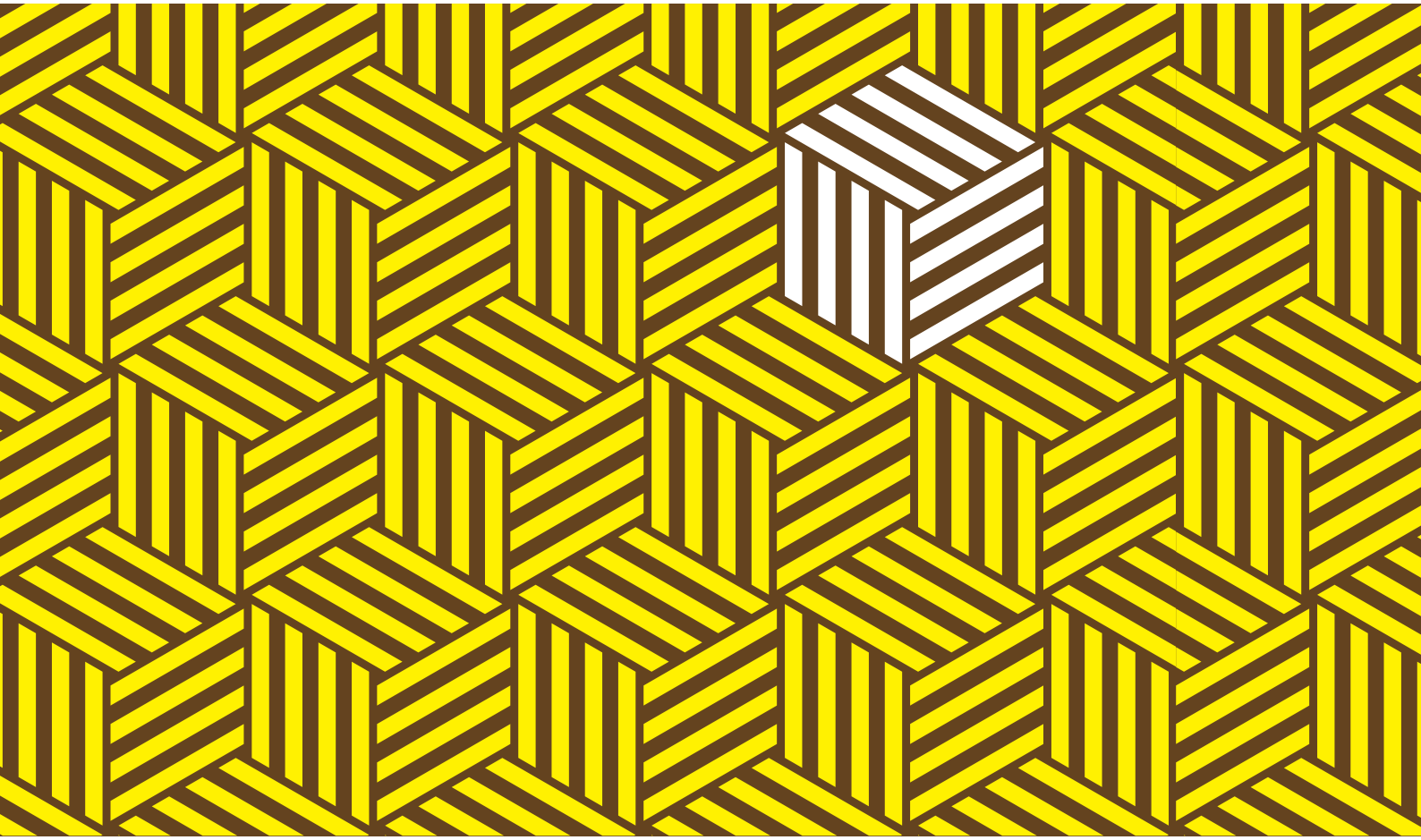
Singapore Academy of Law
Law Reform Committee

Report on Use of Experts in Construction Arbitration

September 2015



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About the Law Reform Committee

The Law Reform Committee ("LRC") of the Singapore Academy of Law makes recommendations to the authorities on the need for legislation in any particular area or subject of the law. In addition, the Committee reviews any legislation before Parliament and makes recommendations for amendments to legislation (if any) and for carrying out law reform.

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A. INTRODUCTION

1 This Subcommittee was appointed to look into the possibility of the regulation of experts in arbitrations. This report was commenced by the Subcommittee comprising Johnny Tan and Eugene Seah in 2010 and 2011; and subsequently completed by the Subcommittee comprising Eugene Seah and Naresh Mahtani in 2011 and 2012 ("the Subcommittee").

2 Generally, witnesses in both court and arbitration proceedings may only testify on relevant and factual evidence. The *opinions* of witnesses are generally inadmissible, as it is the duty of the tribunal (and not the witnesses) to issue opinions and judgments, and make decisions on issues.

3 However, an exception is made in the case of opinions given by experts, who have special knowledge and/or experience in specific issues, and whose opinions may assist the tribunal in its decisions and judgment on such specific issues.

4 Such expert witnesses may be appointed by the parties and/or the tribunal.

5 The evidence, opinions and guidance of expert witnesses are often considered helpful or even necessary to assist the parties in presenting their case and to assist the tribunal to decide on technical issues in engineering and construction proceedings (in court as well as in arbitration). These technical issues include those for instance relating to nature and extent of the works; valuation of the works; identification and valuation of variations; delays and delay analysis; issues concerning design, workmanship or materials; and defects and failures.

B. AREAS OF CONCERN

6 There has been widespread concern in various jurisdictions in relation to the quality of expert evidence in both litigation and arbitration.

7 For instance, in Lord Woolf's *Access to Justice, Interim Report* (1995)[1] included the following comments:

> In many cases the expert, instead of playing the [independent and impartial] role … has become … 'a very effective weapon in the parties' arsenal of tactics' [leading to] …
>
> - polarisation of issues and unwillingness to concede issues from the start;

1 Lord Woolf, *Access to Justice, Interim Report* (1995) at ch 23, paras 5–6.

- insufficient observance of the confines of expert evidence and expansion into the realms of rival submissions; and
- insufficient willingness to strip out, agree or concede all but the essential issues following exchange of reports.

8 Both the Australian Law Reform Commission (1999)[2] and the Law Reform Commission of Ireland[3] identified some of the main challenges to expert evidence to be the following:

- The court hears not the most 'expert' opinions, but those most favourable to the respective parties, and partisan experts frequently appear for one side.
- Experts are paid for their services, and instructed by one party only; some bias is inevitable and corruption a possibility.
- Questioning by lawyers may lead to the presentation of an inaccurate picture, which will mislead the court and frustrate the expert.
- Where a substantial disagreement concerning a field of expertise arises it is irrational to ask a judge to resolve it; the judge has no criteria by which to evaluate the opinions.
- Success may depend on the plausibility or self-confidence of the expert rather than the expert's professional competence.

9 Likewise in Singapore, there has been concern on the above matters. At the International Construction Law Conference in October 2006, The Honourable Attorney-General Chao Hick Tin (as he then was) remarked[4] amongst other things, on the need for perhaps a code of conduct to govern the conduct of construction professionals who support litigants in construction cases, and the increasing costs involved in such cases due to construction consultants (who sometimes double up as the parties' experts) operating on a contingency basis in such cases.

C. RULES AND CODES FOR CONDUCT OF EXPERT WITNESSES

10 In some jurisdictions, such as Australia and New Zealand, the conduct of expert witnesses in court is governed by their respective Rules of Court.[5]

2 Australian Law Reform Commission, *Managing Justice* (ALRC Report No 89, 1999) at para 6.75.

3 Law Reform Commission of Ireland, *Expert Evidence* (Consultation Paper No 52-2008) at para 10.

4 Keynote address delivered by The Honourable Attorney-General Chao Hick Tin at the International Construction Law Conference (October 2006) organised by the Society of Construction Law (Singapore).

5 Federal Court *Rules* 2011 (SLI No 134 of 2011) (Australia) and Judicature Act 1908 (PA No 89 of 1908) (New Zealand).

11 In England, in addition to Part 35 of the Civil Procedure Rules ("CPR 35") and its associated Practice Direction ("PD 35"), the Civil Justice Council Protocol provides guidance to expert witnesses and those instructing them in the interpretation and compliance with CPR 35 and PD 35.

12 In addition, in England, The Academy of Experts and the Expert Witness Institute have produced codes of practice for experts.

13 In Singapore, the conduct of expert witnesses in court proceedings is governed by Order 40A of the Rules of Court[6] ("ROC").

14 Order 40A rule 2 of ROC provides that it is the duty of an expert to assist the court on matters within his expertise; and adds that this duty overrides any obligation to the person from whom he has received instructions or by whom he is paid. Order 40A rule 3 provides for items which must be stated in an expert's report, such as details of his qualifications; a statement of the issues he is asked to consider; and identities of persons who carried out tests and experiments referred in the report; and reasons for his opinions. The other rules in Order 40A provide for procedural matters, such as limitations on the number of witnesses (rule 1); submission of written questions to the expert (rule 4) and provision for discussions and agreements between the experts (rule 5).

15 Order 40 provides rules in relation to court-appointed experts.

16 There do not yet exist any formal rules or codes governing expert witnesses in arbitrations.

17 The relevant provisions in the two statutes governing arbitrations are stated in the following paragraphs.

18 With regard to experts appointed by the tribunal, both the Arbitration Act[7] ("AA") and the International Arbitration Act[8] ("IAA") (that is, the UNCITRAL Model Law on International Commercial Arbitration ("Model Law")) provide that, unless otherwise agreed by the parties:

> (a) the arbitral tribunal may appoint experts to report to it on specific issues to be determined by the arbitral tribunal;
>
> (b) the arbitral tribunal may require the parties to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection; and
>
> (c) if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral

6 Rules of Court (Cap 322, R 5, 2014 Rev Ed).
7 Arbitration Act (Cap 10, 2002 Rev Ed) s 27.
8 International Arbitration Act (Cap 143A, 2002 Rev Ed) First Sched, Art 26.

report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

19 There are no specific provisions in AA and IAA regarding party-appointed experts, but both acts provide that the tribunal has wide discretion on the conduct of proceedings and the power to determine the admissibility, relevance, materiality and weight of any evidence.[9]

20 Following from this wide discretion given to the arbitrators and this very general guidance given in both AA and IAA, it is of course open to the arbitrators and to the parties (the latter, by agreement) to either adopt the relevant provisions in the ROC as rules in the arbitration; or to formulate their own rules.

21 Further, although the Evidence Act[10] does not govern arbitration proceedings, it is generally open to the tribunal to seek guidance from it in deciding evidential issues.

22 For institutional arbitrations (such as Singapore International Arbitration Centre ("SIAC") and International Chamber of Commerce ("ICC") arbitrations), the procedures are governed by their applicable rules (such as the SIAC Rules[11]). The institutional rules largely do provide general rules governing witnesses and the tribunal's discretion in the conduct of proceedings (such as rules 22 and 23 of the SIAC Rules), but these rules, similar to the provisions in AA and IAA, are couched to give the arbitrator a wide discretion, subject to consensus or agreement otherwise by the parties.

23 Furthermore, parties to arbitrations have the liberty to agree, and the tribunal also has the power to direct, that the rules relating to expert witnesses (and in fact on other matters relating to the evidence given in the arbitration) follow international conventions and guidelines.[12]

D. LAW REFORM?

24 As far as law reform is concerned, the Subcommittee is not ready yet to suggest any reforms to AA and IAA or recommend any codes of conduct. We summarise the reasons as follows:

(a) It appears to have been a deliberate policy in AA and IAA, following international practice in the arbitral world, to provide

9 Arbitration Act (Cap 10, 2002 Rev Ed) s 23; International Arbitration Act (Cap 143A, 2002 Rev Ed) First Sched, Art 19.

10 Cap 97, 1997 Rev Ed.

11 Singapore International Arbitration Centre Rules (5th Ed, April 2013).

12 *Eg*, International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration* (29 May 2010).

broad autonomy to the parties and a wide discretion and power to the arbitrators; leaving it free for them to agree procedures; or failing agreement, to let the tribunal have discretion in relation to such procedures. The abovementioned provisions in AA and the Model Law refer in this regard. As mentioned above, the parties and tribunal also have the liberty to apply in their arbitrations procedures similar to those in ROC, the institutional rules concerned, as well as guidelines such as those contained in the International Bar Association Rules.[13]

(b) It would be premature and contrary to the policy (in AA and IAA) and international convention for this Subcommittee to recommend any reform by introducing rules governing experts and evidence of expert witnesses, when it seems to have been considered as a matter of policy to allow the wide discretion, power and flexibility discussed above.

(c) In any case, before there are any such recommendations from this Subcommittee, there ought to be a deeper or more widespread study on the subject, with input from the stakeholders and concerned bodies, such as the Singapore Institute of Arbitrators; the Singapore International Arbitration Centre; and the Society of Construction Law (Singapore).

(d) Further, if there is to be any code of conduct, there needs to be a body to work on, administer and maintain such a code (such as The Academy of Experts and the Expert Witness Institute existing in England).

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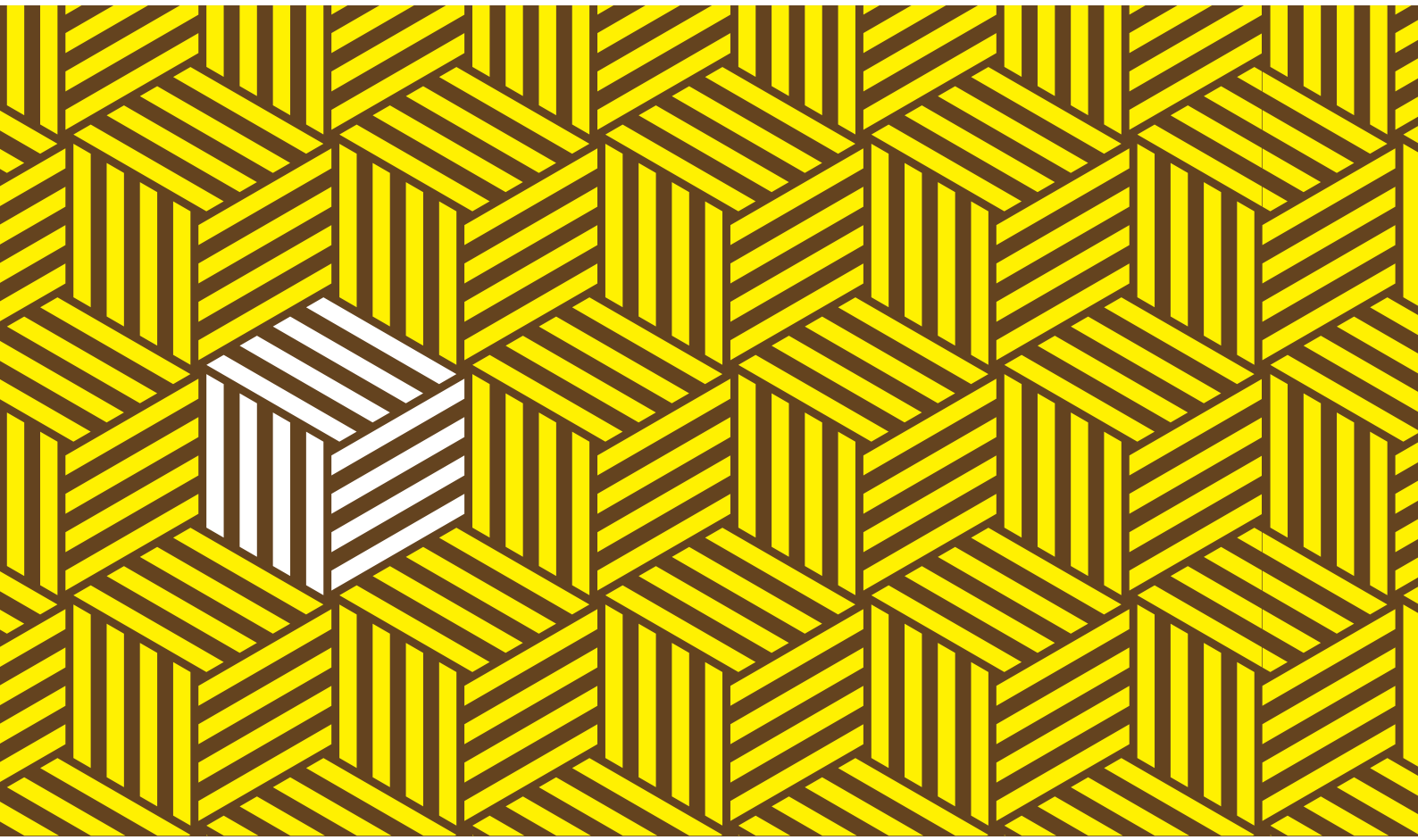
13 International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration* (29 May 2010).



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