The Academy of Experts

Form & Content of Joint Statements Guidance for Experts

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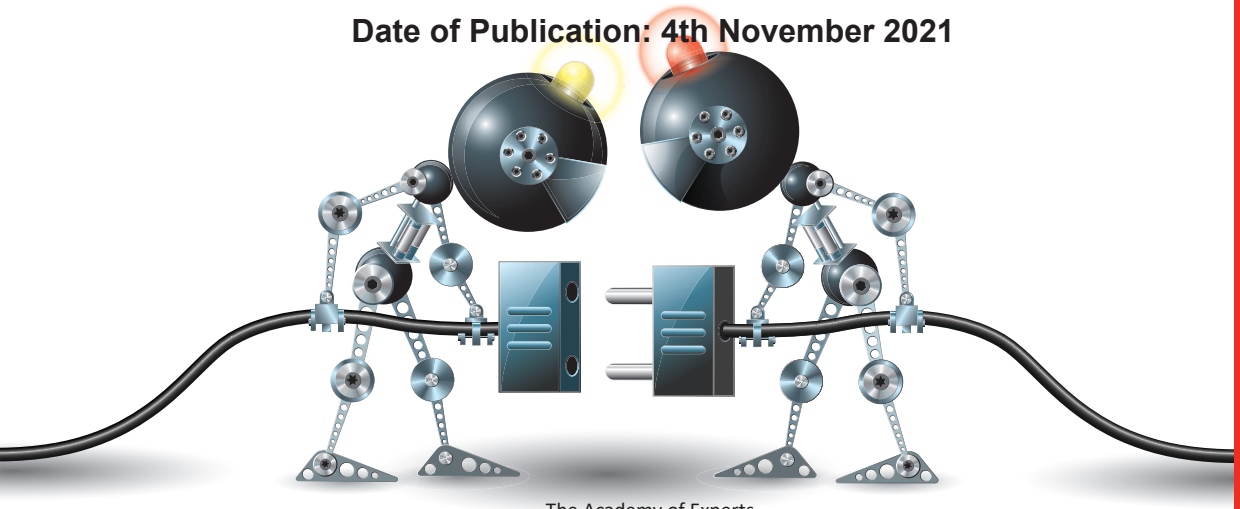

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INTRODUCTION

In 1989 the Lord Chancellor approved the formation of the Judicial Committee of The Academy of Experts consisting of seven senior Judges representing the English, Scottish and Northern Irish Benches. In 2003, the Lord Chancellor approved inclusion of the Hong Kong Bench followed by approval for the Singapore Bench in 2019. In the last 30 years it has rendered invaluable assistance in the promotion and improvement of standards.

In Civil Litigation one of the most valuable tools for the parties and especially the courts is the Joint Statement of Experts which results from the Meeting of Experts. These Meetings, usually court ordered, go under a variety of different labels – Meetings; Conferences; Conclaves; Discussions and others – however in essence they are all Meetings of Experts. For ease of multi-jurisdictional reading they are referred to in this Guidance as 'Meetings'. Similarly the words Claimant and Defendant are used irrespective of jurisdictional labels such as Claimant, Pursuer and Respondent.

The purpose of these Meetings is to produce a Joint Statement showing the Expert issues they agree and those which they do not agree and the reasons they cannot agree. Although most Meetings in Common Law jurisdictions are 'Without Prejudice', the Joint Statement once signed by the Experts is an 'Open' document which will be for the benefit of the Court as well as the parties.

Meetings are intended to be 'technical' meetings of professionals of like discipline and not adversarial or partisan. The rules governing Meetings and Joint Statements are very similar in most of the jurisdictions. Although this Guidance is focussed on Court Ordered Meetings, it is likely to be applicable to Tribunal or Arbitrator directed Meetings.

This Guidance is intended primarily to apply to adversarial Common Law Civil Litigation. Other proceedings for example in the Family Courts or in Public Inquiries, may have different requirements although the principles may be of assistance.

The Judicial Committee members* who have approved this guidance, are:

The Rt Hon The Lord Saville of Newdigate

President of The Academy of Experts

Chairman of the Committee

The Rt Hon The Lord Reed of Allermuir

Supreme Court United Kingdom

Sir Rupert Jackson

Arbitrator

The Rt Hon Lady Smith

Court of Session - Scotland

The Hon Mr Justice Horner

High Court - Northern Ireland

The Hon Mr Justice Harris

High Court - Hong Kong

The Hon Justice Quentin Loh

Supreme Court of Singapore

The Rt Hon Lord Justice Dingemans

Court of Appeal - London

The Hon Mrs Justice O'Farrell DBE

High Court - TCC - London

Sir Vivian Ramsey

Singapore International Commercial Court

The Hon Mr Justice Williams

High Court - London

Nicola Cohen

Clerk to the Committee

ACKNOWLEDGEMENT

The Committee wishes to acknowledge the valuable assistance given by Sir Bernard Eder and Justice Anselmo Reyes who generously shared their wide experience.

* Committee members are shown in the posts they held at the time that the committee worked on the guidance.

The Form and Content of the Joint Statement of Experts

Purpose of the Joint Statement of Experts

1. The Purpose of the Joint Statement of Experts ("JSE") is to assist the Court or Tribunal by setting out in concise form what the Experts can agree upon, thereby narrowing the issues in contention, and what they cannot agree upon and their reasons for disagreeing with another Expert on an issue.

List of Issues for Experts

2. The JSE begins with the proper identification of the issues or questions the Experts are asked to answer or address.

3. In the normal course of litigation or arbitration, the lawyers, (and if necessary, with the guidance of the Judge at the Case Management Conference or Tribunal in a Preliminary Meeting), frame the questions for the Experts to answer. This is because the lawyers know their respective cases and what they have to prove in support of their respective cases.

4. It is good practice that after the questions are framed by the lawyers (with or without the input of the Judge or Tribunal), they should be sent to the Experts for review in the event there is a need to refine them.

Individual Experts' Reports and/or Joint Statements

5. Depending on the nature of the case and the kind of Expert evidence to be given, the Court or Tribunal may require the Experts to file their reports and then to proceed to the Meeting of Experts to produce a JSE. This is the traditional or normal approach. This will also be the case in arbitrations where the case proceeds with memorials or submissions which attach all the documents, witness statements and Expert reports.

6. There is a current trend for Courts or Tribunals to order[1] the Experts:

   (a) to meet to discuss the issues before producing their reports; or

   (b) to produce the JSE before producing their reports.

   Many Courts or Tribunals see the early meeting of Experts as essential. The advantages of this sequence are first that it obviates the problem where Experts work separately and commit themselves to a case or a conclusion before meeting to hear other Expert views. This leads to polarization and less desire to change or modify their views. Secondly, this is particularly important where there is an important question concerning methodology. For example:

   i) in a money tracing case, there may be accounting or accountancy issues concerning how tracing is to be carried out and an early meeting of Experts to discuss alternatives which they can each

1 An order may read as follows: "Experts shall meet at an early stage and produce a joint statement of matters discussed. Experts shall seek to agree matters relating to the approach to be taken and documents or information to which the other Expert has access so as to agree a common database."

consider; or

ii) in a case involving computer modelling like finite element analysis, which is very expensive to carry out, an early meeting of Experts will enable them to consider which computer programme to use and the assumption for input into the programme or to agree on the alternative assumptions; or

(iii) an early meeting of Experts will surface discrepancies in information, documents and evidence made available to the respective Experts. It is important for Experts to be on a level playing field and there are standard directions to achieve this.[2]

7. However, what sequence is adopted depends very much on the nature of the case and the kind of Expert evidence required. For example in less complex cases, like a rent review case, the traditional sequence of the submission of the Expert reports before the Experts' Meeting may be more useful as it allows a more focused discussion between Experts before they issue the Joint Statement. Which course is adopted will be also very much driven or decided upon by the lawyers and the Court or Tribunal.

Experts' Meeting and the Joint Statement of Report

8. It is desirable that when the Experts meet to produce the Joint Statement or Report of Experts, they do so *without* lawyers being present.[3]

9. Experts know their subject better than other witnesses and are best placed to assist the court or tribunal on areas within their Expertise. Experience has shown that when two Experts in the same field meet without anyone else being present, they are usually able to agree upon some basic principles or facts or aspects or what they will consider as undisputed within their profession. They will be best placed to narrow down the areas of disagreement and bring the areas of issues in dispute into better focus.

Form and Content of the Joint Statement

10. There is no set format. Experts, lawyers and the Court or Tribunal are free to craft a format that suits the nature of the case and the Expert evidence being presented.

11. Experience has shown that the most useful format is the Schedule Form with columns and rows, like a Scott Schedule. A typical Schedule-type Joint Statement of Experts contains the following columns, (numbered (i) to (v) below), starting from the left:

(i) A Serial Number tracking the questions or issue or sub-questions or sub-issues within the List of Issues;

2 A standard direction of this nature is as follows: "The Parties shall ensure that all Experts (whether instructed by that Party or another Party) have access to such documents or information as are reasonably necessary for those Experts to provide their evidence on the Expert issues," In construction cases involving delay, another common direction is as follows: "In particular, delay Experts shall be given access to programmes and as-built records and quantum Experts shall be given access to documents and other records and accounting systems which are sources of quantum data."

3 Some Courts, like the UK Technology & Construction Courts, have practice directions that provide that whilst parties legal advisors may assist in identifying issues which the statement should address, those legal advisors (and the parties) should not be involved in either negotiating or drafting the JSE. In the London Commercial Court Guide, it is stated that "Subject to any directions of the Court, the procedure to be adopted at a meeting of Experts is a matter for the Experts themselves, not the parties or their legal representatives."

(ii) A statement of the question or issue to be answered: *eg*, "Was the design of the fixing brackets adequate to carry the load of the panel?"

(iii) Areas of Agreement of the Experts: *eg*, "We agree that (a) the design of each fixing bracket was consistent with good engineering design and practice; (b) the choice of stainless steel with *x* specification for fabricating the fixing was correct, consistent with good engineering design and practice; and (c) the load which each fixing had to carry was *y* and that for each standard panel of 2 meters by 1 meter, weighing *z* kg, a total of 4 fixings per panel, which includes the required factor of safety, would be adequate and consistent with good engineering design and practice".

(iv) Claimant's Expert's opinion on areas of disagreement: *eg*, "I do not agree that the three areas of agreement disposes of the issue. I am of the opinion that the shoddy workmanship in installing the fixing brackets caused the cladding to be defective. (a) My calculations (see my Report at page 18) shows that the fixing brackets had to be properly installed and accurately installed in a vertical position. (b) Some fixing brackets (see my Report, Appendix A where there are 78 photographs with identification of locations) were installed out of verticality, *some as much as by 45 degrees** and my calculations (see my Report at page 20) show that the effective strength drops by 18.75% which causes the carrying capacity to drop below the required factor of safety for each fixing bracket. (c) Moreover, the engagement of the fixing bracket to the stone panel at the angles observed will cause stresses within the stone panel sockets which can cause cracks to develop, either when the stone panel was placed on its fixings or over a period of time where the panels are subject to wind loads and vibrations from the passage of heavy trucks or vehicles. Such cracks completely compromise the carrying ability of the fixing brackets and may importantly compromise the required integrity of the stone panel which is another vital component for its safety as installed cladding (see my Report at Appendix B where there are 52 photographs showing such cracks at or around the vicinity of the fixing brackets). In my opinion the stone cladding of the building is not safe." (emphasis added)

(*For the phrase emphasized - this kind of statement in the context of this dispute should be avoided. A similar kind of statement to avoid is: "More than 35% of the panels in this façade are defective". The Expert should set out a schedule with precise identification of the panels that are defective or a schedule with those fixing brackets he criticizes with details like angle deviation from the vertical and calculations for each one as to how much the carrying capacity has been compromised. The aim of the Experts in the Joint Statement is to narrow the issues and not make such statements without proper substantiation thereby depriving the other Expert of the opportunity to state whether he agrees or disagrees).

(v) Defendant's Expert's opinion on areas of disagreement: *eg*, "I disagree with the the Claimant's Expert for the following reasons. (a) His calculations contain errors and his end result of carrying capacity dropping below the factor of safety is wrong – see my Report at Appendix D-1; his calculations carry arithmetical errors at lines 12 to 14 and again at lines 22-23. My calculations

are correct, consistent with current engineering practice (see Appendix G-1 in my Report) and the net result is that the factor of safety is not breached. (b) His calculations also include erroneous assumptions on the strength and performance of the stainless steel fixing brackets – see my Report at Appendix D-2. This further aggravates his erroneous results. (c) whether the fixing brackets are vertical or not, their load carrying capacity is not affected – see paragraphs 22 to 28 of my Report. The assumptions applied and deductions reached by the Claimant's Expert are incorrect: see Appendix F, G and H for the professional literature disagreeing the approach taken by him. (d) the cracks pointed out by the Claimant's Expert are incorrect – of the 52 photographs identified by him, 12 are duplicated in that they are taken from different angles; 46 of these photographs show cracks that developed 4 years after Completion (as they were not present in photographs taken 1.5 years after completion) and they were the clear result of tunneling works carried out in the immediate vicinity of the building and which tunneling works had 2 stop work orders issued by the public authorities due to unacceptably high vibrations during tunneling – see my Report pages 35 to 42 and Appendix J for the relevant facts, which are of public knowledge. (e) More than 20 photographs (see my Report, Appendix D-5 for identification of the photographs) were of cracks that were hardly visible and our Granite Expert has opined that these are inherent in the nature of the granite used, were within the specifications for the granite purchased and posed no danger of further crack development: see the Report of Mr ABC, page 3 to 4 and the tests carried out on the granite sample in his Appendix II. The cladding is, in my opinion, safe."

Note: It is sometimes convenient to allow, within the same column but in two sub-rows, for each Expert to first state the reasons for his disagreement in the first sub-row and his "reply" to the other Expert in the second sub-row; these two sub-rows are put within the same Serial Number and Question but to have two sub-rows for the Expert's reply to the other Experts grounds for disagreeing with him or her.

12. If there are more than two parties, the number of columns can be increased to cater for each party's Expert. There may be more than one Joint Statement of Experts, *ie*, more Scott Schedules, if there are different disciplines involved. In most cases, it is more productive to keep the separate disciplines in separate Joint Statements but to allow cross references, as in the above example, to the Vibration Experts or the Materials Expert on the qualities of the granite in question.

13. It is important for the Experts to give their views in a concise and point form manner to be of real assistance to the Judge or Tribunal. In most cases, if the Judge or Tribunal wishes to read more, he or she or they can go to the Expert reports or evidence for elaboration. It is therefore important for the Experts to cross-reference their points to the evidence, their reports, the reports of the other Experts or the published literature on the subject. It is very unhelpful for an Expert to make a point and leave the Judge or Tribunal to go and look for the evidence or reports or professional literature.

14. There can be as many rows as there are issues, sub-issues and sub-sub-issues. It is also acceptable for the Joint Statement to be set out on A3-sized paper.

15. Some Judges or Tribunals prefer the parties to provide one more column at the right most position left blank for the Judge or Tribunal to make their own notes.

16. The Scott Schedule form for the Joint Statement of Experts is not the only format. There may be times when the Expert evidence cannot be reduced to concise point form statements as in the examples above. One example is the evidence of medical Experts.

    (a) Some Judges or Tribunals prefer to frame the question and allow a few short and concise paragraphs to explain the Expert's view (his or her main points) and why he disagrees with the other Experts, meanwhile making references to the evidence, the authorities or professional literature.

    (b) Such a format can still accommodate a section in the front where the Experts can state what they can agree upon. For example, in the case of drowning in a swimming pool, the doctors may agree that (i) if a person is unconscious underwater for more than *x* minutes, in all likelihood serious brain damage would have occurred; (ii) but if the person is revived within *y* minutes, the likelihood is survival without much in terms of adverse effects, (iii) it is imperative in drowning cases in swimming pools to identify victims, rescue them and start resuscitation as soon as possible and (iv) it is important for all swimming pools to have AED equipment at hand.

    (c) Each such question may accommodate a few concise paragraphs to explain why they disagree with another Expert, *eg*:

    The Defendant's Expert: *"In this case, the victim had underlying cardiac conditions and was not taking his prescribed medication regularly that made a rescue under y minutes academic. In my opinion, the autopsy report shows considerable thickening of the wall muscles of the heart and paragraphs 5 to 9 in the autopsy report show that there was a heart attack followed by drowning."*

    The Claimant's Expert may reply: "*I disagree with the view of Dr PQR that the primary cause of death was a heart attack followed by drowning; the thickening of the wall muscles of the heart were only moderate (see the medical literature, with the relevant portions highlighted in my Report at Appendix C). The autopsy report's conclusion are erroneous because (1) the thickening of the muscle walls of the heart are not indicative of a heart attack, only that the Deceased suffered from hypertension; (2) the medication dosage prescribed to the deceased was more prophylactic in nature and not a serious medical condition (see my Report at paragraphs 34 to 38, Appendix D).*"

17. There are times when Experts start from different points or utilize different methodologies to derive the opinions. This can happen with Experts dealing with delays and extension of time issues in a construction contract or quantum Experts using different bases from which to calculate damages. If all else fails to achieve some common ground, such Experts should be asked[4] to at least do the following:

4 Standard directions in this respect might be as follows: "Delay Experts should seek to agree such things as the methodology to be used, the appropriate baseline programme for the analysis and the availability of other programmes and as-built records to be used" and "Quantum Experts should seek to agree such matters as the approach to the quantum claims to agree figures as figures, they should also discuss what documents, other records and accounting systems are available as the source for quantum data."

(a) state why they would not use the bases or starting points used by the other Expert or Experts or even why it is erroneous; and

(b) in the event the Court of Tribunal finds that the basis or starting point of the other Expert is the correct methodology, would they agree with the conclusions or figures reached by the other Expert, *ie*, "to agree figures as figures".

It is sometimes possible for Experts to agree upon discrete parts of the damages even though they start from different bases or employ different methodologies. If they can, they should do so.

18. In relation to the Experts' Meeting and the JSE, two matters can give rise to disputes and should be clarified, *ie*, agreed or ordered before the procedure is settled and/or meetings take place:

(a) First, whether the discussions between the Experts during the Experts' Meeting or in connection with the JSE is without prejudice and cannot be referred to in Court or Arbitral proceedings; and

(b) Secondly, whether, if the Experts reach agreement on an issue, that agreement does not bind the parties.

19. In many Common Law countries, whether by procedural rules or convention or order of court, the Joint Statement must (or at least should) include the Joint Statement Declaration (see Civil Justice Council 'Guidance for the instruction of Experts in civil claims' s.80 and 'TAE Expert's Declaration (Civil Cases)'). This will usually be immediately before the signatures of the Experts in the Joint Statement to the following effect[5]:

"(a) We the undersigned Experts individually here re-state the Expert's Declaration contained in our respective reports that we understand our overriding duties are to the court and not the party appointing us, and that we have complied with them and will continue to do so.

(b) We further confirm that we have neither jointly nor individually been instructed to, nor has it been suggested that we should avoid or otherwise refrain from reaching agreement on any matter within our competence."

At times, the Experts may additionally be asked to confirm that the parties and or their legal advisors have not attempted to interfere with their discussions or answers in the JSE or to suggest any particular answer be given.

20. In the case of International Arbitrations, it may be good practice to have the above Joint Statement Declaration, but whether it is mandated or not will depend on mainly the Tribunal or in some cases, the law of the seat or the procedural rules under which the arbitration is being held.

5 NOTE when the JSE is before the Experts' Report(s) have been prepared, there is an alternative Declaration (see Appendix A)

APPENDIX A

Joint Statement Declaration to be used when the Meeting is prior to Reports being prepared

Generally the discussion between Experts takes place once the reports have been prepared and exchanged. These Reports would have included the Expert's Declaration. If however, the discussion is before the preparation of the Experts' Reports a different Declaration is required on the Joint Statement. This is shown below and should be in the Joint Statement immediately before (above) the Experts' signatures.

The Declaration

1 We the undersigned Experts individually confirm that we understand our overriding duties to the court, have complied with them and will continue so to do.

2 We the undersigned Experts individually confirm that we have read Part 35 of the Civil Procedure Rules, the accompanying practice direction and the Guidance for the instruction of Experts in civil claims and have complied with their requirements.

3 We further confirm that we have neither jointly nor individually been instructed to, nor has it been suggested that we should, avoid or otherwise defer from reaching agreement on any matter within our competence.

NOTE: This declaration is for the Joint Statement only and does not take the place of the full Expert's Declaration which should be included in all expert's reports - see www.academyofExperts.org

APPENDIX B

EXPERT'S DECLARATION (Civil Cases)

This Declaration* should be inserted between the end of The Report and the Expert's signature.

For arbitration and tribunal proceedings you should use the appropriate declaration.

I [**Insert Full Name**] DECLARE THAT:

1 I understand that my duty in providing written reports and giving evidence is to help the Court, and that this duty overrides any obligation to the party by whom I am engaged or the person who has paid or is liable to pay me. I confirm that I have complied and will continue to comply with my duty.

2 I confirm that I have not entered into any arrangement where the amount or payment of my fees is in any way dependent on the outcome of the case.

3 I know of no conflict of interest of any kind, other than any which I have disclosed in my report.

4 I do not consider that any interest which I have disclosed affects my suitability as an expert witness on any issues on which I have given evidence.

5 I will advise the party by whom I am instructed if, between the date of my report and the trial, there is any change in circumstances which affect my answers to points 3 and 4 above.

6 I have shown the sources of all information I have used.

7 I have exercised reasonable care and skill in order to be accurate and complete in preparing this report.

8 I have endeavoured to include in my report those matters, of which I have knowledge or of which I have been made aware, that might adversely affect the validity of my opinion. I have clearly stated any qualifications to my opinion.

9 I have not, without forming an independent view, included or excluded anything which has been suggested to me by others, including my instructing lawyers.

10 I will notify those instructing me immediately and confirm in writing if, for any reason, my existing report requires any correction or qualification.

11 I understand that;

11.1 my report will form the evidence to be given under oath or affirmation;

11.2 questions may be put to me in writing for the purposes of clarifying my report and that my answers shall be treated as part of my report and covered by my statement of truth;

11.3 the court may at any stage direct a discussion to take place between experts for the purpose of identifying and discussing the expert issues in the proceedings, where possible reaching an agreed opinion on those issues and identifying what action, if any, may be taken to resolve any of the

outstanding issues between the parties;

11.4 the court may direct that following a discussion between the experts that a statement should be prepared showing those issues which are agreed, and those issues which are not agreed, together with a summary of the reasons for disagreeing;

11.5 I may be required to attend court to be cross-examined on my report by a cross-examiner assisted by an expert;

11.6 I am likely to be the subject of public adverse criticism by the judge if the Court concludes that I have not taken reasonable care in trying to meet the standards set out above.

12 I have read Part 35 of the Civil Procedure Rules, the accompanying practice direction and the Guidance for the instruction of experts in civil claims and I have complied with their requirements.

13 I am aware of the practice direction on pre-action conduct. I have acted in accordance with the Code of Practice for Experts and/or code of conduct for experts of my discipline, namely [identify the code].

STATEMENT OF TRUTH

I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Discussions Between Experts

Joint Statement Declaration

For all civil cases in England & Wales under CPR in accordance with the Guidance for the instruction of experts in civil claims issued by the Civil Justice Council this Declaration should be inserted into the Joint Statement issued following the discussion(s) of experts immediately before the experts' signatures.

1 We the undersigned experts individually here re-state the Expert's Declaration contained in our respective reports that we understand our overriding duties to the court, have complied with them and will continue so to do.

2 We further confirm that we have neither jointly nor individually been instructed to, nor has it been suggested that we should, avoid or otherwise defer from reaching agreement on any matter within our competence.

Experts' Signatures …… Date……

The Academy of Experts

The Academy

Located in Gray's Inn TAE was founded in 1987 with the objective of providing, for the first time, a professional body for Experts to establish and promote high objective standards.

Although there is representation on the Academy's Council from the legal profession the majority of the officers, including the Chairman, are practising Experts - The Academy of Experts (TAE) is run by Experts for Experts and those using them.

Training and development

TAE offers a comprehensive range of training programmes to enable members to develop their Expert skills, and undertake Continuous Professional Development activity. Courses range from basic Role and Responsibilities through to the requirements of Procedure Rules and the practice of Giving Evidence.

TAE is also a training and accreditation body for ADR Neutrals, including Mediators, Conciliators and Expert Determiners. It publishes and maintains The Register of Qualified Dispute Resolvers and awards the designatory letters QDR to those achieving the approved standard. Standards are enforced in exactly the same way as for Experts.

Accreditation of Experts

All applicants to TAE who wish to become Accredited Practising Expert Witnesses undergo a rigorous vetting procedure to ensure standards of excellence are maintained. This is the process which gives the officially recognised full accreditation as a Practising Expert. Those achieving it are awarded the designatory letters MAE. Ethical and professional standards are underlined by Codes of Practice and enforced by a disciplinary committee.

ADR

The promotion of Cost Efficient Dispute Resolution became increasingly important to TAE. It is now a major force in the introduction and development of Alternative Dispute Resolution (ADR) and has led to the development of the Faculty of Mediation and ADR.

Range of services

TAE provides a full range of services to its members including:

- ❑ Technical Helpline
- ❑ Bespoke Training
- ❑ Technical Meetings
- ❑ Magazine and regular newsletters
- ❑ A detailed Expert's Handbook for Practical Guidance
- ❑ A regular survey of Expert's fees
- ❑ Regular meetings on matters of Expert interest
- ❑ Social functions

TAE provides a number of services which assist both Academy members and the legal profession including:

- ❑ ExpertSearch Finding and matching the right accredited Expert to the case.
- ❑ Full training & accreditation of Commercial Mediators. The Academy awards the qualification QDR (Qualified Dispute Resolver) to members on its register.
- ❑ Mediator Appointment Service - Finding the right accredited mediator.
- ❑ Membership also open to the legal profession.