



Concurrent Expert Evidence – ‘Hot Tubbing’

INTRODUCTION

This practical perspective is intended to assist members of the Forensic & Expert Witness Community new to the procedure of concurrent expert evidence. Its aim is to provide an insight into this procedure and the role of the forensic accountant as expert witness and/or adviser. This practical perspective is not advice for acting as an expert and should not be used as such. It reflects an understanding of English procedure based on research undertaken. This is not legal advice and should not be relied upon as legal advice, which, if required, should be obtained from a suitably qualified legal adviser.

For these purposes, concurrent expert oral evidence, also known as ‘witness conferencing’ or ‘hot tubbing’, is taken to be two or more expert witnesses being sworn in at the same time and participating in a discussion chaired by a judge. The agenda would be based on the joint statement prepared by the experts before the hearing, which would record the matters upon which the experts still disagreed. The discussion would be attended by counsel for the parties, who would be entitled to cross examine on points not raised by the judge (hereinafter referred to as ‘the procedure’ or the more descriptive ‘hot tub’).

In this practical perspective, the decision-maker is described as the ‘judge’, although the procedure could equally apply to one or more arbitrators or other tribunals. Also, it is intended to assist with experts giving evidence in accordance with the Civil Procedure Rules (CPR), although most of the points are equally applicable to arbitral proceedings where the arbitrator(s) and the parties have agreed that expert evidence will be given concurrently. The expert should obtain the applicable rules and required format from the instructing party on their appointment and request that they are notified of any changes as the proceedings unfold.

HISTORY OF CONCURRENT EXPERT EVIDENCE

Hot tubbing was originally developed in the Australian Competition Tribunal, and was introduced in the English Courts by CPR PD 35, paragraph 11 under the April 2013 Jackson Reforms.

Prior to the formal implementation in the CPR, hot tubbing had been adopted by specialist courts and numerous international arbitration bodies, for example as a pilot scheme in the English Technology and Construction Court guidelines in 2010 and by the IBA in 1999.

In April 2016, the Civil Justice Council commenced an 18-month project focusing on how the hot tubbing process had fared since its formal implementation. The majority of expert witnesses, legal practitioners and judicial respondents surveyed believed that hot tubbing

saved time, improved the quality of the evidence and assisted the court. However, they disagreed that hot tubbing saved costs.

In April 2019, the Chartered Institute of Arbitrators (Singapore) issued their Guidelines for Witness Conferencing in International Arbitration. These guidelines provide tribunals, witnesses and parties with guidance in the context of hot tubbing.

Trends show that, in international arbitrations, the request for concurrent evidence is usually initiated by the arbitration tribunal, rather than the parties or counsel. This may be due to the perceived disadvantages of hot tubbing, such as a sense of loss of control from counsel and therefore increased risk.

WHAT IS CONCURRENT EXPERT EVIDENCE?

In the traditional expert evidence process, the experts for the parties provide examination-in-chief based on their expert report, followed up by cross-examination, with the expert for the claimant testifying first, followed by the expert for the respondent. The process can be time consuming, and the evidence in chief provided by the two experts often focuses on points advancing their respective clients' cases, rather than focusing on points of conjecture. Hot tubbing is an alternative approach whereby the experts give evidence at the same time as opposed to as part of their client's examination.

In practice, the experts issue written reports and usually then meet pre-trial in order to identify where they agree and where they disagree. At trial, experts in the same, and conceivably related, disciplines are sworn in at the same time and the judge chairs a discussion between them. If a joint statement has been prepared, the matters upon which the experts disagree typically serve as the agenda, although this can be set by the Court or by the parties subject to Court approval. After the judge has put his questions, counsel is then usually allowed to join in the discussion. They can put questions to the experts as and when permitted by the judge, to test the validity of the expert's view, to seek clarification of the expert's view or to elicit evidence on any issue which has been omitted from consideration during the judge's questioning. In addition, at the judge's request the experts can put questions to each other, or comment on responses provided by the other expert. Another variation allows for a conventional cross-examination by counsel before the judge puts his questions and chairs the discussion. The judge may then summarise the experts' respective positions and ask them to confirm or correct that summary.

The overall objective of a hot tub is to put the two experts on an equal footing and to allow the court to concentrate on the real issues between them. The judge can hear the experts discussing the issues together and explaining their points while reducing the 'one on one' gladiatorial combat between cross-examining counsel and expert. It is designed to save court time by avoiding separate cross examination of each expert and by only investigating areas of disagreement. The hot tub is said to highlight the strengths and weaknesses of the experts' respective positions and often lead to weak or flawed expert evidence becoming readily apparent. With another expert present an expert will find it much harder to 'get away with' flawed evidence.

ADVANTAGES / DISADVANTAGES OF CONCURRENT EXPERT EVIDENCE

Advantages

- Arguably, one of the greatest strengths of hot tubbing is its reduction in the length of proceedings, as the experts no longer need to be separately examined. Especially where there are numerous experts in different disciplines providing evidence, which would normally take several days, evaluation of the experts' opinions and reasoning can now be resolved much more quickly.
- It leads to efficiency in that the experts can effectively confront each other's evidence on the spot and aids the court or judge and counsel to formulate fully informed questions. In particular, it defines more precisely the issues in dispute in the case.
- The level of tension perceived by the experts may dissipate as any sense of adversarial contest between counsel and the expert gives way to a genuine exchange of expert views. The process allows the expert to express their opinions without inhibitions that come from the traditional method of cross-examination. The expert can perceive that the process is directed towards identifying the truth, rather than winning a case. In addition, the quality and accuracy of the expert evidence may improve as the experts can be questioned by the opposing expert, rather than by counsel without a background in the discipline in which the expert is giving evidence.
- Sometimes the most qualified professionals will not agree to act as expert witnesses because of a perception that cross-examination is a hostile experience and designed to heighten the client's case rather than to establish the truth. As the hot tub becomes standard practice in UK civil courts, it may encourage the most qualified practitioners into acting as experts if the process is controlled by the judge.
- It allows all the experts to deal with the same topic based on the same assumptions at the same time, rather than in conventional cross-examination where experts may be working from different assumptions and days, if not weeks, may separate their respective evidence, with a good deal of other evidence having been interposed. The experts can clarify immediately any lack of understanding that may exist.

Disadvantages

- In some instances, one particular expert may 'lead' the discussion due to their dominant personality, superior experience or eloquence. Additionally, an expert may be unable to present themselves as well as they would under regular examination or may feel compelled to concede on a point due to peer pressure or relative seniority within the profession.

- Unlike traditional cross-examination, which is driven by counsel, the discussion is typically driven by the judge one topic at a time, which places an emphasis on counsel to ensure the judge does not miss any important points before moving on. This may lead to situations where poor experts are let off the hook from a searching cross-examination.
- Counsel is unable to call upon their expert's assistance whilst the other expert is speaking as both experts are seated together.
- Time traditionally spent by counsel preparing and probing the expert for their testimony will need to be reallocated to preparing the expert for their hot tubbing experience. This preparation could well differ to what experts have experienced previously.
- There is a risk that experts may over-simplify their explanations to enable counsel and the judge to understand the underlying concepts, and that the time constraints could lead to discussions remaining at a superficial level.
- There may not always be a time and cost saving as compared to traditional cross-examination and it may be difficult to determine the cases in which concurrent evidence is more appropriate.

GIVING EVIDENCE IN THE HOT TUB

The Experts' Joint Statement usually forms the basis of the agenda for hot tubbing, the final form of which is either decided at the pre-trial review or at the trial by the judge after hearing from the parties. However, the judge may re-order, revise or supplement the agenda as they see fit. The written agenda would then be produced and made available to the experts before they give their evidence.

Potentially, there could be more than two experts giving their evidence together where the subject matter overlaps into other experts' domains. In a large case where there are multiple claims, the experts' evidence may be divided into several sessions at which all the relevant experts are present for particular claims.

Before the evidence starts, and after hearing from the parties, the judge will identify to the experts any significant factual matters or issues which have arisen in the trial thus far and which may affect their evidence.

The judge will generally explain the procedure that will be followed and how it is different to the traditional approach, and then introduce issues in the order in which they appear in the agenda. Once an expert has expressed a view the judge may seek further clarification from that expert or invite the other expert to provide their view or question the first expert. The judge may also invite counsel to question the experts at any time.

Following any cross-examination, the judge may seek to summarise the experts' different positions on the issues, as they then are, and ask them to confirm or correct that summary.

CONCURRENT EXPERT EVIDENCE IN A VIRTUAL WORLD?

Despite the potential delays and re-listings of many hearings arising out of difficulties during the pandemic, a number of matters have been resolved by way of virtual hearing since the beginning of the pandemic. Accordingly, the use of virtual hearings is likely to increase. In fact, virtual hearings were not uncommon pre-pandemic, for example, in emergency arbitrations, or where witnesses were unable to attend in person. Evidence suggests that virtual hearings may be more time and cost efficient, eliminating the costs and inconvenience of international travel and accommodation.

The International Chamber of Commerce released a Guidance Note on mitigating the effects of the COVID-19 on 9 April 2020, which included Annex II as set out below:

“The tribunal may agree with the parties or require them to make their witnesses/experts available for a hot tubbing session. If so agreed or required, the parties should ensure that their witnesses/experts are readily available at the time and for the duration of the hot tubbing and the process shall proceed as instructed by the tribunal”.

The revised guidance and protocols in light of virtual hearings have been relatively silent with respect to hot tubbing, with the emphasis on sequential evidence. This infers that for virtual hearings, the use of hot tubbing may no longer be as frequent as in a physical court or tribunal setting.

Additional guidance is required if hot tubbing is to thrive in the virtual world, including logistics and procedures, which would build upon the existing frameworks, such as Clarb’s virtual hearing guidance of April 2020.

Considerations could include, ensuring no-one else was in the room with the expert, managing interventions and questioning from the judge, setting out how to signal interventions from counsel and the court without the need to interrupt the audio-feed. The expert is also encouraged to make full use of the electronic presentation of evidence where applicable, for example visual presentation of the evidence (such as a slide deck). There may also be a remote hearing protocol in place which will set out the process for the provision of concurrent evidence (if any).

The principal additional difficulty with hot tubbing in a virtual hearing would appear to relate to the more complicated logistics and preparation time required which do not dilute the benefits of hot tubbing as detailed above.

CHECKLIST OF ADDITIONAL POINTS TO CONSIDER FOR THE HOT TUB

While the expert’s over-riding responsibility remains to the court, this practical perspective shows that the expert will need to modify their approach when seated in the hot tub. The following checklist is designed to help the expert prepare for the first time.

- Remember always – your overriding duty is to assist the court with your expertise.

- Draft your expert report in the knowledge that the judge may invite the expert with the apparently superior knowledge or more controversial position to take the lead in presenting the expert evidence.
- Expand the 'joint statement' by explaining or cross-referring all areas of disagreement to the expert reports as the judge will use this as his agenda.
- While preparing the joint statement with the other expert(s), think about how you will interact with them during the hot tub discussion. Report to your instructing party any concerns about your opposing expert's experience or independence, which may render the hot tub unworkable.
- Check with your instructing party the applicable court or arbitration rules and whether any modifications have been agreed with their opposite numbers and the judge, for example whether any cross-examination will take place before or only after the discussion.
- You may wish to establish the degree to and manner in which the judge has allowed experts to directly challenge the evidence of other experts in previous cases.
- Be ready with an opening statement setting out your overall position, where this may be allowed.
- You should plan how to respond to arguments that the other expert(s) may put.
- Once in the hot tub, listen attentively to the other expert's arguments and avoid the danger of simply being carried along by their presentation.
- Listen carefully to the questions and instructions put to both experts by the judge and remember your duty to assist the decision-maker rather than be drawn into argument with the opposing expert.
- In this less structured environment, you may need to respond to a very persuasive, confident or assertive expert, but without becoming an advocate for your own client's case.
- Consider bringing along an assistant to assist your party's legal team during cross examination.

ETHICAL ADVICE

If you are ever in doubt as to whether or not your conduct is ethical, you should step back from the situation and analyse it. It often helps if you put your thoughts down on paper or take a second opinion. Section 100 of the Code of Ethics (paragraphs 100.16 – 100.20) includes a framework for ethical conflict resolution. This outlines a series of steps that can help you not only to identify the problem but also to resolve the ethical conflict. In resolving such ethical conflicts it is important that

you make a file note to explain the rationale for your position. This will help if your conduct is later challenged.

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