

## **HOT TUBBING EXPERT WITNESSES – DOES IT WORK?**

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### **Abstract**

Hot Tubbing, also known as Concurrent Evidence, the Tandem Expert Process, or Dueling Experts, originated in Australia in the 1970s and has been exported to Canada, Hong Kong, New Zealand, the U.K., and more recently, to the U.S. While hot tubbing has primarily been used in arbitration it is now being imported to courtrooms. As initially formulated the process was intended as a way to better control cases involving expert testimony. The process involves experts taking the witness stand to offer their opinions back to back on specific issues. Following each presentation, experts may question one another and debate various responses. The judge or tribunal may also question experts directly to clarify issues in their minds. As is to be expected, there are perceived good and bad points concerning the process. This paper is based in part on a literature review concerning hot tubbing. This review has been bolstered by the results of a privately run survey of expert witnesses who have participated in hot tubbing. Each experienced expert was asked to address what they consider to be the benefits and the weaknesses of the process to help answer the question – does hot tubbing work from the perspective of testifying experts?

## ➤ Introduction

Expert witnesses are often critical in litigation or arbitration of construction disputes on complex construction projects, especially if these legal disputes center on technical issues such as forensic schedule analysis, loss of productivity, failure analysis, design defect issues, etc. Traditionally, each party to the dispute retains their own expert witnesses for each complex technical issue. The role of an expert witness is to explain technical issues to independent neutrals or triers of fact (i.e., mediators, arbitrators, judges or juries) that are unlikely to understand on their own. The role of an expert in arbitration or litigation is generally discussed in the following manner.

*“The Royal Institution of Chartered Surveyors ... provides an apt definition for an expert witness.*

*‘An expert witness is a person engaged to give an opinion based on experience, knowledge, and expertise. The overriding duty of an expert witness is to provide independent, impartial, and unbiased evidence to the court or tribunal.’*

*... Evidence from an expert is used when the evaluation of the issues in dispute involves technical or other subject knowledge that only real experts would have and that would likely be outside the knowledge of laypersons and those trying the case.”<sup>1</sup>*

Notwithstanding the long use of expert witnesses in U.S. courts and arbitration proceedings expert witness testimony is, today, being called into question concerning the independence, impartiality, and unbiased nature of the analysis performed and the testimony proffered in legal proceedings.

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<sup>1</sup> Charles O’Neil, The Duties and Responsibilities of Expert Witnesses, LEXOLOGY®, <https://www.lexology.com/library>

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*“The role of experts and expert testimony remains a controversial component of the United States legal system. Critics have highlighted that the adversarial nature of U.S. legal proceedings likely creates partisan bias in experts through unconscious affiliation with the side that hires them (i.e., adversarial allegiance) and by attorneys who select and pressure experts to make extreme claims. Furthermore, a growing body of research suggests experts and their testimonies are susceptible to a host of unconscious biases, which are particularly concerning for cases in which experts provide testimony on complex scientific matters that may confuse judges and juries. Although existing legal procedures, such as cross-examination and competing experts, are assumed to protect against such biases, extant research suggests otherwise.”<sup>2</sup>*

As another commentator succinctly put it:

*“Taking into account that courts and arbitrators have become more skeptical of the ever increasing number of expert witnesses parading into trials, expert conferencing or hot tubbing might be used to improve the quality of resolution of technology related disputes.”<sup>3</sup>*

Due in no small part of this growing lack of confidence in expert witness testimony, hot tubbing is slowly easing into the U.S. legal system in both arbitration and litigation. This paper explores hot tubbing; what it is; its goals; how it differs from the traditional adversarial expert witness process; how hot tubbing works; and, the perceived advantages and disadvantages of this new form of expert witness testimony.

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<sup>2</sup> John Kellerman, Serena Faruquee, Brendan Busch, and Daniel Krauss, [Expert Opinion: Hot Tubbing As An Alternative To Adversarial Expert Testimony](#), American Psychology-Law Society, American Psychological Association Monthly, April 2018.

<sup>3</sup> Paulius Docka, [How Hot Tubbing Might Affect Technology Related Arbitration – 10 Frequently Asked Questions](#), Silicon Valley Arbitration & Mediation Center, 2016.

## ➤ What Is Hot Tubbing?

While hot tubbing may be used for both percipient (fact) witnesses as well as experts this paper focuses on the use of expert witness hot tubbing. Expert witness hot tubbing is also referred to in the literature as “concurrent expert witnesses”, the “tandem experts process” or “dueling experts”. While hot tubbing is a relatively new process for presenting expert witness testimony in the U.S. it has been used in other countries as part of the litigation process as well as in international arbitration. For example, “In Australia, hot tubbing has a long history, having been employed in tribunals as far back as the 1970s.”<sup>4</sup> Hot tubbing is considered an alternative to the traditional adversarial process for obtaining expert witness testimony.

*“Concurrent evidence has been described as a discussion chaired by the judge or tribunal in which the various experts, the parties, the advocates, and the judge engage in a cooperative endeavor to identify the issues and arrive, where possible, at a common resolution of them.”<sup>5</sup>*

Hot tubbing in arbitration or litigation is a different way to present expert witness testimony. In the hearings expert witnesses on an issue testify sequentially or back to back so that the triers of fact hear from both on the same issue in the same hearing. Hot tubbing is ...

*“... a technique in which two or more fact or expert witnesses, presented by one or more parties, are questioned together on particular topics by the arbitral tribunal and possibly by counsel.”<sup>6</sup>*

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<sup>4</sup> Judy van Rhijn, Hot Tubbing Experts – Should Lawyers Like It?, <https://www.canadianlawyermag.com/article/hot-tubbing-experts-should-lawyers-like-it-1244/>

<sup>5</sup> Melinda S. Gentile, Introduction to the Process of “Hot Tubbing”, Peckar & Abramson, P.C., <http://pecklaw.com>, February 2016.

<sup>6</sup> ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in Arbitration, 2012.

In this process the experts are encouraged to address the court or tribunal directly; deal with statements made by opposing experts; and encouraged to directly ask questions of opposing experts. Experts are encouraged to have open discussion with one another to identify where they agree and where they differ on the issues. Additionally, judges or arbitrators may ask questions of each expert directly to make certain they understand the issues and the expert's testimony. Depending on the rules of the proceedings attorneys for both sides may or **may not** be allowed to question the experts.

### ➤ **What Are The Goals Of Hot Tubbing?**

Based on the literature as well as discussion with testifying experts who have participated in hot tubbing proceedings, the goals of expert witness hot tubbing are fourfold:

- To save time during the arbitration or trial proceedings;
- To save costs during the arbitration or litigation hearings;
- To improve the quality and effectiveness of expert witness testimony; and,
- To assist the court or tribunal in understanding and deciding upon the complex technical issues in dispute.

Overall, the idea is that through hot tubbing the experts are able to identify where they agree on issues, where they disagree, and, why. Thus, the court or tribunal should be better positioned to understand the complex technical issues in dispute. And, if they do reach a better understanding, the quality of their decisions should improve.

### ➤ **Does Hot Tubbing Differ From Traditional Expert Witness Procedure?**

Based on the literature review and discussions with experts who have participated in hot tubbing proceedings, the author found a number of differences between this process and the traditional U.S. expert witness process employed in construction disputes. The dynamics of hot tubbing are very different from the traditional direct and cross examination process used in U.S. courts and arbitrations. A summary of these differences follows.

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- In hot tubbing experts offer their analysis in a setting where opposing experts can question or challenge their conclusions immediately and directly. Hot tubbing allows experts to identify inaccuracies in the opposing expert's testimony immediately and engage in a discussion concerning the inaccuracies in front of the court or tribunal rather than days or even weeks later.
- The hot tubbing process is much looser than traditional U.S. court or arbitration hearings in that experts are able, and even encouraged, to question or debate other experts to highlight the weaknesses of the other expert's position.
- By virtue of the expert's live questioning of one another each expert's opinion can be openly and rigorously tested in front of the court or tribunal thus allowing the triers of fact to better understand each position.
- Experts are expected to be able to respond to questions from both the other experts as well as the court or tribunal rather than be faced with the traditional direct and cross examination by attorneys who may **not** fully understand the expert's findings and conclusions.
- The traditional U.S. legal process encourages use of adversarial experts as opposed to hot tubbing where experts are compelled to work together to clarify issues through open discussion. Through the hot tubbing process experts are expected to find areas of agreement and refine the areas of disagreement succinctly
- Hot tubbing in dispute resolution board or arbitration hearings diminishes the role of the attorneys in the hearing room while at same time increasing the flexibility and spontaneity of the experts.
- Finally, hot tubbing changes the dynamic of expert witness testimony by which their opinions are presented through calculated questioning during direct testimony from the attorneys for their client. In hot tubbing, the questioning of an

expert's opinion is more likely to come from the other expert and the court or tribunal.

## ➤ **How Does Hot Tubbing Work – What Are The Basic Steps?**

There are considerable variations in the hot tubbing process as there is no crystalized process. However, the basics of the hot tubbing process are set forth below.

### **In Preparation for the hearing**

Hot tubbing **may** and often does commence before the hearing.

- Experts **may** be allowed or even directed to meet and confer (sometimes referred to as “expert conferencing” or “joint expert meetings”). This early expert conference allows experts to meet and greet one another, discuss the claim methodology to be employed, and the source data to be reviewed. The most positive outcome of an early expert conference would be to agree on a method, key source documents, and a procedure to come to such an agreement.
- During the expert conferences the experts **may** be questioned jointly by the attorneys on such issues as what forensic schedule analysis should be used; what project documents must be reviewed in forming expert opinions; what progress has been made on preparation of reports; what areas of agreement or disagreement remain; etc.
- Each expert will prepare their own report. Often, draft reports are exchanged early between the experts so comments on each can be shared and addressed in their respective final analyses. Both experts will submit their reports simultaneously.
- The experts will then collaborate to publish a **joint report** outlining in detail the issues they agree on, where they disagree, and why. This report is submitted to the dispute board, court or tribunal and focuses primarily on the issues still in dispute.

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- The substance of each of the foregoing steps are reported to the parties and the tribunal after the completion of **each** step. While there is transparency in this process, there is no undue meddling by the parties or their legal counsel.
- The joint expert report is analogous to a Scott Schedule<sup>7</sup> in that it lists all issues remaining in dispute with the position of both experts and reasons for disagreement. Frequently, the issues are prioritized in terms of the damages associated with each issue – from the largest to the smallest. The joint expert report is used by the court or tribunal to structure the agenda for expert testimony. It also “... highlights the extent of agreement between the experts”.<sup>8</sup>
- During the hot tubbing session, the experts will then focus on the areas of disagreement.

## **At the hearing**

Court or arbitration hearings employing the hot tubbing process tend to follow the process outlined below.

- Attorneys present their opening statements to set the stage for the hearing.
- Fact witnesses present their testimony through direct testimony and cross examination in the traditional manner.
- Experts are then both sworn in by the court or tribunal.

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<sup>7</sup> Use of the “Scott Schedule” to Expedite the Resolution of Quantum Issues, International Arbitration: Managing Risk in High Growth/High Risk Markets – A Conference to In-House Counsel and Executive Involved in International Arbitration, K&L Gates and Navigant Consulting, Inc., September 10, 2008.

<sup>8</sup> Hadley Lenthall, Are Existing Measures Effective Or Is Further Reform Necessary To Guarantee Independent Expert Evidence? Dissertation submitted in part fulfillment of an MSc degree in Construction Law & Dispute Resolution, King’s College London, September 2017.



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- Some proceedings include separate brief presentations by the experts of their analysis and opinions followed by cross examination. This is most likely an accommodation to the attorneys who feel that otherwise they would lose control over their case.
- Both experts take the witness stand together so that they may give a summary of their opinions and views of the opposing expert's findings and conclusions. Both are examined at the same time, focusing on areas of disagreement that form the agenda for their testimony.
- The court or tribunal hears both sides of the disputed issues sequentially and chairs the discussion between the experts on the unresolved issues.
- The court or tribunal **may** question the experts and each expert is allowed to respond to the questions raised as well as the other expert's answers to the same questions. This part of the hot tubbing process becomes something akin a debate.
- Expert are allowed encouraged to question the other expert directly and discuss or respond to the answers from other experts.
- Attorneys **may** be allowed to ask questions of the experts depending on the process approved by the court or tribunal. Both experts are permitted to respond to these questions.

This hot tubbing process differs remarkably from the traditional U.S. court or arbitration process in that hot tubbing is an informal, unscripted process. Only one expert speaks at a time in order to promote a collegial and constructive discussion of the issues in dispute. This is intended help the triers of fact better understand the opinions and conclusions of each expert on each issue.

The following list of advantages and disadvantages has been derived from literature on hot tubbing penned by attorneys and experts. The opinions, both positive and negative, are summarized herein below. These articles include the following;

*Presenting Expert Evidence – What Arbitrators Want (and Need) to Know<sup>9</sup>*

*Introduction to the Process of “Hot Tubbing”<sup>10</sup>*

*Hot Tubbing:” A Presentation to DLA Piper’s UK Construction & Engineering Group<sup>11</sup>*

*How Hot Tubbing Might Affect Technology Related Arbitration<sup>12</sup>*

*Hot Tubs and Other ADR Remedies for Disputes That Ail You<sup>13</sup>*

*Pros and Cons of Hot Tubbing in International Arbitration<sup>14</sup>*

## ➤ **Advantages Of Hot Tubbing Experts**

Based on the articles listed above plus interviews with testifying experts who have participated in the hot tubbing process the advantages of hot tubbing are thought to be the following. **All** the advantages listed concern the hot tubbing **process**; **none** focus on the **people** involved in hot tubbing – experts, attorneys or triers of fact.

- **Reduction in cost** – Arbitration and litigation are both very expensive undertakings. A good deal of the cost of either proceeding is expended on expert witnesses. The CI Arb Costs of International Arbitration Survey 2011 estimates that expert witness costs are approximately 10% of the total cost of the arbitration process.<sup>15</sup> If hot tubbing results in experts spending less time on each case then the costs of the experts should decrease.
- **Reduction in time** – This same survey indicates “... that the average arbitration took between 17 and 20 months, depending on the nature of the dispute.”<sup>16</sup> It should be

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<sup>9</sup> Jon Prudhoe and Garry Crossley, Navigant Consulting, Inc., April 26, 2017.

<sup>10</sup> Melinda S. Gentile, Ibid.

<sup>11</sup> Mark Pontin, Navigant Consulting, Inc., November 21, 2013.

<sup>12</sup> Paulius Docka, Ibid.

<sup>13</sup> Kathleen Olden Barnes, Christopher J. Brasco and George “Trip” Stewart, CDR.2608, AACE 2017 Annual Meeting Transactions.

<sup>14</sup> Gilbert Samberg, Law 360, Portfolio Media, New York.

<sup>15</sup> CI Arb Costs of International Arbitration Survey 2011, Chartered Institute of Arbitrators, London.

<sup>16</sup> Ibid.

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noted that this estimate is measured from the filing the demand for arbitration to the issuance of the tribunal's award and does **not** include the time from the initial claim filing until the demand for arbitration. While this study indicates an average duration for arbitration of 18.5 months the author is personally aware of one arbitration that continued for nearly 17 years from the demand for arbitration until the tribunal issued the award. And, a major construction claims lawsuit in Southern California was filed in 1995 with the final court decision issued in 2014 – 19 years later.<sup>17</sup> Hot tubbing is likely to shorten trial or arbitration hearings.

- **Issues in dispute narrowed** – Due to the preparation and submittal of the jointly prepared expert report, the hearing process focuses **only** on the issues in dispute – increasing time and cost savings. As the joint expert report narrows the issues in dispute it is useful for both schedule and quantum experts as it allows them to focus on the largest and most contentious issues first.
- **Quality of expert evidence increased** – Literature review and discussion with experts indicate that due to discussion between experts, the opinions and conclusions of the experts are more completely explained and understood.
- **Experts as independent advisors** – A synergistic effect of hot tubbing highlighted by some experts interviewed is that experts tend to take on a role as independent advisors to the triers of fact insofar as assisting them in understanding the complex issues the experts have opined on.
- **Triers of fact hear both sides of each issue entirely at the same time** – In the traditional adversarial expert witness testimony process in the U.S. legal system competing experts often testify days or even weeks apart. Whereas in the hot tubbing process the triers of fact hear the opinions of both experts sequentially and question both on their positions immediately following their testimony. Hot tubbing makes it easier for triers of fact to recall and understand the positions of the experts by hearing

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<sup>17</sup> *Tutor-Saliba-Perini J.V. v. Lost Angeles County Metropolitan Transportation Authority*, Court of Appeals of California, Second District, Division Seven, Nos. B232372, B237037, June 16, 2014.

testimony simultaneously. As a result, the triers of fact are likely to end up with a fuller understanding of each issue.

- **Experts allowed to point out inaccuracies in other expert's testimony or responses** – In the hot tubbing process both experts testify sequentially. If either or both experts detect inaccuracies in the other expert's testimony, they **may** question the other expert upon completion of their testimony. Thus, hot tubbing provides an opportunity for a focused discussion on each discrete issue simultaneously. Such discussion should help clarify issues for the triers of fact.
- **Triers of fact encouraged to ask questions of experts directly** – In the traditional adversarial expert witness process it is rare that a judge asks questions of an expert witness beyond the voir dire process. An article entitled When Should A Trial Judge Intervene To Question A Witness? answered the question in the following manner – “The simplistic answer is: rarely and sparingly ...”<sup>18</sup> In the author's experience, arbitrators tend to take a similar approach. In hot tubbing triers of fact are encouraged to ask questions of the experts. In situations when there is disagreement between the experts on specific issues, hot tubbing allows triers of fact to question and compare the differing opinions of the experts
- **Experts allowed to question other experts** – As experts are one of the few in the hearings who genuinely understand the complex issues in dispute, they are more suited to question opposing experts than the triers of fact. This give and take between the experts in front of the triers of fact should allow for a more constructive discussion of the issues than in the traditional adversarial process. Doing so in front of the triers of fact should also aid them in understanding these issues.
- **Role of legal counsel diminished** – In the traditional adversarial process the attorneys exercise direct control of the proceeding. Hot tubbing allows less controlled testimony and increases both the flexibility and the genuineness for the testifying

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<sup>18</sup> Hamilton H, Hobgood, *When Should a Trial Judge Intervene to Question a Witness?* 3 Campbell L. Rev. 69 (1981).

experts. Hot tubbing allows a discussion, **not** a cross examination, led by triers of fact without the attorneys shaping the way experts present their evidence and opinions. With everyone in the hearing on same page they should be more focused on issues rather than theatrics or distractions. Thus, hot tubbing is a significant intrusion into the adversarial system because it involves judges or arbitrators questioning the experts directly rather than the attorneys questioning their own experts on direct and opposing experts on cross examination.

- **Objectivity of expert witnesses improved** – Experts present complex issues without interruption, giving short presentations. Peer scrutiny of their testimony should mitigate misleading or disingenuous answers. Experts questioning one another freely, without the need for cross examination, should help improve the objectivity of the experts.
- **Additional positive comments from experienced testifying experts** – The following are comments from several experts who have testified in the hot tubbing process that are favorable concerning hot tubbing.

*“We’ve used it to great effect in Court and Arbitrations. It would usually be preceded with the experts getting together in a conclave to come up with a list of issues and their brief responses to them in a table form with X ref to the relevant expert report pages. This helps parties go on issue by issue. The evidence taking itself may get messy if there are no ground rules on who speaks first. Don’t let the experts argue or talk over each other. Set the ground rules - 1 talk at a time etc. and it will be smoother.”<sup>19</sup>*

**“Quantum Experts**

*Hot Tubbing can be particularly well suited to Quantum Experts as they often have a large Scott Schedule of items that are in dispute which can be examined on an*

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<sup>19</sup> Daniel Chia, Partner, Litigation, Regulatory & Investigations, Morgan Lewis, Singapore. LinkedIn communication, June 15, 2018.

*item by item basis. This is in preference to taking each Expert through every disputed item separately.”<sup>20</sup>*

*“I had to testify back to back with their expert, and the results, in the arbitrators and attorney’s words, was great. Having both experts testify back to back and having both cross-examined about the other’s reports a few days apart, was apparently very fruitful for the arbitrators. This is my first experience in a hot tubbing type process, but I believe it was very useful both for the testimony, our opinion on the case, as well as for the arbitrators themselves.”<sup>21</sup>*

*“I’ve hot tubbed during giving testimony at an ICC Arbitration here in London. I thought it was very useful as it provided the panel the opportunity for rapid fire questions to both of us. It also allowed questioning to focus in on specific matters through Q&A which would have been difficult in the normal set piece examination.”<sup>22</sup>*

*“Reflecting on my limited experience giving concurrent evidence, I think that it is probably most useful when there has been little agreement between the experts. Although there should be nowhere to hide when giving evidence if the cross examination is effective, sitting with the opposing expert beside me felt more of a test of my integrity than giving evidence alone.”<sup>23</sup>*

## ➤ **Disadvantages Of Hot Tubbing Experts**

Again, based on the literature and interviews with experts who have offered testimony in the hot tubbing environment the following are the potential disadvantages of hot tubbing. While the advantages of hot tubbing listed above primarily centered on the

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<sup>20</sup> Paul Taplin, Managing Director, Navigant Global Construction Practice, Dubai, UAE. E-mail communication, June 18, 2018.

<sup>21</sup> Carlos Ortega, Managing Director, Construction Solutions, FTI Consulting, Bogota, Colombia. E-mail communication, June 18, 2018.

<sup>22</sup> Andrew Jeffery, Managing Director, Navigant Global Construction Practice, London, UK. E-mail communication, June 18, 2018.

<sup>23</sup> Mark H. Hyam, Associate Director, Navigant Global Construction Practice, London, UK. E-mail communication, July 5, 2018.

**process**, the listed disadvantages set forth below focus, in the main, on issues concerning the **people** involved in the process – the experts, attorneys, arbitrators, and judges. It appears that the hot tubbing process is more sensitive to the people involved than to the process itself.

## **People Issues**

- **Necessary additional skills needed for experts** – According to Federal Rule of Evidence 702, expert witnesses must have “...knowledge, skill, experience, training, or education...” which will “...help the trier of fact to understand the evidence or to determine a fact in issue.” These are the standard requirements for an expert in litigation and arbitration in the U.S. However, given how the hot tubbing process works, experts **must also** have a number of additional skills, among them are the following.
  - ✓ Experts in hot tubbing must have excellent debating skills as quick thinking is critical for experts in this process.
  - ✓ They must be skilled in effective probing and questioning of other experts.
  - ✓ As there will be increased pressure on experts while hot tubbing they must be able to produce rapid responses to questions and arguments from both the other experts as well as from the triers of fact and the attorneys.
  - ✓ The process puts a premium on the expert’s communication skills as experts who are more effective during the question and answer session may be more persuasive than their earlier well thought out presentations.
  - ✓ The hot tubbing process, therefore, disfavors witnesses who prefer to consider and process issues more slowly or more thoroughly.
- **Advance preparation by triers of fact** – If the triers of fact are **not** fully prepared to question expert testimony then the value of the hot tubbing proceedings may be substantially reduced.

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- **Control by triers of fact** – If tribunal loses control of the testimony and the questioning process between the experts, the discussion during hot tubbing may drift from the real issues in dispute, focusing more on minor or irrelevant issues.
- **Issues between experts** – The value of hot tubbing may diminish if the experts do **not** know or respect one another. In a situation like this the question and answer session between the experts may devolve into a shouting match rather than a cooperative discussion of the issues in dispute.
- **Prior academic relationship between experts** – A negative experience with hot tubbing provided by a testifying expert, and former colleague, is set forth below.

*“In one particular case, a colleague observed that an economics expert, who was a past student of the other expert, tended to defer to his professor rather than present his evidence freely. In a traditional cross examination, the effects of this deference ... might have been avoided.”<sup>24</sup>*

Because of the deference by one expert (the former student), the credibility of the credibility of opposing expert (the former professor) was inadvertently enhanced.

- **Experts’ demeanor** – Experts must be more conscious of their body language during proceedings, especially during the exchange between experts and discussion with the triers of fact. Body language, especially during the question and discussion phase, may reflect positively or negatively on the experts in the minds of the judge or tribunal and inadvertently impact the outcome.
- **Experts’ listening skills** – Experts must pay close, careful attention to the other expert’s discussion to they may pose questions, offer alternative responses, or provide other information and insight concerning the other expert’s presentation or responses to questions from attorneys or the triers of fact.

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<sup>24</sup> Mark Pontin, Efficiency in Expert Evidence, [www.CDR-News.com](http://www.CDR-News.com), November-December 2016.



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- **Experts' scope of assignment** – Since expert testimony in hot tubbing is less scripted and controlled than in the typical adversarial process and the discussion by and between the experts as well as with the triers of fact is totally unscripted, experts may inadvertently discuss topics outside scope of their knowledge and expertise. Testifying experts during the hot tubbing process must **not** stray into areas they would **not** have gone into when offering testimony in traditional adversarial proceedings.
- **Loss of control by experts** – There is a risk that experts during the question period **may** slip into non-professional language or become overly familiar with the opposing expert or triers of fact and forget to remain both formal and professional.

## **Process Issues**

- **Lack of direct and cross examination** – Depending upon what forum the dispute is being heard in attorneys **may** or **may not** be provided the opportunity to directly examine or cross examine testifying experts. If the dispute is heard by a dispute resolution board then it is very likely that attorneys will not be allowed to do either as most dispute resolution agreements preclude attorney involvement in the hearings. If dispute is in arbitration direct and cross examination may or may not be allowed depending upon the arbitration agreement and rules. On the other hand, if the dispute is in litigation attorney direct and cross examination is almost a given. If direct and cross examination is **not** allowed, then important points may be missed in the proceeding.
- **Informality of hot tubbing** – The informality of the hot tubbing process may detract from what some feel are the benefits of more formal proceedings – strict rules of evidence, scripted presentations, objections on the record, etc.
- **Loss of control** – Several attorneys have mentioned that in the hot tubbing process attorneys lose control of the evidence and the testimony of the experts which **may** adversely impact their case.

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- **Advocacy by experts** – Due to the informality of hot tubbing there is a risk that an expert **may** slip into advocacy role, rather than an independent, objective expert.
- **Expert concessions** – As a result of the informality of hot tubbing, experts may make more concessions concerning their positions than legal counsel would typically allow in a traditional adversarial proceeding.
- **Risk of rapid responses** – As the hot tubbing process involves an open question and answer session between experts as well as with triers of fact, there is a potential that the need for quick responses to questions **may** be offered without adequate time for thoughtful response.
- **Additional cautions from experienced testifying experts** – The following are comments from experts who have testified through the hot tubbing process that are **not** all together favorable toward hot tubbing.

*“I have considerable experience of Hot Tubbing and set down my thoughts/observations below.*

## Delay Experts

*Given the reality that delay experts are rarely able to agree on very much the benefits of Hot Tubbing are negligible. In my experience they are often unable to agree on which methodology to use, the baseline programme or the relevant critical path and as such there seems little point in having them in the box at the same time.*

...

## Other Observations

*I once witnessed two delay experts get Hot Tubbed and it was a disaster. The Claimant's Expert had produced a very good report but was a fairly meek and mild individual. The Respondent's Expert had produced hundreds of pages of rambling analysis with little or no conclusion, but he was a very strong confident character.*

*During the Hot Tubbing session, the Respondent's Expert continually talked all over the Claimant's Expert and essentially bullied him for the entire 4 hours they were being examined. The result was that the Respondent's Expert made a bad case look good and the Claimant's Expert managed to make a good case look bad. A prime example of when Hot Tubbing shouldn't be used."*<sup>25</sup>

*"I understand that "Hot Tubbing" has many approaches. I have one experience, not that satisfying or beneficial. ... At the end of the Hot Tubbing period ... the experts were to jointly present to the arbitrator and parties/counsel those areas on which they could agree and those areas on which they could not agree. The expert testimony would then be limited to only the areas of disagreement and the experts would testify back-to-back.*

...

*For this approach to be effective, both experts need to be open minded and not advocates. ... the opposing expert was such an advocate for his side that we could make no progress ... Albeit, the matter settled in private discussion between the parties at the conclusion of the Hot Tubbing ... So, it could be inferred that while the experts, in my opinion, did not have productive discussions, the exchange between the experts provided one or both sides information or insights that supported settlement."*<sup>26</sup>

## ➤ **Recommendations Concerning Effective Hot Tubbing**

Through the literature review and discussion with testifying experts experienced with the hot tubbing process some recommendations follow.

- Experts should be of approximately equal stature and experience in order to avoid one expert being very deferential or overshadowing to the other.

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<sup>25</sup> Paul Taplin, Managing Director, Navigant Global Construction Practice, Dubai, UAE. E-mail communication, June 18, 2018.

<sup>26</sup> Charles E. Bolyard, Jr., Chairman, MBP, Fairfax, VA. E-mail communication, June 20, 2018.

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- It is important that experts be selected with the hot tubbing process in mind including the points raised in this paper.
- Parties must manage the expert conferencing process before the hearing to make certain that the joint report adequately reflects their relative positions.
- Triers of fact must be aware of and experienced with disputes in the field related to the dispute.
- If possible, triers of fact should also be familiar and experienced with hot tubbing.
- Parties to the dispute must manage the hot tubbing process carefully to make certain both experts have approximately equal time and opportunity to address their issues.

## ➤ **Conclusion**

Hot tubbing has proven itself in Australia and is growing in Canada, Hong Kong, New Zealand, and the U.K. There is, however, little experience with this process in the U.S. Additionally, hot tubbing procedures have **not** yet been crystalized, **nor** is the hot tubbing process being discussed or encouraged by any legal or construction industry organization. As the process is unfamiliar to most attorneys, experts, and triers of fact in the U.S. implementation of hot tubbing on a specific case **may** be problematical.

The expert conferencing process common in hot tubbing **may** increase the likelihood of disputes being settled prior to the hearings as issues are explored jointly and examined closely for the parties to the dispute. The joint conferencing process identifies issues discretely and examines the merits of each party's position in detail. Expert conferences provide greater clarity than cross examination of experts in the hearing room. But, it is also noted that the hot tubbing process is more sensitive to the people involved in the process (i.e., attorneys, experts, arbitrators, and judges) than the traditional U.S. adversarial process.

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Overall, the noted success of hot tubbing abroad seems to outweigh the potential disadvantages. Disputed issues discussed, examined, and narrowed through expert conferences prior to the hearings are likely to decrease time and costs expended during the hearings. As the process provides an opportunity for judges and arbitrators to hear both sides of each issue at the same time their understanding of the issues will improve. The quality of expert witness testimony should improve as experts understand they will be questioned by both other experts and the triers of fact immediately in the open hearing. As a result, the quality of the decisions rendered by courts and arbitration panels should improve.