

What is “Hot-tubbing” in expert witnesses? What are the pros and cons of it?



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Introduction

“Hot-tubbing” (“HT”) has slowly crept into the legal proceedings of the northern (e.g. United Kingdom, Europe, USA) and southern (e.g. Australia) hemisphere recently. In the UK, after Lord Justice Jackson’s reviewed civil litigation costs in December 2009, he proposed an HT pilot programme in his final report in 2010.¹ Canada allows judges to force lawyers to serve up their experts in a “hot tub”. Recently, one of my colleagues here in Hong Kong who acted as an expert in a case was instructed by a judge to carry out HT between experts. Hence, from my observations, judges/arbitrators in the UK, USA, Canada, Australia, and Hong Kong are aware that HT may be a useful, common, and potential tool for future expert services.

What is HT?

What, then, is HT? What are its pros and cons? This article shall address them accordingly. Many different articles have defined HT. I list the following as examples:

“Hot-tubbing also known as ‘dueling experts’ or ‘concurrent expert evidence’ – is said to focus expert witnesses more on the search for truth, and less on being advocates for the side that hired them. The idea is attracting interest in US arbitration circles.”²

“Hot-tubbing involves experts giving evidence at the same time. They do it in each other’s presence and in front of the judge or arbitrator, who puts the same question to each expert in turn, effectively acting as ‘chair’ of a debate between the experts.”³

“Hot-tubbing or ‘concurrent evidence’ is a method of giving evidence where both experts give evidence simultaneously and the court or tribunal chairs a discussion between them.”⁴

“Hot-tubbing or ‘concurrent evidence’ as it is formally known...whereby experts from both sides of a dispute sit in the dock together, with the judge or arbitrator leading a discussion between them.”⁵

“Hot-tubbing, or ‘concurrent evidence’ giving, is a method of giving evidence whereby both experts of the same discipline give their evidence simultaneously and where the court or arbitrator chairs a discussion between them.”⁶

“Hot-tubbing is legal slang for concurrent expert evidence... involves experts from the same discipline, or sometimes more than one discipline, giving evidence at the same time and in each other’s presence. The experts are sworn in together, and sit in front of the judge, who puts the same questions to each expert in turn, effectively acting as ‘chair’ of a debate between the experts.”⁷

“Hot-tubbing is a procedure for hearing expert evidence that involves multiple experts presenting their evidence at the same time, in a panel format.”⁸

“...process of taking evidence from witnesses in the presence of other witnesses (from both sides of the dispute) and allowing them to engage with each other as to the accuracy of their claims.”⁹

“Hot-tubbing, or ‘concurrent evidence’...involves both parties’ experts sitting in the box with the judge or arbitrator leading a discussion between them. It is a discussion and

1. Van Rhijn J **“Hot-tubbing experts – should lawyers like it?”** Canadian Lawyer Magazine, 2011.
2. **“Hot-tubbing the expert witnesses – the latest Australian import”**, On Contracts, 2010.
3. Burns M, **“Hot Tubbing”** RICS, 2012.
4. Matthew Arnold & Balwin, **“Hot tubing – Litigation, Mediation & Arbitration – UK”**, 2010.
5. Barry P, **“Hot-tubbing: is it time to take the plunge?”** Navigant, 2011.
6. Matthew Arnold & Balwin, **“Hot tubing –an update”**, 2011.
7. Healy D, **“Hot tubing for expert witnesses?”** Pannone Solicitors, 2012.
8. Stephenson A & Barraclough A, **“Expert ease their tensions in the hot tub”**, Project Insights, Clayton Utz, 2005.
9. Professor Jones D, **“The Efficient Arbitration: Party Appointed Experts”** Legal Update, 2011.

not a cross-examination. The principle is that the experts can tell it how it is and they can talk between/among themselves and ask questions each other...¹⁰

In short, instead of the existing/old-fashioned process in which each expert is examined and cross-examined, the oral evidence is concluded, the expert leaves the witness box, and the next expert steps up, HT provides a proactive discussion between/among experts by way of a procedure in which the evidence by all experts is presented simultaneously before the judge/arbitrator conducts a full discussion of it. Sometimes a question over a single issue is asked by the judge/arbitrator for open discussion between/among the experts so that they could arrive at a final and accurate conclusion.

Pros of HT

1. As it gives experts a definite role in a trial by enabling them to ask each other questions and respond to each other's opinions, this may fully assist the court in understanding and appreciating the technical stuff.¹¹
2. It saves time and, thus, costs.¹²
3. Experts are more likely and properly to assist the court/arbitrator to resolve disputes.¹²
4. It encourages open and frank discussions that may assist in resolving disputes.¹³
5. There are more chances for experts to exchange their honest opinions with their professional colleagues in the same discipline during challenges.¹⁴
6. The exchange of questions between experts often allows an issue to be explored in greater detail until it is clear to everyone.
7. It is easier for an expert to concede a fact without losing face and credibility.¹⁵
8. More extreme views are usually moderated when experts need to justify their opinions.¹⁵
9. It is easier for a judge to recall and understand the positions of both experts by hearing the evidence simultaneously and sequentially, but not separately.¹⁵
10. After the process, both parties understand more clearly the strengths and weaknesses of their positions, which may be conducive to a more amicable and earlier settlement.¹⁵

Cons of HT

1. If experts do not know or respect each other or if an expert does not act in good faith, this approach may not work well.¹²
2. Time may be wasted if the experts go around in circles or digress from the relevant issues, thereby losing control over the proceedings.^{12, 13}

3. An expert may lose his concentration or fear being cross-examined.¹²
4. A single expert may be able to manipulate a discussion if he/she has a greater knowledge of a particular topic than all the other experts.¹²
5. One's ability as an advocate could play a greater role in a case than one's expertise.
6. Key evidence the expert considers important may be missed without a formal examination and cross-examination process.¹²
7. It limits the parties and the respective counsels' opportunities to scrutinize the experts on their respective opinions.¹⁵

What shall go next?

It may be premature to presently declare that HT leads to a reduction in both time and money in litigation and arbitration. This may require examining more cases that adopt HT instead of the traditional process and making comparisons afterwards. Furthermore, if HT is adopted after/in addition to the formal and traditional examination and cross-examination, it could be even more costly than the traditional process.

Still, all parties, including the experts, judges, and arbitrators, should properly embrace the purpose of hot-tubbing, which is to get to the root of the issues between the parties in a constructive, but not combative, manner.¹³ In my opinion, regardless if HT will be more commonly adopted, experts should be continually invited to testify themselves under traditional or HT means, which both require a high degree of maturity and professionalism that an expert is expected to exhibit.

Finally, it is clear that HT allows judges or arbitrators to draw upon a diverse range of expertise and experiences in order to address the key issues of a dispute effectively and amicably. I reckon that all of us prefer to avoid disputes, but, nevertheless, it is unlikely for any project to come without them. Hence, whether litigation proceeds traditionally or through HT, expert witnesses will continue to be an invaluable part of it to assure a helpful and successful settlement. ■

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10. Blamire-Brown C, "**Fancy a dip in the hot-tub?**" Magazine Comment, Building, 2010.
 11. Supra Burns M.
 12. Supra Matthew Arnold & Baldwin.
 13. Supra Barry P.
 14. "**Hot tubbing in Australia, the United Kingdom, Canada and the United States**", Smith International Law, 2011.
 15. Supra Stephenson A & Barraclough A.