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Pros And Cons Of Hot-Tubbing In International Arbitration

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Law360, New York (December 1, 2016, 10:17 AM EST) -- "Hot-tubbing" of experts — a procedure for the joint presentation of expert testimony — is now regularly considered, although infrequently adopted, in international arbitrations. Frequently referred to as "concurrent evidence" or "witness conferencing," hot-tubbing

> "is a technique in which two or more fact or expert witnesses, presented by one or more of the parties, are questioned together on particular topics by the arbitral tribunal and possibly by counsel."
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> ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in Arbitration, at (2012), at 14 (emphasis added).

Although it reportedly originated in the courts of Australia, it has crossed oceans and legal regimes and found a place in the current repertoire of many arbitrators.

In brief, the aims of employing the hot-tubbing mechanism are (i) to promote objective impartiality, and to reduce or eliminate bias or advocacy, in expert evidence; (ii) to ensure that experts answer the same questions, based on the same assumptions, at about the same time; and (iii) to improve the responsiveness, precision and clarity of expert evidence.

Hot-tubbing is not mandated by the leading arbitration-administering organizations — e.g., the International Chamber of Commerce (ICC), the American Arbitration Association (AAA) or its International Centre for Dispute Resolution (ICDR), the London Court of International Arbitration (LCIA), the Singapore International Arbitration Center (SIAC), etc. Indeed, it appears to be described in only one important set of broadly used guidelines — i.e., the IBA Rules on the Taking of Evidence in an International Arbitration (2010) (the "IBA Rules"). See, IBA Rules Arts. 8(3)(f) ("[t]he Arbitral Tribunal ... may vary [the] order of [witness testimony], including ... in such a manner that witnesses be questioned at the same time and in confrontation with each other (witness conferencing) ..."), 5(4). However, this method may be agreed by the parties, or suggested or mandated by the arbitral tribunal.

As Michael Huang, a leading Singapore-based arbitrator, has remarked, "It cannot be thought of as a standard procedure. It is an unusual procedure." See Witness Conferencing and Party Autonomy, Selected Essays on International Arbitration (Academy Publ. 2013), ¶9. However, "hot-tubbing" of experts is no longer an extraordinary phenomenon in international arbitration proceedings either. (It is also common in Australian courts, permitted in Canadian and Hong Kong courts, and known in U.K. and U.S. courts (e.g., in Tax Court, and a few-non-jury-cases.) Therefore, in each arbitration presented, one should consider whether this technique would be useful. ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in Arbitration (2012), at 14.

How Does it Work?

Descriptions of the procedure vary, indicating its malleability or the diverse understandings of its nature, or both. It is most often described as follows: experts are sworn in at the same time at a

hearing; the tribunal chairs or moderates a discussion or debate between the experts; tribunal members may put questions to the experts; the experts may put questions to each other; counsel may or may not be permitted questions as well; the hearing agenda may be set by the tribunal, or it may be based on a required prehearing collaborative submission in which the experts identify points on which they agree and points on which they disagree.

Hot-tubbing has also been described in the following ways: (1) the experts are sworn in and appear contemporaneously, the arbitrators question those experts, and there is no predetermined order of questioning; or (2) the experts appear together, albeit for sequential questioning of each (i) by party counsel and/or (ii) by the arbitrators, with each expert being permitted or encouraged to respond to the other's answers; or (3) the experts' joint appearance to give sequential testimony is preceded by, or even comprised of, a joint written report (in lieu of separate written expert testimony or after the exchange of initial written testimony) that identifies points of agreement and disagreement, and the reasons for disagreement, on respective issues.

Hot-tubbing, as it is principally described, usually follows exchanges of written testimony — both direct and rebuttal — from each expert. It may be an "add-on" process, following cross-examination by counsel, or it may be limited to questioning by the tribunal and the respective experts, and thus exclude cross-examination by advocates.

Moreover, some institutional rules may affect how hot-tubbing may be conducted. (See, e.g., LCIA Art. 20.8 ("[a]ny witness who gives oral testimony at a hearing ... may be questioned by each of the parties under the control of the Arbitral Tribunal. The Arbitral Tribunal may put questions at any stage of such testimony."); SIAC Art. 25.3 ("[a]ny witness who gives oral evidence may be questioned by each of the parties, their representatives and the Tribunal in such manner as the Tribunal may determine.").

Pros

Several reasons of varying merit are given in favor of the use of hot-tubbing of experts in international arbitrations, including the following:

(1) It encourages open and frank discussions among the experts. (But this is likely only if they are all acting independently and in good faith, and if there is a degree of mutual respect among them.)

(2) It makes it easier to identify points of disagreement clearly. (But a prehearing joint expert report can accomplish this more efficiently. Otherwise, the issues should be evident from the experts' respective written direct and rebuttal testimony, which is customary.)

(3) Misleading or bad faith statements by an expert will be deterred by instant peer review by one or more adverse experts.

(4) It deters advocacy by an expert due to the peer pressure and instantaneous peer review of adverse experts.

(5) It enables the arbitrators to make extended explorations of issues. For example, inconsistencies in expert evidence can be hashed out in a non-disjointed relatively brief period. (But routine procedures for examination by counsel and by the arbitrators will accomplish this, and differ only slightly in timing.)

(6) Participation by the arbitrators will enable them to satisfy themselves better with respect to their questions, and should result in an improved quality of decision-making by the tribunal. (But arbitrator participation does not require hot-tubbing. And there is no apparent basis to expect an incremental improvement in arbitrator decision-making due to hot-tubbing.)

(7) The relatively informal and non-adversarial format of hot-tubbing may put an expert at ease in an unfamiliar process. (But the arbitration process is not intended to be informal or unstructured. And indeed, how comfortable will confrontation with a peer expert be, as compared to questioning by a lay advocate or arbitrator?)

(8) By creating a relaxed environment for the experts at the hearing, cooperation and concessions by the experts will be promoted, thus reducing the number of issues in dispute. (But how likely is it that inconsistent written opinions by the expert witnesses will change to oral agreements on the same points? This seems not only unlikely, but highly unlikely unless the experts know each other well and respect each other. The commentary to the IBA Rules suggests that witness conferencing can make the arbitral proceeding more economical because "[e]xperts from the same discipline, who are likely to know each other, can identify relatively quickly the reasons for their divergent conclusions and work towards finding areas of agreement." (Emphasis added.) But the reasons for divergent opinions are likely to be known, by one means or another, long before oral testimony is given.)

(9) It will result in cost savings. (But it is difficult to identify where the cost saving will be, especially if this procedure is layered onto customary procedures that include written expert testimony, cross-examination by counsel, etc. In that case, hot-tubbing would be an add-on. And in any case, more prehearing preparation by the expert and of the expert will almost certainly be required.)

(10) It will produce a time saving. (But it is difficult to identify where the time saving will be, especially if this procedure is an add-on. And again, more time will be spent in prehearing preparation by and of the expert in any case.)

Cons

Several reasons of varying weight are given against the use of hot-tubbing of experts in international arbitrations, including the following:

(1) It is analogous to dueling as a method of settling disputes. It over-values a particular skill — debating — rather than the merit of the expert witness's opinions.

(2) If debating skills are at a premium, that will limit the pool of experts who will be well qualified to be an expert witness.

(3) It creates pressure on an expert witness to produce rapid responses to questions and arguments, whereas reflection before responding might be more useful. Assuming that the issues requiring expertise are complex, a rapid response without time for thoughtful consideration is not necessarily beneficial to assessing the ultimate merits of an expert opinion.

(4) It puts a premium on an expert's glibness. The weight of evidence from a rhetorically less skilled expert might therefore be discounted. If the hot-tubbing discussion or debate becomes the principal or most impressive means of communication by the experts to the tribunal, then the expert who is more effective during this oral exercise may be the most persuasive. (On the other hand, the benefits of rhetorical skills may be offset by the presence of one or more peer experts, provided they are ready and willing to challenge instantly the contents of artful communication by another expert.)

(5) The format disfavors a witness who prefers to consider and process issues more slowly.

(6) If cross-examination by counsel is excluded, important points are likely to be missed. This deprives a party of the opportunity to present its case fully and freely, as required in most administered arbitration rules and in accordance with the culture of international arbitration. That may have implications for the eventual confirmation and/or enforcement of an award under the New York Convention.

(7) If counsel or the tribunal lose control of the line and scope of testimony, the discussion may drift, resulting in time-wasting or distraction from relevant matters or worse (i.e., concealment through drift).

(8) The value of the format is diminished if the experts do not know and/or respect each other, or if any of them do not act independently and good faith.

(9) The time and expense in preparing an expert for this sort of procedure, including mock hot-

tubbing, will undoubtedly be increased.

(10) Informality may detract from the benefits of a sober formal proceeding.

Notes On Utilizing Hot-Tubbing

First, the opportunity that hot-tubbing presents will be wasted if the arbitrators are not fully prepared to question the experts. Therefore, this technique is unlikely to have substantial utility unless it follows written submissions by the experts. (Both direct and rebuttal written testimony are recommended.) Its focus and effectiveness is likely to be improved also if the experts prepare a joint submission that identifies the issues in dispute, the experts' respective opinions regarding each, points of agreement and disagreement, and descriptions of the reasons for disagreement.

It is submitted that the utility of the technique will be enhanced also if it comes after some cross-examination of the experts by counsel. If that is limited or prohibited, the experts' opinions are unlikely to be thoroughly tested. (It is a truism that no one has, or at least no one should have, a more thorough understanding and appreciation of the factual issues in a dispute than counsel.)

If cross-examination by counsel is indeed limited or prohibited, counsel may be tempted to deploy their own experts to pose certain questions to adverse experts, but that would place an undue burden on the "deployed" expert and such seeming advocacy might compromise his/her credibility. As an alternative, counsel might identify the most critical questions to be put to an adverse expert, and request that the arbitrators pose them.

Finally, one may anticipate that arbitrators will likely pose broader questions to the experts, eliciting narrative responses, in contrast with the narrower questions that counsel typically use in cross-examinations to elicit narrow responses.

An Advocate's Comments

Hot-tubbing raises the bar for what is required from an expert witness. It tends to make an expert an independent actor in the process, thereby requiring him/her to be rather more self-sufficient. The expert must be prepared by counsel to perform that function accordingly.

Among other things, there will be pressure for the expert to be more articulate and quicker-witted, and the expert's understanding of the case, including its commercial aspects, may have to be broader and deeper than otherwise.

In hot-tubbing, the usual "translation" by legal counsel of an expert's opinions and descriptions ceases, and the expert will be called upon to express his/her views in his/her own words and manner. If counsel believes that his/her expert witness (a) is not sufficiently articulate, or (b) lacks sufficient tenacity, or (c) might be subdued in the face of a more experienced peer, or (d) is unwilling to challenge another view by a peer, then hot-tubbing likely ought to be avoided.

We suggest avoiding hot-tubbing also (a) if the credibility of an opposing expert is in issue, because cross-examination by counsel will show the flaws more effectively; or (b) if cross-examination by counsel is more likely, as it usually is, to expose the fallacies in an opposing expert's opinions; or (c) if cross-examination by counsel is more likely to show that the opinions of an opposing expert are actually useful and favorable to one's client.

So too, if the respective experts' opinions regarding the majority of issues are irreconcilable, little if anything is to be gained from hot-tubbing, and the use of traditional/conventional methods of presentation of expert testimony is recommended.

If, on the other hand, a client's case would benefit from the experts' arriving at an agreement on a middle ground, then there is something to be gained by hot-tubbing.

As to procedures, if hot-tubbing will be utilized, try to reach early agreement on the details of that exercise. For example, one might seek to (i) define the issues to be explored; (ii) set an agenda identifying the order in which the issues will be examined; (iii) set time limits regarding the exploration of each of the issues; (iv) determine whether the tribunal or counsel will lead, as well

as if, how and when others may follow in participating; and (v) determine whether prehearing conferencing of experts will be required in order to prepare a joint submission as previously described.

We also recommend resisting the exclusion of cross-examination of expert witnesses by counsel. It is a cardinal rule in international arbitration — and it is part of the culture of the process — that each party is to be permitted a full and fair opportunity to present its case, to make relevant points, and to support its position to the fullest practical extent. Toward that end, the parties hire advocates. Arguably, prohibiting the cross-examination of experts by those advocates deprives the party of the right to present its case fully and to make relevant points.

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