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Expert Hot Tubbing – Litigators, It’s Coming Your Way

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Expert hot tubbing, also known as expert conferencing, has become standard practice in international arbitration hearings for construction experts. Expert hot tubbing is a process typically mandated by a tribunal, domestically referred to as an arbitration panel. The parties' experts simultaneously answer questions put forth by the arbitrators with neither assistance nor interruption from the parties' counsel. The process takes place after the experts have testified and as one of the last activities in the hearing. In some situations, the experts are allowed, or even encouraged, to debate an issue (or issues) of interest to the panel. The questioning is not adversarial in nature, and is more of an informational process to clarify issues or opinions of the experts.

This concept, considered a process of concurrent delivery of evidence, is used predominantly in international arbitrations held under the various arbitral forums of the International Court of Arbitration of the Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), United Nations Commission on International Trade Law (UNCITRAL), and other lesser-known forums. Expert hot tubbing is growing more popular in arbitrations where the seat of the arbitration is the US, and is gaining acceptance and use in the International Centre for Dispute Resolution (ICDR), a division of the American Arbitration Association (AAA).

In light of its growing popularity internationally, the concept of expert hot tubbing is being used more frequently in construction disputes when one or more of a domestic panel's arbitrators has international arbitration experience. Many users consider it a process that can save time and money for the parties in the matter because it allows the arbitrators the opportunity to focus on a key issue or issues of the dispute. It also has been known to enhance the quality and timeliness of the panel's decision by allowing the panel to eliminate any ambiguities.

The expert hot tubbing process is unstructured and allows considerable latitude for an expert to comment on and advocate his or her position on issues. The direct control of trial counsel is substantially diminished and the experts' opportunity for spontaneity and advocacy is enhanced. It can be advantageous for an expert who is knowledgeable, experienced, and skilled at delivering expert testimony under adverse conditions. On the other hand, it can be a disaster for an expert uncomfortable with and inexperienced at dealing with inquiries without advance preparation or knowledge.

The key to a successful demonstration of expert knowledge in a hot tubbing situation is for the expert to listen carefully to an arbitrator's inquiry, and any other expert's comments concerning an inquiry, and respond clearly, concisely, and correctly. Simply said, but sometimes difficult to do when the arbitrator's questions or the comments by the opposing expert are convoluted, but nonetheless, the response needs to be clear and helpful. The expert who assists the panel in understanding the relevant issues is the expert that is likely to be considered to have the greatest credibility and the most appropriate position on an issue.

Expect to see more use of the expert hot tubbing concept in domestically seated arbitrations; this trend has already begun in Texas and is becoming more widespread in US-based arbitrations. This is a process that will be coming to litigators involved in arbitrations, particularly in engineering and construction disputes.

Frank G. Adams, PE, is president of Interface Consulting International, Inc. An internationally recognized construction expert, Mr. Adams has testified in US and international courts and arbitrations with AAA, ICDR, LCIA, ICC, UNCITRAL, and other forums.

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