

CONSTRUCTION

HOT-TUBBING: IS IT TIME TO TAKE THE PLUNGE?

Times have changed since expert witnesses had to wait patiently for their turn to give evidence, says Paul Barry, from Navigant Consulting. But is the arrival of so-called hot-tubbing a welcome development?

Hot tubbing — or ‘concurrent expert evidence’ as it is formally known — is becoming an increasingly popular practice whereby experts from both sides of a dispute sit in the dock together, with the judge or arbitrator leading a discussion between them. What makes this approach unique is the fact that it does, indeed, encourage an open and frank discussion between both sides. As such, this model differs from a traditional cross-examination, since there are no barristers shaping the way in which the experts give their evidence.

At the moment, the use of concurrent expert evidence is voluntary, and requires full agreement from all parties. However, the hot-tubbing method is already being championed as an effective way of tackling the longstanding and systemic problems associated with adversarial expert testimony.

THE PHILOSOPHY BEHIND HOT-TUBBING

Although hot-tubbing represents a new way of collecting expert testimony, it retains the most important features of direct and cross-examination, as each party still has a chance to make its own argument. However, because hot-tubbing can be used to solicit the viewpoints of multiple expert witnesses at the same time, this model can be especially useful for cases that include unusually complex findings, questions, or conclusions.

The construction industry, in particular, faces a number of important challenges in this regard, as design and construction problems often require a thorough forensic investigation to determine the root cause of the issue. Defects in construction can occur for a variety of reasons, and can lead to serious damage, leaks, flooding, mould, cosmetic flaws, and even structural instability.

With the hot-tubbing model, the hope is that experts in all of these areas can tell it like it is as they give their testimony: they can discuss the case openly, ask each other questions, and respond to enquiries from the judge or arbitrator directly. With this approach, the experts involved can often find common ground and/or take the time to discuss any issues that are proving especially difficult to resolve. As a result (and because they are not confined to answering questions posed by advocates), hot-tubbing can — at least in theory — help these experts to respond to each other’s questions more effectively.



However, with the hot-tubbing model in particular, it's not only important to have an expert who knows his/her topic well, but also to make sure that the expert has the knowledge and ability to offer a convincing argument, especially in court or in a binding arbitration. In other words, when it comes to the hot tub, experts need more than just the knowledge and experience required to support their opinion: they must also be credible and convincing in terms of how they present their testimony.

HOT-TUBBING FOR CONSTRUCTION DISPUTES

The hot-tubbing model has particular relevance in construction disputes — especially those involving technical issues, schedule delays, and economic damages — as testimony provided by a recognised expert can often play a critical role in cases like these. Not only can many factors cause problems during a construction project, but they often result in claims and disputes long after the project is completed.

Furthermore, as most contractors know, nearly all construction projects will encounter change at some point. Whether it's a change to the scope of work, a revision to the specifications, or a change in the way in which the work will be performed, unexpected changes can significantly affect a project's cost and schedule. In most cases, provisions for any necessary changes are covered by the initial contract between the two parties, but in some instances the parties are unable to resolve these issues, and a dispute develops. Due to the complex nature of cases like these, as well as the wide variation in the types of disputes that can arise, this expert testimony plays a vital role in helping the judge or arbitrator to make an informed — and fair — decision.

For this reason, expert witnesses are often needed to share their knowledge, conduct detailed damage analysis, and to give key testimony on a wide variety of complex engineering and construction disputes. In many cases, experts are also called in to perform after-the-fact site investigations and forensic analyses in order to assist in litigation and arbitration. Factors such as the expert's command of the subject matter, professional experience, and credentials will often be crucial to the case. As such, the presence of a well-qualified and experienced testifying expert can provide a party with a significant strategic advantage.

The Technical and Construction Court in the UK has recognised the need for change and has introduced, in its Technology and Construction Court Guide 2nd Edition 2nd Revision, dated October 2010, the hot-tubbing model as an alternative available to the parties. It is understood that a suitable pilot case is being sought in order to evaluate the types of cases that might be suitable, the extent of cost savings achieved and whether the parties and their advisors perceive the procedure as an effective and fair basis for resolving their disputes. For the moment, it is for the parties to choose this route but it remains to be seen if in accordance with the new TCC Guide the judge can make the decision.

BENEFITS OF HOT-TUBBING

Advocates of the hot-tubbing model believe that experts are more likely to make concessions and come to an agreement on common issues by adopting this approach, since hot-tubbing encourages an open and frank discussion between both sides. Plus, as already mentioned, the judge or arbitrator is also able to get to the root of the issues much more quickly and efficiently by posing questions to the experts directly.

Not only that, but the risk of an expert giving an unclear or confusing answer is also reduced by the opportunity for his or her testimony to be immediately challenged by another expert. As a result, proponents of hot-tubbing believe that this approach can save a great deal of time during arbitration, which of course translates to cost savings, as well.

Advocates of hot-tubbing also claim that it is easier to focus on the key issues with this approach, and that the judge or arbitrator is therefore able to obtain a better understanding of the evidence being presented, as well as any points where the experts disagree with one another. Plus, although the judge or arbitrator will typically take the lead in hot-tub discussions, both experts are able to give their views candidly, and without having to rely upon a middleman to direct their testimony.

Construction claims, in particular, often benefit from this approach, since they tend to rely upon a large amount of complex evidence. As such, disputes related to construction will often require experts with a combination of construction engineering experience, analytical ability, and the ability to communicate these ideas clearly and concisely to a nonexpert audience.

DOES HOT-TUBBING HAVE ANY DRAWBACKS?

The hot-tub principle has been around in arbitration in various guises for a while, and in fact has often been used after cross-examination. However, arbitrators are sometimes reluctant to participate in such a dynamic forum, in case they are criticised for not giving both parties an equal opportunity to put their case forward.

Indeed, many feel that the hot-tub model violates the fundamental principles of arbitration. To illustrate this argument, detractors point to a scenario where one party's expert is an especially strong advocate who therefore manages to manipulate the discussion. In this case, critics argue, the party with a less bullish expert hasn't had a fair opportunity to present its case, especially if the witness is repeatedly being silenced by interruptions from the other side.

Clearly, the personalities involved play a very important role in the hot-tubbing model, and it is therefore often very important for experts to be good advocates for their cause, in addition to specialists in their field. But isn't this a dilution of the expert's proper role? Surely experts should be used by the tribunal precisely because they are experts — and not silver-tongued barristers. After all, shouldn't their knowledge and expertise ultimately carry the most weight with the judge or arbitrator?

Another common concern for parties considering the hot-tub model is the potential loss of control over the proceedings. Already, some barristers have reported feeling sidelined, and have voiced fears that the hot-tubbing model will result in a loss of control over their witnesses. For example, if the case begins to go in an unwanted direction during a discussion in the hot tub, there is less that barristers can do about it. However, to counter this argument, proponents of the hot-tubbing model claim that this problem can be addressed by preparing experts sufficiently, and also by selecting an expert who already has experience with this format.

WHAT'S NEXT FOR HOT-TUBBING?

It remains to be seen whether hot-tubbing will lead to a reduction in costs, both in litigation and in arbitration. If parties continue to opt for both the hot tub and traditional methods of cross-examination, then it is unlikely that the amount of time saved will be significant. Having said that, most experts expect the hot-tubbing model to become more common in construction disputes and other areas of arbitration in the future.

To prepare for these changes, all parties — including arbitrators and judges — will need to embrace the purpose of the hot tub properly, which is to get to the root of the issues between the parties in a constructive (rather than combative) manner. Even so, the effectiveness and fairness of this model will ultimately depend upon the tribunal's approach and ability to manage the hot-tubbing process effectively.

Regardless of whether or not the hot-tub model gains widespread acceptance in the UK, expert testimony will continue to be needed when it comes to resolving disputes effectively, whether in the construction industry or in other areas. As such, a wide variety of architects, engineers, construction managers, certified public accountants, and quantity surveyors may all be called upon to testify. In addition to expert testimony and litigation support, many people — including owners, contractors, architects, engineers, and their counsel — now rely on these experts for the analysis of the many technical, schedule, and cost issues that arise during arbitration.

Hot-tubbing allows the judge or arbitrator to draw upon a diverse range of experience and expertise in order to address complex issues effectively, so that all sides benefit from the wisdom of dedicated experts who fully understand these highly technical concepts. Although all businesses would prefer to avoid any disputes in the first place, the ability to call upon expert witnesses — whether in or out of the hot tub — will continue to be an invaluable part of ensuring a swift resolution to a wide variety of legal disputes.

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