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HOT TUBBING EXPERT WITNESSES + DOES IT WORK? 1

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Abstract 1

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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,

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

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Introduction

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Expert witnesses are often critical in litigation or arbitration of construction disputes on complex construction projects, especially if these legal disputes center on

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“ The role of experts and expert testimony remains a controversial component a

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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. 1

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What Are The Goals Of Hot Tubbing? 1

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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: 1

To save time during the arbitration or trial proceedings; 1

To save costs during the arbitration or litigation hearings; 1

To improve the quality and effectiveness of expert witness testimony; and, 1

To assist the court or tribunal in understanding and deciding upon the complex technical issues in dispute. 1

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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. 1

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Does Hot Tubbing Differ From Traditional Expert Witness Procedure? 1

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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 processes used in U.S. courts and arbitrations. A summary of these differences follows. 1

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expert's opinion is more likely to come from the other expert and the court or tribunal. 1

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How Does Hot Tubbing Work + What Are The Basic Steps? 1

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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. 1

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In Preparation for the hearing 1

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Hot tubbing may and often does commence before the hearing. 1

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. 1 1 1

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During the expert conferences the experts may be questioned jointly by the attorneys on such issues as what forensic schedule 1

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. 1

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The joint expert report is analogous to a Scott Schedule⁷ in that it lists all issues remaining in dispute with the position of both experts and reasons for disagreement. 1 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".⁸ 1

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During the hot tubbing session, the experts will then focus on the areas of disagreement. 1

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At the hearing 1

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Court or arbitration hearings employing the hot tubbing process tend to follow the process outlined below. 1

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Attorneys present their opening statements to set the stage for the hearing. 1

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Fact witnesses present their testimony through direct testimony and cross examination in the traditional manner. 1

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Experts are then both sworn in by the court or tribunal. 1

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⁷ 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.

⁸ 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. 1

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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.¹⁷ Hot tubbing is likely to shorten trial or arbitration hearings.

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Issues in dispute narrowed + Due to the preparation and submittal of the jointly

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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. 1

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Objectivity of 2 ~~As the trier of fact, the judge or arbitrator should not be influenced by the attorneys' arguments or the experts' testimony. The trier of fact should focus on the evidence and the experts' testimony, and should not be influenced by the attorneys' arguments or the experts' testimony.~~

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Control by triers of fact - If a 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. 1 1

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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. 1 1 1

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Prior academic relationship between experts - A negative experience with hot tubbing provided by a testifying expert, and former colleague, is set forth below. 1

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"In one particular case, a colleague observed that an economics expert, who was a past student of the other expert, testified that the

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Issues

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Advocacy by experts 4 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. 1

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Expert concessions 4 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. 1

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Risk of rapid responses 4 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 though 1 Tf 1.985wTT3 1 Tf 1.28 0 TD 0 Tcc <0231>Tj /TT4 1 Tf .26 0 TD -.0003 Tc.lellthere

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x It is important that experts be selected with the hot tubbing process in mind including the points raised in this paper.

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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.