

2010

Into the Hot Tub - A Practical Guide to Alternative Expert Witness Procedures in International Arbitration

Frances P. Kao

Justin L. Heather

Ryan A. Horning

Martin V. Sinclair Jr.

Recommended Citation

Frances P. Kao et al., *Into the Hot Tub - A Practical Guide to Alternative Expert Witness Procedures in International Arbitration*, 44 INT'L L. 1035 (2010)

<https://scholar.smu.edu/til/vol44/iss3/7>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

Into the Hot Tub . . . A Practical Guide to Alternative Expert Witness Procedures in International Arbitration

FRANCES P. KAO, JUSTIN L. HEATHER, RYAN A. HORNING,
AND MARTIN V. SINCLAIR, JR.*

Abstract

The arbitration rules adopted by various U.S. and international arbitration organizations vary in the amount of guidance they provide regarding the submission and presentation of expert evidence. Most of these arbitration rules provide minimal, if any, guidance regarding the procedures for the presentation of evidence from party-appointed experts. Several legal systems, however, have adopted procedural reforms intended to make the expert evidence process more streamlined, less adversarial, and more useful. The foregoing article attempts to analyze the various existing approaches to the presentation of expert testimony, review current trends and developments with respect to alternative approaches in this area with respect to international arbitration, and provide practitioners with guidance for advising their clients and developing successful expert strategies.

For those who have gone through expert discovery, preparation, and testimony in American civil litigation, the procedures for expert testimony traditionally followed in the United States may leave a practitioner with the feeling of “two ships passing in the night.” Intended as an avenue to assist the trier of fact, international observers have expressed concerns about the reliability of expert evidence, seeking to keep it from becoming no more than highly-paid advocacy from a credentialed witness.¹ Moreover, because the responsibility for retaining experts largely falls on the parties’ lawyers, expert witnesses may have an incentive to meet the lawyers’ demands and heed their instructions in the hopes of

* Frances P. Kao is a partner in the Chicago office of Skadden, Arps, Slate, Meagher & Flom LLP. Justin L. Heather, Ryan A. Horning, and Martin V. Sinclair, Jr. are associates in the litigation department in the same office.

1. See John Markoff, *A Boom in Expert-Witness Firms*, N.Y. TIMES, Oct. 2, 2005, <http://www.nytimes.com/2005/10/02/business/worldbusiness/02iht-IPRwitness.html?emc=eta>; see also *Protocol for The Instruction of Experts to Give Evidence in Civil Claims*, CIV. JUST. COUNCIL 1, 3 (2009), http://www.justice.gov.uk/civil/proc_rules_fin/contents/form_section_images/practice_directions/pd35_pdf_eps/pd35_prot.pdf [hereinafter *Protocol*].

obtaining future engagements.² This posture may result in polarized, intractable positions between the parties' experts. Most importantly, lawyer control over the examination process means that the important questions—typically the thorniest ones—can go unanswered or are glossed over, either because they are intentionally sidestepped or because counsel does not have sufficient facility with the particular topics at issue to elicit clear, relevant testimony. Despite the ongoing reliance on expert testimony by parties to complex civil cases, little headway has been made in the United States towards resolving these difficulties.

Given the mirroring of court procedures in the arbitration process, the expert witness conundrum is also frequently present in arbitrations. The arbitration rules adopted by various U.S. and international arbitration organizations vary in the amount of guidance they provide regarding the submission and presentation of expert evidence. Most of these arbitration rules provide minimal, if any, guidance regarding the procedures for the presentation of evidence from party-appointed experts.³ Regardless of whether the expert is tribunal- or party-appointed, most arbitration rules provide little guidance with respect to the procedure for the examination of experts during the arbitration hearing.⁴ Some limited exceptions exist with respect to rules governing the parties' right to question experts appointed by the Tribunal. Thus, for example, Article 29(3) of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC Rules") provide that ". . . the parties shall be given an opportunity to examine any expert appointed by the Arbitral Tribunal at a hearing."⁵ Given the limited guidance that most arbitration rules provide, the expert witness process in international arbitration frequently looks like the usual morass found in the U.S. courts, particularly where American lawyers are involved. This in large part is because, for American lawyers, the existing morass is the devil we know.

2. See WALTER R. LANCASTER, ET AL., *EXPERT WITNESSES IN CIVIL TRIALS: EFFECTIVE PREPARATION AND PRESENTATION* §§ 7:2, 7:7 (2010).

3. See, e.g., UNICITRAL Arbitration Rules, U.N. GAOR, 9th Sess., Supp. No. 17, at 34, U.N. Doc. A/31/17, para. 57, arts. 24-25, 27 (Dec. 15, 1976); LONDON COURT OF INT'L ARB. [LCIA], LCIA ARBITRATION RULES, arts. 20-21 (1998); CHICAGO INT'L DISPUTE RESOLUTION ASS'N, THE ARBITRATION RULES OF CHICAGO INT'L DISPUTE RESOLUTION ASS'N, arts. 23-24, 26 (revised 2005).

4. For example, Article 22.4 of the International Arbitration Rules of the American Arbitration Association provides that parties may question the tribunal appointed and "may present expert witnesses to testify on the points at issue." AM. ARB. ASS'N, ARBITRATION RULES art. 22.4 (2001). The AAA INT'L ARB. RULES do not specify the procedure by which either Tribunal—or party—appointed experts shall provide such oral testimony, including whether such testimony should be heard in a witness conferencing session. See also HONG KONG INT'L ARB. CTR., ADMINISTERED ARBITRATION RULES art. 23.5 (2008) [hereinafter HKIAC RULES]; SINGAPORE INT'L ARB. CTR., ARBITRATION RULES OF THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE art. 22.3 (3d ed. 2007) [hereinafter SIAC RULES]; RULES OF ARBITRATION OF THE INT'L CHAMBER OF COMMERCE art. 20.3 (1998) [hereinafter ICC RULES].

5. ARB. INST. OF STOCKHOLM CHAMBER OF COMMERCE, ARBITRATION RULES art. 29(3) (2010), available at http://www.sccinstitute.com/filearchive/3/35894/K4_Skiljedomsregler%20eng%20ARB%20TRYCK_1_100927.pdf. The arbitration rules of other international arbitration agencies as well as various international protocols have similar provisions. For example, Article 6(6) of the International Bar Association Rules on Taking Evidence in International Commercial Arbitration provides that "[t]he Arbitral Tribunal may question the Tribunal-Appointed Expert, and he or she may be questioned by the Parties or by any Party-Appointed Expert . . ." INT'L BAR ASS'N, IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION art. 6(6) (1999) available at <http://www.int-bar.org/images/downloads/IBA%20rules%20on%20the%20taking%20of%20Evidence.pdf> [hereinafter IBA RULES]; see also ICC RULES, *supra* note 4, art. 20(4); SIAC RULES, *supra* note 4, art. 23.2; HKIAC RULES, *supra* note 4, art. 25.4.

Apparently recognizing the inefficiencies in the use and presentation of expert testimony, several legal systems, including those in Australia and the United Kingdom, have adopted procedural reforms intended to make the expert evidence process more streamlined, less adversarial and more useful.⁶ Many of these systems and the rules and protocols promulgated by some international organizations incorporate a practice commonly thought to have developed within Australian trade practices cases—that of eliciting concurrent testimony, more colloquially called “hot-tubbing.”⁷ This practice has found some support in the United Kingdom, Canada, and, yes, even the United States.⁸

I. Innovative Practices in Australia

Hot-tubbing originated within the Australian Competition Tribunal (formerly known as the Australian Trade Practices Tribunal) in the 1970s and has been deemed by some as being the “Australian approach” to expert testimony.⁹ As outlined by former Australian Federal Court Justice Peter Cadden Heerey:

[The Australian hot-tub approach typically] involves the parties’ experts literally giving evidence at the same time. Written statements are filed at an earlier stage. After all other evidence has been concluded, the experts are sworn in and sit in the witness box—or at a suitably large table which is treated notionally as the witness box. One expert will then give a brief outline for, say, ten minutes of his or her current views, and the opposing witness may then ask questions. The process is then reversed. Each expert gives a brief summary. When all this is completed, counsel (somewhat on the sidelines in this process) may then ask questions.¹⁰

Australian judges laud the approach as one that is designed to remove partisan advocacy from expert testimony—a goal that, as in the United States, long had existed merely as a legal fiction.¹¹ Hot-tubbing, according to its proponents, removes advocacy tensions and allows the experts to respond more effectively to their colleagues, rather than just answering opposing lawyers’ questions, which often are designed to serve as sound bites and not really to aid in understanding the substance of the matters in dispute.¹² Hot-tubbing has gathered steam throughout Australia, and has officially been introduced into the Rules of

6. Doug Jones, *Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last*, 24 *ARB. INT’L* 137, 138–40 (2008).

7. *See id.* at 147–49 (discussing the use of hot-tubbing within Australia); *see generally* Gary Edmond, *Merton and The Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure*, 72 *L. & CONTEMP. PROBS.* 159 (2009) (analyzing the use of hot-tubbing with Australia and opining on the usefulness thereof); *see also* Lisa C. Wood, *Experts in The Tub*, 21 *ANTITRUST* 95 (2007) (profiling the contemplation and use of hot-tubbing in Canada and the United States).

8. *See* Wood, *supra* note 7, at 97–100.

9. Jones, *supra* note 6, at 147 (describing hot-tubbing’s origination within the Australian Competition Tribunal); Adam Liptak, *In U.S., Expert Witnesses Are Partisan*, *N.Y. TIMES*, Aug. 11, 2008, http://www.nytimes.com/2008/08/12/us/12experts.html?_r=2&au&emc=au&oref=slogin (describing “a new way of hearing expert testimony that Australian lawyers call hot tubbing”).

10. Marvin J. Garbis, *Aussie Inspired Musings on Technological Issues—Of Kangaroo Courts, Tutorials, and Hot Tub Cross-Examination*, 6 *GREEN BAG* 141, 148 (2003) (quoting Peter Heerey, *Expert Evidence in Intellectual Property Cases*, 9 *AUSTL. INTEL. PROP. J.* 92, 98–99 (1998)).

11. *See* Christopher T. Robertson, *Blind Expertise*, 85 *N.Y.U. L. REV.* 174, 178 (2010).

12. *See* Liptak, *supra* note 9.

the Federal Court of Australia, the Uniform Civil Procedure Rules for the Supreme Court of New South Wales, and the Court Rules of the Victorian Supreme Court.¹³ The practice is particularly popular within the New South Wales Land and Environment Court, under the direction of Justice Peter McClellan, who is credited with introducing the practice therein.¹⁴

II. Developing (Slowly) in the United Kingdom

Evidence of hot-tubbing within the United Kingdom is scant, though use of the practice may help address certain concerns of those within the system. In particular, Lord Woolf's 1996 report expressed the familiar view that the method behind expert evidence, among other things, led to the unnecessarily high cost and length of litigation, and recommended that the clamps be placed on expert partisanship and bias.¹⁵ Reforms followed in the shape of a Protocol for the Instruction of Experts to Give Evidence in Civil Claims, authored by the Civil Justice Council.¹⁶ The Protocol does not address any notion of concurrent evidence by multiple experts, but does encourage the use of "single joint experts" and corresponding joint reports.¹⁷

III. Canada, Ahead of the Curve

Canada has followed Australia's lead and has introduced expert hot-tubbing through its Competition Tribunal Rules for use in contested antitrust proceedings (the "CCT Rules").¹⁸ The CCT Rules specify that the Tribunal has the discretion to have multiple or all expert witnesses testify "as a panel after oral evidence by non-expert witnesses," and that the expert witnesses may "comment on the views of other experts on the panel [and] pose questions to [those] other expert witnesses."¹⁹ The CCT Rules appear to provide the Tribunal with a great deal of discretion in implementing the procedure, but clearly contemplate the simultaneous presentation of expert testimony.

IV. Treatment of Alternative Procedures in the United States

To many, reforms such as hot-tubbing within U.S. jurisdictions may seem to be extreme and unlikely.²⁰ American lawyers have developed a distinctly adversarial system, wherein even independent, neutral expert testimony only occurs either where it is imposed by the court or agreed to because both parties believe the neutral testimony will be completely benign.²¹ Often, to the frustration of everyone but the most cynical advocate, experts are

13. Jones, *supra* note 6, at 148.

14. Wood, *supra* note 7, at 95; Edmond, *supra* note 7, at 163.

15. Jones, *supra* note 6, at 138; *Access to Justice*, NAT'L ARCHIVES (U.K.), <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/overview.htm> (last visited Oct. 25, 2010).

16. Jones, *supra* note 6, at 39; see *generally Protocol*, *supra* note 1.

17. *Id.* ¶ 17.2.

18. Wood, *supra* note 7, at 95-96.

19. *Id.*

20. *Id.* at 98.

21. See Ned Mitenberg, *Myths About 'Neutral' Scientific Experts*, 36 TRIAL 62, 66-67 (2000); see also FED. R. EVID. 703.

led or directed by the parties' lawyers to the point of being nonresponsive and unhelpful.²² It is difficult to imagine the typical American lawyer taking the shackles off of an expert and allowing for a free flow of ideas between the experts or amongst the experts and the trier of fact.

Yet even in the United States, at least some movement toward hot-tubbing has begun.²³ Like Canada, and Australia before it, courts and practitioners in the United States have explored the hot tub in relation to antitrust cases.²⁴ The American Bar Association (ABA) Section of Antitrust Law's Task Force on Economic Evidence contemplated the practice in connection with its August 2006 report.²⁵ Though it expressed a dim view on the prospects of hot-tubbing (citing, ironically, concerns of overly adverse experts),²⁶ the report at least signaled that Americans have turned their eyes toward the hot tub, even if not wanting to jump in full force.

Interestingly, while alternative expert witness practices have not found widespread use within U.S. jurisdictions, they have been used (in varying forms) with reported successful results in several federal cases, including cases involving voting rights, contractual disputes and corresponding damage calculations, and products liability claims.²⁷

V. Use of Alternative Expert Witness Procedures in International Arbitration

Given that the courts of many countries have adopted procedures that are intended to enhance the usefulness of the expert witness, and given the broad discretion that almost all arbitration rules give to arbitral tribunals, the arbitration forum, intended to be an alternative dispute resolution process, should be one in which the tribunal, the lawyers, and the parties work together to alter the negative dynamics that currently exist with respect to expert evidence.

It is important to note that no existing rules of arbitration prohibit the use of alternative procedures for handling expert witnesses. In fact, there are international rules and protocol applicable to arbitrations that contemplate the possibility of such procedures. For example, the International Bar Association (IBA) Rules contain numerous provisions designed to foster cooperation amongst experts in the pre-hearing stages of the arbitration. Further, the IBA Rules provide the tribunal with discretion to implement various procedures with respect to the submission and taking of expert evidence. For example, Article 5(3) of the IBA Rules provides that "[t]he Arbitral Tribunal in its discretion may order that any Party-Appointed Experts who have submitted Expert Reports on the same or related issues meet and confer on such issues."²⁸ During the course of this meeting, the parties'

22. See Gross, *Expert Evidence*, 1991 Wis. L. R. 1113, 1152-53 (1991).

23. Wood, *supra* note 7, at 97.

24. *Id.*

25. *Id.* at 96-97.

26. *Id.* at 97.

27. *Id.* at 97-101 (profiling the voting rights and contractual cases); see also *In re Welding Fume Prod. Liab. Litig.*, No. 1:03-CV-17000 MDL 1535, 2005 WL 1868046, at *23 n.39 (N.D. Ohio Aug. 8, 2005) (noting, after holding an additional hot tub session with neurological experts who, to that point had expressed "dramatically different views," that "the parties and the Court found this 'hot tub' approach extremely valuable and enlightening").

28. IBA Rules, art. 5(3).

respective experts “shall attempt to reach agreement on those issues as to which they had differences of opinion in their Expert Reports, and they shall record in writing any such issues on which they reach agreement.”²⁹

The IBA Rules also provide several methods for the presentation of testimony during the course of the evidentiary hearing that are subject to the “complete control” of the tribunal.³⁰ Following the traditional common law method, the IBA Rules provide for cross-examination of any witness (either fact or expert) following the direct testimony of the witness.³¹ After such cross-examination, “[t]he Party who initially presented the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties’ questioning.”³² But the IBA Rules also provide for the possibility of concurrent expert witness testimony during the hearing, i.e., all expert witnesses being subject to questioning at the same time. Specifically, the IBA Rules provide that: “[t]he Arbitral Tribunal, upon request of a Party or on its own motion, may vary this order of proceeding, *including the arrangement of testimony by particular issues or in such a manner that witnesses presented by different Parties be questioned at the same time and in confrontation with each other.*”³³ Unlike the below-discussed Chartered Institute of Arbitrators Protocol for the Use of Party-Appointed Expert Witnesses in International Commercial Arbitration (“CI Arb Protocol”), which applies only to party-appointed experts,³⁴ a fair reading of Articles 5, 6, and 8 of the IBA Rules demonstrates that these provisions presumably apply to both party- and Tribunal-appointed experts.

By its terms, the CI Arb Protocol “expands upon the IBA Rules” in a number of ways.³⁵ Although structurally similar to the IBA Rules, the CI Arb Protocol differs from the IBA Rules by “providing for an experts’ meeting before reports are produced.”³⁶ In addition to the joint pre-hearing meetings provided by the IBA Rules, the CI Arb Protocol endeavors to establish “before any hearing the greatest possible degree of agreement between experts.”³⁷ To this end, the CI Arb Protocol provides for a meeting of party-appointed experts prior to the submission of expert reports to reach agreement on issues where possible in order to streamline the proceedings.³⁸ The CI Arb Protocol further permits the arbitral tribunal to order that experts exchange draft outline opinions to facilitate the meet and confer session.³⁹ This is in contrast to the IBA Rules, which provide only for meet and confer sessions by experts “who have submitted Expert Reports on the same or related issues”—in other words, the meet and confer session takes place after expert reports have been exchanged.⁴⁰ Article 6 of the CI Arb Protocol further provides a detailed

29. *Id.*

30. *Id.* art. 8.

31. *Id.* art. 8(2).

32. *Id.*

33. *Id.* (emphasis added).

34. *Protocol For The Use of Party-Appointed Expert Witnesses in International Arbitration*, CHARTERED INST. OF ARBITRATORS, 1 (Sept. 2007), <http://www.ciarb.org/information-and-resources/The%20Use%20of%20party-appointed%20experts.pdf> [hereinafter CHARTERED INST. OF ARBITRATORS].

35. *Id.*

36. *Id.*

37. *Id.* at pmb1.

38. *Id.* art. (6)(1).

39. *Id.*

40. IBA RULES, *supra* note 5, art. 5(3).

procedure for the development and submission of expert evidence in advance of the hearing.⁴¹ Although there is no explicit reference to expert witness conferencing (other than its implicit adoption of the IBA Rules), the CIArb Protocol provides that “[t]he Arbitral Tribunal may at any time, up to *and during the hearing, direct the experts to confer further* and to provide further written reports to the Arbitral Tribunal either jointly or separately.”⁴²

In short, the IBA Rules and the CIArb Protocol clearly raise the possibility of expert witness meet and confer sessions and the taking of concurrent testimony during the course of an international arbitration. Since the taking of evidence at the arbitration hearing is entirely within the control of the arbitral tribunal, parties entering into an international arbitration should be prepared for the possibility that various alternative procedures will be the arbitral tribunal’s preferred approach for dealing with expert witnesses. This will particularly be the case where the majority of the tribunal are non-U.S. arbitrators and thus tend to be more familiar with and more accepting of these alternative expert witness procedures, and even more so where one or more members of the tribunal come from civil law jurisdictions. Those individuals will be better accustomed to the more inquisitorial nature of the alternative expert witness procedures than arbitrators from common law jurisdictions.⁴³

VI. Practical Implications for the Practitioner

Many practitioners assert that it is unclear whether the alternative procedures achieve all the desired results of time and cost efficiency, reducing the adversarial atmosphere, narrowing the issues, eliminating polarized positions, and increasing expert collegiality.⁴⁴ But, given the increasing resort to alternative expert witness processes by international arbitral tribunals, practitioners would do well to become familiar with these procedures and to anticipate the myriad important decisions that have to be made along the way.

A. EDUCATING THE CLIENT

The lawyer’s first task is to educate the client early that expert witness procedures in an international arbitration proceeding may be completely different than what the client has previously experienced. The client should be warned that the question is not whether a different process will be imposed; the question, rather, is how different in nature the process will be. Where the client is a sophisticated party and a frequent participant in the dispute resolution process, the lawyer and client should, at the outset (before any procedural conference is held with the arbitral tribunal), mutually determine the nature of key issues in the case and how the range of alternative procedures may affect those issues and case strategy.

41. CHARTERED INST. OF ARBITRATORS, *supra* note 34, at 7.

42. *Id.* at 8 (emphasis added).

43. Urs Martin Laeuchli, *Civil and Common Law: Contrast and Synthesis in International Arbitration*, 62 DISP. RESOL. J. 81, 82 (2007).

44. See generally, *Expert Witnesses, Hot Tubbing, and Horse-Choking Payments*, MEDICAL JUSTICE, May 7, 2009, <http://www.medicaljustice.com/medical-malpractice-reform-det.asp?article-id=311003741>.

B. CONSIDER WHAT PROCEDURES WOULD BE MOST ACCEPTABLE

Expert witness procedures in international arbitrations are almost always the result of discussion between the parties and the arbitral tribunal.⁴⁵ The lawyer must consider what processes will be the most acceptable and those that should be avoided. The range of options to consider should at least include:

- whether the experts will meet and confer to determine if they can agree to certain facts and conclusions in order to narrow the issues;
- if the experts meet and confer, whether to do so before or after expert reports are exchanged;
- if the experts meet prior to the exchange of expert reports, whether draft outline opinions will be provided to facilitate the meet and confer;
- whether lawyers for the parties may be present at the expert witness meet and confer (it is important to note that many arbitral tribunals will bar lawyers from being present at the conferencing session because of concerns that the presence of lawyers will chill the experts' ability to have a genuine exchange of ideas on the issues);
- whether the experts must commit to writing all the areas of agreement arising out of the meet and confer before the end of the conference or whether they may consult with their respective sides before such agreement is made;⁴⁶
- whether the experts will take the stand jointly at the arbitration hearing to participate in a hot-tubbing session to be questioned by the arbitral tribunal, each other, and the parties' counsel;⁴⁷ and
- whether the lawyers will be permitted to cross-examine the experts either before or after the hot-tubbing session takes place (some arbitral tribunals may not permit further cross-examination once the experts have stated their case and responded to the tribunal's and opposing expert's questions).

C. THE PROS AND CONS OF THE PROCEDURES

The combination of alternative procedures that should be agreed to will differ depending on the nature of the case. For example, many practitioners agree that the meet and confer sessions work best where the experts are addressing discrete issues and the broad underlying principles governing the issues are largely not in dispute.⁴⁸ This permits the experts to focus solely on their discrete areas of disagreement to determine whether there can be common ground between them.

The hot-tubbing process is particularly useful where the expert testimony, when put on through the usual direct, cross, and redirect process, would take up significant time. This is because by the time one expert concludes lengthy testimony, and the second expert comes on the stand, the trier of fact must try to recall the first expert's statements and how they compare to the opposing expert's positions. When the experts give concurrent evidence following a short summary of their opinions, the differences in opinion are immediately highlighted and can then be the subject of exploration by both the arbitral tribunal

45. See e.g., CHARTERED INST. OF ARBITRATORS, *supra* note 34, at 2.

46. See *id.* at 8.

47. See *id.* at 2.

48. See Jones, *supra* note 6, at 147.

and the experts themselves.⁴⁹ Where a party has confidence in both their litigation position and the ability of their expert to highlight the differences and focus on the credibility of their case, hot-tubbing can be an effective medium.⁵⁰

Where a case is not document intensive, the meet and confers and hot-tubbing can also be useful streamlining mechanisms because the focus is on the individual testimony and not the use of documents to prove particular issues.⁵¹ It is not unusual that eliciting concurrent testimony can reduce the time allotted to expert testimony by almost one half. That time reduction directly translates to a reduction in cost. Lastly, both the meet and confer process and hot-tubbing can help reduce tensions because individuals are more likely to provide honest opinions within their own professional peer group, especially when subject to immediate challenge. Thus, having experts give testimony concurrently with professional peers is likely to reduce embellishment, avoidance of tough issues, and harsh rhetoric, which, in turn, can reduce overall hostility in a contentious matter.

On the downside, all of these alternative procedures can result in total loss of control over the expert witnesses and the testimony that is ultimately elicited.⁵² Thus, the meet and confer sessions, particularly where lawyers are prohibited from attending, can result in an expert agreeing to apparently uncontroversial technical points but which may have negative impacts elsewhere in the case. Similarly, an expert unused to going it alone—that is, no direct examination to help shape responses—may not make all the factual and technical points necessary to the case during the hot-tubbing session. Or, an expert may begin to think of himself almost as a tribunal-appointed neutral expert such that key evidence that the expert now considers somehow partisan simply does not come through. Document intensive cases may also be risky in terms of hot-tubbing because that give-and-take process is not conducive to focusing on documents, and it is also risky to ask that the expert call to the arbitral tribunal's attention large numbers of documents without being prompted to do so. Although follow-up questions by lawyers are generally permitted to elicit facts and opinions that the expert somehow omitted, these follow-ups should be brief in nature and should not be used as an opportunity to go through documents piece by piece—such conduct will not be appreciated by the arbitral tribunal.

The key to whether alternative procedures are ultimately successful is the arbitral tribunal's ability to guide and control the proceedings. Ideally, the members of the tribunal should be well prepared and familiar with the issues being discussed by the experts. That way, the arbitral tribunal can focus the questioning, appropriately ask the experts for responses to opposing statements, request further elucidation where needed, and probe areas of inconsistency or disagreement. Further, the arbitral tribunal will also set the tone for the hearing and actively work to prevent the hot-tubbing session from taking on derogatory or otherwise negative and combative tones.

49. Hannah Ambrose, *Witness Conferencing in International Arbitration: A Practical Experience*, ALLEN & OVERY, Jan. 14, 2010, <http://www.allenoverly.com/AOWEB/Knowledge/Editorial.aspx?contentTypeID=1&contentSubTypeID=7950&itemID=54402&prefLangID=410>.

50. Justine Ash, *Hot Tubbing*, MATTHEW, ARNOLD & BALDWIN, Apr. 19, 2010, <http://www.mablaw.com/2010/04/hot-tubbing/>.

51. Ambrose, *supra* note 49.

52. *See id.*

D. SKILLS AN EXPERT SHOULD HAVE TO BE SUCCESSFUL UNDER ALTERNATIVE PROCEDURES

What should be apparent by now is that the quality of the expert is critical if alternative procedures might be used. In a process where the expert has to engage the opposing expert in dialogue and has to directly address the finder of fact without the overall guide of attorney questioning, the expert has to have a number of important traits. More than anything else, the expert must be a good teacher—that is, she must be able to explain complicated concepts in simple terms using simple examples without condescension or pedantry. The expert must also be able to question or “cross examine” the other expert during the hot-tubbing process to highlight areas of error or inconsistency to the arbitral tribunal without any antagonistic attitude. The expert has to be sufficiently secure so that she is capable of agreeing to obvious facts and conclusions in order to maintain credibility without giving up important ground in the case. The expert must also have a likeable demeanor. Most importantly, with the give-and-take nature of the meet and confer process and the hot-tubbing procedure, the expert witness must be a good listener. That is, the expert has to be able to parse through even convoluted questions from the tribunal and the opposing expert and answer them directly and succinctly. The main thing to remember in assessing an expert is that the lawyer will have limited or no ability to guide the expert during witness conferencing and the hot-tubbing session.⁵³ The expert must have the ability to understand the nuances in the case and be able to stay on message, be credible, be proactive in addressing the opposing expert’s case, and be able to explain why the client’s position is the appropriate one for the tribunal to adopt.

At the end of the process, every lawyer will have an opinion whether these alternative procedures for expert witnesses in fact achieve the intended goals of streamlining issues, reducing adversarial rhetoric, promoting dialogue between the experts and parties, and making testimony more efficient. Irrespective of varying opinions, however, what is clear is that going through these alternative processes just once is a learning experience for even long-time practitioners and there is inevitably a part of the process that will prove to be highly useful and suitable for consideration, not just in international arbitrations, but perhaps even in traditional American litigation.

53. See Jones, *supra* note 6, at 148.