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Hot Tubbing in International Arbitration

Finding a path through the maze of expert evidence

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What you need to know

- Concurrent evidence has a long history in international arbitration. While it has some drawbacks, it has also been viewed as a success in the Australia courts and, partly on the back of that success, has been adopted in courts in the United Kingdom, Singapore and Canada.
- The advantages of concurrent evidence apply equally whether the dispute is resolved by a court or by arbitration, however, in international arbitrations, parties from different jurisdictions may be reluctant to adopt the procedure due to unfamiliarity with how it works and the benefits of the procedure.
- In this article, we discuss the growing acceptance of concurrent evidence globally both in courts and in arbitrations, why it is seen as an efficient method of examining expert witnesses despite having some drawbacks, and we give some tips on how to approach the preparation of expert evidence if the experts will be examined concurrently.

The introduction and growth of concurrent evidence

For a long time, courts and tribunals have been concerned about the way expert evidence is obtained and presented. These concerns surround the court time absorbed by cross-examining experts separately, the tendency of the issues to become blurred in a maze of technical detail and the perceived tendency for experts to become partisan in an adversarial system.[1]

The international arbitration community have been using a method to address these concerns: concurrent expert evidence,"hot tubbing" or "witness conferencing".[2] This is a procedure whereby the evidence of two or more opposing expert witnesses is heard simultaneously. The witnesses are sworn in together and the judge or arbitrator chairs a discussion between them, usually after the issues have been narrowed through meetings between the experts and the preparation of a joint report. The International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration (**IBA Rules**) have made provision for concurrent evidence since about 2000.[3]

Australian courts were early adopters of concurrent evidence, with it being introduced over 20 years ago.[4] While it has some drawbacks, it has been viewed as a success in Australia and, partly on the back of that success, has been adopted in courts in the United Kingdom, Singapore and Canada, although the uptake of the procedure remains largely confined to specialist practice areas.

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[1] The Hon Justice Stephen Rares, Federal Court of Australia, *Using the "Hot Tub": How Concurrent Expert Evidence Aids Understanding Issues*

[2] Wolfgang Peter, *Witness 'Conferencing'* Arbitration International Vol 18, No 1.

[3] Peter at p 51.

[4] Rares J at [19].

The advantages of concurrent evidence apply equally whether the dispute is resolved by a court or by arbitration. However in international arbitrations some parties and tribunals may be disinclined to adopt concurrent evidence because they are unfamiliar with the procedure and its benefits, coming from countries where the court system does not use concurrent evidence.

In this article, we discuss the growing acceptance of concurrent evidence globally, in both courts and in arbitrations, why it is seen as an efficient method of examining expert witnesses despite having some drawbacks. We also give some tips for how to approach the preparation of expert evidence if the experts will be examined concurrently, which may be useful if you are required to explain the procedure to clients and solicitors from a different jurisdiction.

The acceptance of concurrent evidence in arbitrations

International arbitrations often involve substantial contractual disputes which turn on the resolution of complex technical issues. The quality of the expert evidence is critical. The shortcomings of expert evidence in domestic court proceedings can be compounded in disputes resolved by international arbitration. Parties can come from different countries with different cultures. Instructions to experts can then be inconsistent between the parties, resulting in a disconnect in the various expert reports. This problem is compounded if the experts are not allowed to talk to one another. Concurrent evidence is a good way of tackling this problem and bringing the expert evidence into alignment.

Most institutional arbitration rules leave the mode and structure of questioning witnesses to the tribunal's discretion and the parties' agreement.[5] As a result, the approach to the presentation of evidence at an arbitration hearing depends significantly on the nationalities and legal backgrounds of the tribunal and lawyers involved.[6]

As concurrent evidence is well established in Australian courts, it is not surprising that the practice of concurrent expert evidence has been widely adopted by Australian parties involved in domestic arbitrations.

It is gaining momentum in international arbitration proceedings. The Queen Mary 2012 survey on international arbitration practice[7] found that 60 per cent of people had experienced it, although it was not that commonly used. However, the majority of those surveyed thought it should be used more often, considering it to be an effective means of narrowing the issues between the experts.

The growth of concurrent evidence in international arbitration has been limited by the fact that the practice is unfamiliar in many countries. While it has been introduced into courts in some common law countries such as Australia, the United Kingdom, Singapore and Canada[8], it is less familiar to parties from other countries.

The architecture for concurrent evidence in international arbitrations is available, however, in the *IBA Rules on the Taking of Evidence in International Arbitrations 2010*. These rules expressly provide that the Arbitral tribunal may direct experts to confer prior to a hearing to narrow the issues and prepare a joint report outlining areas of agreement and disagreement.[9] The IBA rules also permit the tribunal to order "witness conferencing", ie that "witnesses be questioned at the same time and in confrontation with each other".[10]

Issues have always arisen in international arbitrations when practitioners from civil law and common law jurisdictions are brought into the one forum. When parties come from different jurisdictions, many international arbitrators seek to blend civil, common law and other relevant legal traditions in structuring and managing witness examination.[11] Jeff Waincymer suggests that witness conferencing may ultimately prove to be a useful means to try to reconcile the

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5 Born, *International Commercial Arbitration (Second Edition)*, Chapter 15.08 [9]

6 Born, *International Commercial Arbitration (Second Edition)*, Chapter 15.08 [8]

7 "*International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*", published by the School of International Arbitration at Queen Mary University London (QMUL) in 2012

8 Pepper J, '*Hot Tubbing': The use of concurrent expert evidence in the Land and Environment Court of New South Wales and beyond*", paper presented at the 2015 Annual Alaskan Bar Association Conference in Fairbanks, Alaska USA, on 14 May 2015.

9 Article 5.4

10 Article 8.3(f)

11 Born, *International Commercial Arbitration (Second Edition)*, Chapter 15.08 [8]

differences in view between common law and civil law jurisdictions as to the probative value of party appointed experts.[12]

Evidence is given together and experts can ask each other questions

While the specific approach to concurrent evidence varies between courts and tribunals, the usual process is broadly as follows. The parties identify the issues on which expert evidence is required and the experts then prepare their individual reports. After reports are exchanged, the experts meet for an expert conclave, usually without lawyers and usually on the basis that matters discussed during the conclave will not be disclosed at any hearing.

The experts then prepare a joint report which sets out the matters upon which they agree and disagree and the reasons for any disagreement. Sometimes there will be reports in reply to address any outstanding issues.

At the hearing, the experts are called to give evidence together. The evidence is usually arranged into topics and each expert speaks to the topic and is given an opportunity to explain their position on the issues in dispute. Each expert then has the opportunity to comment on the other experts' opinions and may also ask questions of the other experts. The opposing counsel then cross-examine the experts and may seek assistance from their own expert to understand and clarify the answers given.[13]

Cutting to the chase, with a few pitfalls

There are significant benefits to the tribunal, the parties and the experts in adopting procedures for concurrent evidence:

- It narrows the issues in dispute quickly and effectively.
- Experts who are addressing a particular issue give their evidence in one place at one time, which significantly reduces hearing time and inconvenience to the experts.
- It allows an expert to address immediately a difference of opinion on a particular point and provide an explanation to the tribunal, rather than having to explain the difference of opinion to their counsel who would then cross-examine the other expert.
- The experts are asked the same questions on the basis of the same facts that have been elicited at that stage of the hearing.
- The experts are free to ask each other questions or to supplement other experts' answers.
- Any extreme or biased views adopted by experts are quickly moderated when they need to be justified before their peers. Appropriate concessions are more likely.
- The experts feel more comfortable in a collegiate environment, rather than going head-to-head with a barrister who they fear is only trying to trick or bully them.
- There is one tranche of transcript of the expert evidence to review on that subject, rather than disparate tranches at different stages of the hearing.

The advantages of concurrent evidence are supplemented by the benefits of the expert conclave. Here factual concessions are more likely as they are easier to make in private. The experts often disclose facts and/or relevant information not always known or appreciated by other experts and significant points of disagreement can be identified and more adequately defined, while peripheral issues are often isolated and agreed upon.[14]

There are some drawbacks:

- It can, for example, be difficult to get numerous witnesses in one place at one time.
- If the judge or arbitrator is too interventionist, there may not be sufficient room for the advocate to test the opinions of the other side's expert, especially on credit.

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12 Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer law International 2012), [12.14.12]

13 Rares J, *Using the "Hot Tub: How Concurrent Expert Evidence Aids Understanding Issues*, Federal Court of Australia, 12 October 2013, para 26

14 Pepper J, '*Hot Tubbing': The use of concurrent expert evidence in the Land and Environment Court of New South Wales and beyond*", paper presented at the 2015 Annual Alaskan Bar Association Conference in Fairbanks, Alaska USA, on 14 May 2015, para 48

- If not properly controlled by the court or tribunal, there is a risk that confident and assertive experts might unfairly dominate the discussion.
- The necessary pre-hearing preparation frontloads costs which might otherwise not have been incurred.
- In an arbitration, the inevitable involvement of the tribunal in controlling the discussion and asking questions could lead parties to draw conclusions about the tribunal's supposed predilections, and concerns about this might dissuade the tribunal from appropriately managing the discussion.[15]

Concurrent evidence is widely regarded as successful

Despite the drawbacks, concurrent evidence has been regarded as a success in Australia and it is now well entrenched in Australian courts.

Justice Steven Rares of the Federal Court of Australia asserts that while uninitiated counsel are highly suspicious of concurrent evidence, that suspicion evaporates once they participate, because of the efficiency and discipline which the process brings to bear. There is also support for concurrent evidence from experts and their professional organisations. [16]

Concurrent evidence was introduced in the United Kingdom in 2013 following an inquiry by Lord Justice Jackson and a subsequent pilot scheme.[17] Experience from the UK pilot, which was run in the TCC and Mercantile Court, showed that all the parties agreed that there were clear benefits from concurrent evidence. It was more efficient, as it was easier to present the evidence and to assess it, and the focus on the issues and areas of disagreement prior to trial meant that time was saved at trial and it was easier for the court to compare contrasting evidence.

Similar trials and adoption of the procedure have occurred in Canada and Singapore and it has been trialled in some courts in the United States.[18]

The growing support for concurrent evidence in court proceedings, particularly in the United Kingdom, will no doubt continue to influence the approach to expert evidence in international arbitration. The commentary to the *IBA Rules* states that pre-hearing conferences, joint reports and concurrent evidence "can make the proceeding more economical. Experts from the same discipline, who are likely to know each other, can identify relatively quickly the reasons for their diverging conclusions and work towards finding areas of agreement." It is expected that the hearing will then "focus on the truly disputed aspects of the case".

How to make the most out of concurrent evidence

Lawyers need to approach the preparation of evidence differently if the experts will be examined concurrently with other experts. Preparation must start early, when evidence is being collected and the experts are being retained. The lawyers must be confident that the expert selected is one who will be comfortable with this format of presenting evidence. The experts need to know what lies ahead. While they may be experienced expert witnesses, they may not be familiar with the concurrent evidence process. The choice of expert is important, as the expert needs to be able to gain the respect of the other experts and not be pressured into accepting the views of the others without careful consideration.

The importance of the joint conference of experts is heightened, as the joint report provides the road map for the concurrent evidence at the hearing. The strengths and weaknesses of the parties' cases are often identified in the joint report: a gaping hole in a party's case that is revealed in the joint report is very difficult to patch up in the concurrent evidence. It is therefore crucial to ensure that your expert is fully prepared prior to the joint conference. Likewise, you

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15 Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012), [12.14.12]

16 Rares J, *Using the "Hot Tub: How Concurrent Expert Evidence Aids Understanding Issues*, Federal Court of Australia, 12 October 2013; Pepper J, '*Hot Tubbing': The use of concurrent expert evidence in the Land and Environment Court of New South Wales and beyond*", paper presented at the 2015 Annual Alaskan Bar Association Conference in Fairbanks, Alaska USA, on 14 May 2015, para 73

17 *Manchester Concurrent Evidence Pilot Interim Report*, Professor Dame Hazel Genn UCL Judicial Institute, January 2012, paragraph 1.

18 Pepper J, '*Hot Tubbing': The use of concurrent expert evidence in the Land and Environment Court of New South Wales and beyond*", paper presented at the 2015 Annual Alaskan Bar Association Conference in Fairbanks, Alaska USA, on 14 May 2015

will need to meet with your expert afterwards so that he or she can report on the dynamics of the joint conference and help to identify what needs to be followed up in the concurrent evidence.

Waincymer suggests that in some cases, it may assist to appoint an independent neutral facilitator to coordinate meetings between experts, for example where there are numerous expert witnesses. He observes that this was done successfully in a domestic arbitration in Australia, *Anaconda Operation Pty Ltd v Fluor Australia Pty Limited*, where the tribunal appointed two 'independent assessors' whose role was to chair meetings and produce schedules outlining the key issues and views of the party-appointed experts and areas of agreement and disagreement.[19]

It is also important to spend time preparing the expert before the concurrent evidence. The concurrent evidence process should be described to them so that they know how the room will be set up, how the questioning will proceed, who is allowed to ask questions, and that they will be under cross-examination during the whole of the concurrent evidence so they will not be able to discuss their evidence with anyone (including the lawyers) during breaks.

Where counsel is not familiar with concurrent evidence they will need to consider how they will approach it. Although it becomes easier with experience, advocates need to be aware that they need to know the subject, they only have one go with all the experts and they may have limited time so they have to be disciplined. If possible they should get to know the experts' personalities (e.g. who is likely to dominate the discussion) and they will need a strategy to ensure that their expert's answers are given appropriate weight (e.g. avoid their expert being the last of the experts to answer every question in case his/her answer is lost).

If you would like further information on the Australian/UK perspective, please see Hot-tub: lessons from Australia (Commercial litigation newsletter, October 2013) by Antonia Croke (London) and Louise Mallon (Sydney) of Ashurst

Authors

Georgia Quick
Partner
Sydney
T: +61 2 9258 6141
georgia.quick@ashurst.com

Camilla Wayland
Expertise Counsel
Sydney
T: +61 2 9258 6328
camilla.wayland@ashurst.com

Harriet Lenigas
Senior Associate
Sydney
T: +61 2 9258 5843
harriet.lenigas@ashurst.com

[19] Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012), [12.14.9]