



# CONSTRUCTION **SUPER**CONFERENCE

2025

[CONSTRUCTIONSUPERCONFERENCE.COM](https://CONSTRUCTIONSUPERCONFERENCE.COM)

# HOW TO PUT YOUR EXPERTS IN A HOT-TUB (AND MAKE IT GOOD FOR EVERYONE)

---

Stephen Seeger, Cozen O'Connor

Amanda Amadon, Ankura

Toshi Dezaki, Ankura

Tom Gaines, Secretariat

Meera Wagman, Secretariat

# INTRODUCTION



**Stephen M. Seeger**  
sseeger@cozen.com  
+1.202.747.0793



**Amanda Jo Amadon**  
amanda.amadon@ankura.com  
+1.202.973.3240



**Toshi Dezaki**  
toshi.dezaki@ankura.com  
+1.202.973.3126



**Tom Gaines**  
tgaines@secretariat-intl.com  
+1.856.396.8217



**Stephen M. Seeger**  
mwagman@secretariat-intl.com  
+1.917.612.5458

# IS IT HOT TUB TIME?



# WHAT IS CONCURRENT EXPERT EVIDENCE, or WITNESS CONFERENCING, or “HOT-TUBBING”

“A discussion chaired by a judge in which the various experts, the parties, the advocates and the judge engage in a co-operative endeavor to identify the issues and arrive where possible at a common resolution of them. Where the resolution of issues is not possible, a structured discussion, with the judge as chairperson, allows the experts to give their opinions without the constraints of the adversarial process and in a forum which enables them to respond directly to each other. The judge is not confined to the opinion of one advisor but has the benefit of multiple advisers who are rigorously examined in public.”

*- Hon. Justice Peter McClellan*

*Chief Judge at Common Law of the Supreme Court of New South Wales, Australia*

# WHAT IS CONCURRENT EXPERT EVIDENCE, or WITNESS CONFERENCING, or "HOT-TUBBING"

"The procedure requires the dueling experts to focus on the same point at the same time. And the 'point/counterpoint' dialogue—as opposed to the traditional appellate-type monologue—is a better way of evaluating the accuracy of an expert's opinion. There is no hiding."

- *Hon. Judge Jack Zouhary*

*Senior Judge, United States District Court for the Northern District of Ohio*

# EXPERTS' HOT TUB DUTIES

- International Arbitration
  - Duty is to assist the judge/arbitrators
  - Goal is to facilitate the judge's/arbitrators' understanding of:
    - facts
    - the subject of the experts' specialty
    - agreements/disagreements between experts
    - how differences impact the fact finder's decision-making processes and outcome
- Domestic U.S. Arbitration/Litigation
  - Duty is to the client, limited by standards of integrity and professionalism
  - Goal is to present client's position and persuade arbitrator
  - Moving away from 'advocacy experts'

# IS THERE A PLACE FOR COUNSEL IN THE HOT-TUB?

- International Arbitration – Outside looking in
  - Counsel select experts
  - Counsel provides instructions and evidence for consideration
  - Counsel largely discouraged (much to their dismay) from interacting with experts after submission of reports, editing draft joint expert reports, or preparing for hot-tubbing
- Domestic U.S. Arbitration/Litigation – In up to their eye-balls
  - Unlimited except by ethics, agreement of the parties, or any order of the arbitrators/court
  - Potential areas of limitation: expert conferral, editing of JER

# NO FIRMLY ESTABLISHED PROCEDURES OR GUIDELINES

- Bespoke by court/arbitrators depending on experience and preferences
- Agreed at outset by parties including protocol and procedures
- Agreed at outset by parties, but protocol and procedures set by court/arbitrators
- *Ad hoc* / unplanned (at any time) – employed after preliminary order, or during evidence, or after resolution of claim/phase
- Hot Tubs in Mediations, DRBs, DABs

# TYPICAL COMPONENTS

## (whether or not incorporated in procedural orders)

- Identification of Issues to be Addressed
- Initial Expert Reports or Disclosures
- *Initial Meeting of Experts*
- Identification of Points of Agreement and Disagreement
- Preparation of the Joint Expert Report (JER)
- *Separate Expert Presentations **after** Completion of Fact Witnesses*
- Separate Expert Cross-Examinations by Counsel
- Joint Expert Examination (getting in the tub)

# PRE-HEARING PHASE: INITIAL REPORTS, CONFERRAL, AND JOINT EXPERT REPORT

Article 4.4 of the Chartered Institute of Arbitrators Protocol for the Use of Party Appointed Expert Witnesses in International Arbitration provides that an expert's written opinion should:

- a) contain the full name and address, background, qualifications, training and experience of the expert;
- b) state any past or present relationship with any of the Parties, the Arbitral Tribunal, counsel or other representatives of the Parties, other witnesses and any other person or entity involved in the Arbitration;
- c) contain a statement setting out all the instructions the expert has received from the appointing Party and the basis of remuneration of the expert;
- d) *only address the issue or issues in respect of which the Arbitral Tribunal has provided directions for expert evidence to be adduced;*
- e) state which facts, matters and documents, including any assumed facts or other assumptions, have been considered in reaching the opinion;
- f) state which facts, matters and documents, including any assumed facts or other assumptions, the opinion is based upon;
- g) state the opinion(s) and conclusion(s) that have been reached and a description of the method, evidence and information used in reaching the opinion(s) and conclusion(s);
- h) state which matters the expert has been unable to reach an opinion on;
- i) state which matters (if any) are outside the expert's area of expertise;
- j) adequately reference all documents and sources relied upon

# PRE-HEARING PHASE: INITIAL REPORTS, CONFERRAL, AND JOINT EXPERT REPORT (cont.)

- Conferral and Preparation of Joint Report
- Confirm that the documents or data relied upon is provided to both experts and provide any missing information.
- Identify any additional documents, data, tests or analyses that must be done to complete opinions.
- Identify issues upon which the experts agree and the agreed opinions on those issues.
- Identify issues on which the experts disagree and a summary of the reasons for disagreement and the documents/evidence relied upon for such opinion.

# PRESENTATION PHASE: ORDER OF PROCEEDINGS

- At the start of the concurrent evidence session, the experts will be sworn in together. In general, the disputed expert issues will then be dealt with, one issue at a time, as follows:
  - Each expert will be asked, in turn, to give their opinions on a disputed expert issue. They will next be invited to comment on the other expert's opinion.
  - The defendant or their lawyers will cross-examine the claimant's expert, followed by a re-examination by the claimant or their lawyers.
  - The claimant or their lawyers will then cross-examine the defendant's expert, followed by a re-examination by the defendant or their lawyers.
  - At the end of the discussion, each expert will make their concluding remarks on the expert issue.
  - The process is repeated for the next expert issue until all the expert issues have been covered.
  - The judge may ask questions of either expert at any point in time.

- *Singapore State Courts, Concurrent Expert Evidence Procedure (1 April 2022)*

# DISADVANTAGES OF HOT-TUBBING

- Risk of experts getting too detailed too soon – without thorough presentation of underlying points of agreement, nuances of disagreement may be lost.
  - Arbitrator(s) may miss the import of agreed upon points
- Where lawyers are less involved in cross-examination, experts may feel compelled to act as advocate or engage in debate (and experts may not appreciate legal theories/causes of action and points essential for successful claim or defense).
- Experts are seated together away from counsel which may hinder collaboration between counsel and expert to assist cross-examination.
- Hot tubbing may encourage the dominance of one expert in the discussion, driven by their personality, experience, or eloquence.

# ADVANTAGES TO EXPERT HOT-TUBBING

- Hot tubbing may encourage the dominance of one expert in the discussion, driven by their personality, experience, or eloquence.
- Increased efficiency: move past points of agreement; questions asked once; avoid ineffective time spent on one-sided presentations (for presentation sake).
- Judge/arbitrators know what information they need to reach a conclusion *and* are the persons guiding the expert discussion and asking questions.
- Judge/arbitrators take a more active, inquisitorial role, while counsel's control over the examination is reduced.
- Enhance transparency and cut to the root of the issues.
- Identify risk and narrow areas of real dispute.

# SAMPLE SIMPLE PROCEDURAL ORDER FOR CEE

Meeting of experts to discuss appropriate methodology and other matters	-	As soon as practicable	
Each party shall communicate a list of expert witnesses on whose testimony it intends to rely, identifying the relevant areas of expertise of each witness	-	One (1) week after the statement of defence to counterclaim and reply	[Week of XXX]
Experts of like discipline shall confer with a view to agreeing the issues to be addressed by their reports and any other matters that can be agreed. Experts to report to parties and tribunal on outcome of discussions.	-	Within three (3) weeks of notification of list	[Week of XXX]
The parties exchange expert reports	-	Two (2) weeks after the close of lay evidence	[Week of XXX]
Expert conclave(s) between experts (in the same fields of discipline) and joint expert report to be provided to parties and tribunal	-	Within two (2) weeks of exchange of reports	[Week of XXX]
The parties exchange expert reports in reply	-	Three (3) weeks after exchange of joint report	[Week of XXX]

# SAMPLE DETAILED PROCEDURAL ORDER FOR CEE

1. The parties shall exchange and provide to the Tribunal details of the expert disciplines and the identity of the experts within those disciplines proposed to be called, together with a list of questions upon which the experts in each discipline will be asked to opine on or before XXX.
2. The parties shall seek to agree upon the questions upon which the experts in each discipline will be asked to opine on or before XXX.
3. The areas for expert evidence, the identity of the experts and the briefs for the experts in each area of discipline, shall be subject to review by the Tribunal, or in the event of disagreement between the parties' determination by the Tribunal.
4. The parties shall exchange expert briefs on or before XXX.
5. The parties' experts shall commence discussions with a view to identifying matters of agreement and areas of disagreement on or before XXX.

# SAMPLE DETAILED PROCEDURAL ORDER FOR CEE cont.

6. There shall be a without prejudice exchange of provisional experts reports on or before XXX.
7. Meetings of the experts with a view to finalising matters of agreement and identification of areas of disagreement shall be concluded by XXX.
8. Joint experts' reports in relation to each area of expert discipline shall be delivered on or before XXX.
9. Final experts' reports dealing with areas of disagreement between the experts in each area of discipline shall be delivered on or before XXX.
10. Reply expert reports shall be delivered on or before XXX.
11. Expert reports shall comply with Articles 4 and 8 of the Chartered Institute of Arbitrators Protocol for the Use of Party Appointed Expert Witnesses in International Arbitration (the "Protocol").

# **SAMPLE DETAILED PROCEDURAL ORDER FOR CEE cont.**

12. Reply expert reports shall comply with Articles 4 and 8 of the Protocol. Any reply expert reports shall be responsive to the expert reports respectively served by the opposing side, shall not refer to any new issue not addressed in the reports already exchanged and, generally, shall not exceed the scope of appropriate reply evidence.
13. The Arbitral Tribunal may, upon notice to the parties, at any time hold meetings with any expert.
14. Meetings between the parties' experts, and draft reports prepared by those experts prior to the finalization of joint reports, shall be without prejudice to the parties' respective positions in the arbitration and privileged from production to the Arbitral Tribunal.

# SO, WHAT EXPERTS TO PICK AND HOW BEST TO USE THEM

- Hot-tubbing favors experts who are well prepared, know their subject, and avoid the temptation to advocate for their client.
- Also favors experts who are articulate, engaging, and whose presentational skills are well-honed.
- Look for experts that will read the judge/arbitrators and adjust.
- Where areas of expertise are outside of ordinary experience of judge/arbitrators, look for expert that can teach without being pedantic.
- Ensure that your experts are facile with the facts/evidence and have tools such as demonstratives to explain and emphasize their points.

# QUESTIONS?



**Stephen M. Seeger**

[sseeger@cozen.com](mailto:sseeger@cozen.com)

+1.202.747.0793



**Amanda Jo Amadon**

[amanda.amadon@ankura.com](mailto:amanda.amadon@ankura.com)

+1.202.973.3240



**Toshi Dezaki**

[toshi.dezaki@ankura.com](mailto:toshi.dezaki@ankura.com)

+1.202.973.3126



**Tom Gaines**

[tgaines@secretariat-intl.com](mailto:tgaines@secretariat-intl.com)

+1.856.396.8217



**Stephen M. Seeger**

[mwagman@secretariat-intl.com](mailto:mwagman@secretariat-intl.com)

+1.917.612.5458

**THANK YOU!**