

Everyone in the “Hot Tub” — Experts Only

By Thomas L. Rosenberg

More and more, we try to get creative with ways to resolve disputes. Years ago, the construction industry and construction lawyers realized that litigation before judges who knew very little about construction and jurors who knew even less, was not always the best way to resolve complex construction disputes. Arbitration grew as a means to have well educated people sit in judgment of our disputes. Arbitration has many positives and negative traits that have developed over the years.

GETTING CREATIVE

Meanwhile, we continue to look for ways to be creative. Contract documents often require mediation as a prerequisite to the initiation of arbitration or litigation. Sometimes this works. By forcing the parties to get together with a mediator in advance of filing a formal claim, disputes can be resolved. Other times, this type of mediation can be a waste of time as parties are not ready to engage in settlement discussions. Parties show up only because they have to, in order to later file suit or a claim for arbitration.

Next, we played with the process. We have scaled down trials with



Letting the experts talk it out as a means toward resolution

summary type trials in which the parties summarize their case to a jury as opposed to full-blown litigation. We have permitted in certain circumstances, witnesses to testify remotely to save costs. In arbitrations, sometimes the expert witness does not present its case on behalf of its client but is only cross-examined by the other side with the arbitrator simply reading the expert's report in support of his or her opinions.

CONCEPT OF HOT-TUBBING

New on the scene, however, is the concept of hot-tubbing. Hot-tubbing is a process that allows the experts to confront each other. Normally, the expert testifies on behalf of the claimant, and then is cross-examined by the respondent's lawyer. The expert completes his or her testimony and then leaves the process. Later in the case, the respondent puts its expert on to testify in response to the claimant's expert

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or in furtherance of the respondent's defenses and claims. Never do the two experts confront each other. Not until now.

The concept of hot-tubbing tells us to put the experts in the hot tub together. Let the experts all be in the same room questioning, debating, and arguing amongst themselves. Recently, I experienced hot-tubbing for the first time and it was extremely successful.

REAL-WORLD SCENARIO

In January 2017, I attended a mediation on behalf of my client in Regina, Saskatchewan. The underlying case involved a large factory project and the claim is in the tens of millions of dollars. In January 2017, we had a mediation and in attendance were lawyers for three parties, the owner (who was asserting a claim) and the two respondents (who were defending the claims). Each side had two or three experts to support its position. After the mediator was brought up to speed with the parties' positions in the case, each side had its expert make about a 45-minute presentation in support or response to the claims against a party. After the experts gave

their presentations, then the lawyers for each party gave a brief, 15-minute or so presentation of its claims supplementing what the experts said with various procedural and legal arguments.

Then the hot-tubbing began. In total, there were eight experts. We positioned them in the center of the room with everyone else, lawyers, insurance representatives, and clients in the outer circle. All total, 20 or more people watched the proceeding.

The experts engaged in a very lively discussion, often referring back to their earlier presentations to look at photographs and other materials. The experts questioned each other very well, asking challenging and difficult questions about the positions taken by each other. It was a very civil proceeding. Nothing got out of hand. Voices were not raised. There were no lawyers or others running around the room whispering in the ears of the experts. No expert was told not to respond to something. It was a free-wheeling, interactive conversation among the experts. We originally thought this would take about 30 minutes. It ended up going

for 90 minutes. All of us watching the proceeding from the outer ring were astonished about how well it went, how professional everyone was, and how we significantly advanced the progress of the case towards resolution. While we didn't settle the case at mediation on that day, we made significant progress towards what will likely be an eventual settlement.

IN CONCLUSION

My experience with hot-tubbing was very successful. I would use it again. In doing so, you need to have an expert who fully understands not only his opinions but the opinions of all the other experts, too. The expert obviously needs to be able to think on his or her feet.

I am excited about the concept of hot-tubbing. If we truly want to resolve cases, especially complex, expensive cases, the opportunity to bring all the experts together and have them go at it in a very civil and professional manner can make a lot of progress towards resolving a case. Try it. I think you will find that in a hot tub procedure, you will not end up all wet. ■

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