Kluwer Arbitration Blog

Highlights from CanArbWeek 2021: Lukewarm on Hot-tubbing – Effective Expert Collaboration Goes beyond the Joint Report

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Just about everyone in the legal profession has made a small mathematical error in front of others and quipped, “well, that’s why I went to law school”. Clients hire lawyers for our legal reasoning, not for our abilities in arithmetic. For this reason, supplementing skilled legal analysis with input from industry and quantum experts is an essential component of effective advocacy in the majority of commercial arbitrations. Yet, knowing that experts are useful, and knowing how to work with them, are two entirely different concepts.

This post considers some of the insights shared by the moderators and the distinguished panel that hosted “Effective Expert Testimony: An Expert’s Guide” at CanArbWeek 2021. The moderators were Michael Schafler, Paul Tichauer, and Janet Walker, while the panel members were Enzo Carlucci, Scott Davidson, Neal Mizrahi, Robert Patton, Rachel Ryman, and Peter Steger. In particular, this post will highlight the panel’s thoughts on “hot-tubbing”, the potential value of allowing experts to collaborate on joint reports, and the scope of an expert’s role throughout the arbitration.

Creativity is an essential tool in counsel’s toolbox

Spurred on by the ongoing COVID-19 pandemic and the consequential suspension of Court hearings and backlog of cases, arbitration is experiencing a rise in popularity in Canada as a means of efficiently resolving disputes. Along with the incumbents whose practice is solely focused on arbitration, the increasing number of arbitrations allows opportunities for litigators to act as counsel in arbitrations as well. Lawyers with a litigation-focused background are encouraged to leave behind the Rules of Court that they are comfortable with and consider arbitration’s more flexible, and potentially less adversarial, approach to dispute-resolution. Against this backdrop, the panel suggested that working creatively with an expert may not only minimize the cost of dispute resolution, but may also increase a party’s chances of success when used appropriately.

The panel’s insights apply equally regardless of background, as the unexpected arrival of COVID-19 has galvanized change across the arbitration community by expediting the adoption of virtual hearings, allowing technological innovation to germinate, and, potentially, giving an advantage to counsel that are (or are willing to become) tech-savvy and work with experts in novel ways.

With arbitration's dynamic nature in mind, we examine the panel's discussion from counsel's perspective and consider potential challenges that practitioners may face when balancing tradition with innovation.

Ideas to implement in—or to eliminate from—your practice

There's a time and a place for hot-tubbing, but when and where require a case-by-case approach

Conferencing between expert witnesses either in advance of or at the hearing is known colloquially as "hot-tubbing," and the panel explored this method as a creative form of cooperation among experts in arbitration. Providing evidence in this manner may result in several practical effects, including:

- A narrowing of the issues and a focus on the issues that are truly in dispute;
- A more convivial and less adversarial approach to expert testimony;
- Real-time discussion of technical issues amongst the experts, allowing for a more refined consideration of the issues; and
- Reduced costs and increased efficiencies during the hearing.

Based on the panellists' discussion, it appeared that the consensus of the experts was that hot-tubbing, in theory, achieves the goals of arbitration of being a less adversarial, more efficient, and more cost-effective means of resolving disputes. However, the panellists had mixed opinions as to the actual effectiveness of the process.

The panellists noted that the effectiveness of hot-tubbing is likely dependent upon how cooperative the experts are willing (or able) to be and at what stage of the proceeding the hot-tubbing occurs. One expert, Robert Patton, noted that hot-tubbing can be a "free-wheeling experience" that may not be particularly useful to the tribunal or counsel unless it is subsequently reduced to writing (as in a joint report, discussed below). Another expert, Neal Mizrahi, proposed that hot-tubbing at the hearing may be more fruitful than hot-tubbing before the hearing as it allows the experts an opportunity to respond directly to each other and may allow your expert to shine when contrasted directly with another expert.

When making a decision about whether or not to embrace hot-tubbing the experts, counsel may want to ask such questions as:

- What is the stage of the proceedings?
- Will there be a joint report filed after hot-tubbing?
- Is the nature of the dispute highly technical or is it easily accessible for the tribunal?
- How do I expect my expert's testimony will hold up against her peers?

These questions and more are the type counsel must be prepared to face moving forwards. And the answer to these questions may depend as much on the facts as they do on the expert chosen.

Counsel may need to take their hands off the wheel if they want to arrive at a useful joint report

Much as with hot-tubbing, the panel appeared to be aligned that the utility of a joint report comes down to whether experts are in a position to cooperate. The panel discussed this and some panellists suggested that having the experts meet early on—before drafting the reports and reply reports—may serve to encourage cooperation. This may allow the experts to meet and discuss before becoming convinced by, and entrenched in, their own analyses. However, the tribunal often does not request that a joint report be prepared until a few weeks before the hearing, at which time the experts (and counsel) may be too rooted in their position to render a joint report of much use to the tribunal.

While joint reports may seem like an attractive tool to use in all arbitrations, it is more likely that their efficacy will be dependent upon the parameters of the expert conferences that precede the joint report and upon the instructions provided by the tribunal (or agreed to by counsel) for drafting. Specifically, counsel must consider whether lawyers will be allowed to attend and participate in the pre-hearing conference and the joint report. While many counsel might be instinctually reluctant to take a hands-off approach, the presence of counsel may disrupt the collaborative intent underlying such meetings, reducing the likelihood of success and potentially adding time and expense. Beyond the meeting itself, would counsel be willing to hand over complete control of the report to the experts? If they are, counsel would then need to consider further questions, such as:

- Should counsel appoint a primary expert to pen the joint report? If so, which expert is best suited for this position?
- Is my expert likely to stand her ground, or will she be outmatched?
- Are counsel allowed to interact with their experts during the drafting stage? If so, what are the parameters of these conversations?

Ultimately, counsel is faced with the task of providing clear instructions that simultaneously protect her client's interests while also granting her expert enough rope to effectively collaborate with her counterpart. It is a delicate balancing act and one that counsel may be reluctant to engage in. But if successful the tribunal may have access to a lucid, less partial report that just may tip the scales in your client's favour.

Be thoughtful about both the expert's retainer and her role

A final consideration the panellists noted that counsel may not give sufficient thought to at the outset: How involved does she want her expert to be and for how long? If the records are complicated and the assessment of causation or damages is especially technical or speculative, she may benefit from engaging an expert early. Doing so would also allow her expert to get up to speed on the file well before any potential joint report, hot-tubbing, or other interaction with the opposing expert. The client's appetite for disbursements, as well as other factors mentioned above, may dictate how early to engage an expert.

Another point for the nascent arbitration practitioner to keep in mind is one that the panel gave significant air time: assuming the expert gives oral evidence at all, the expert may only have 30-45 minutes to present her report, not days for an examination-in-chief. As a result, counsel should allow her expert considerable time to prepare and practice (potentially as a mock examination-in-chief) the summary presentation of her written report to be presented to the tribunal. In the words

of Blaise Pascal, “I would have written a shorter letter, but I did not have the time”.

While counsel (and the tribunal) may benefit from having experts involved from the commencement of the dispute through to written submissions, monetary and time constraints may prevent this from occurring as often as we might like.

Conclusion

Challenges stemming from the new world that we find ourselves in have served to demonstrate the adaptability not just of arbitration as a means of dispute resolution in Canada, but of arbitration practitioners themselves. When considering *how* an arbitration will proceed, we encourage counsel to consider not just whether it will be in 2D or 3D, but to take a first-principles approach to all aspects of the arbitration.

Ask yourself: in *this* dispute, how will the experts best assist counsel and the tribunal? You might end up pouring cold water on opposing counsel’s calls for hot-tubbing.

Other posts covering CanArbWeek can be found here.

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