



The advent of hot-tubbing in India

Varun Sharma and Manish Aryan of LexOrbis discuss the origins and uses of hot-tubbing when handling expert witnesses

The role of experts and their testimony in highly technical matters is indispensable. An expert is generally relied upon to prove or disprove a fact, usually of a complex nature such as one pertaining to technology, financial accounting, foreign law, trade practice or forensics.

For example, when the subject matter of any litigation relates to a patented technology in which the opinion of a person skilled in that technology becomes relevant, experts take the

role of such skilled persons to prove or disprove a fact relating to such technology.

Regardless of the importance of experts, there is no denying that an adversarial allegiance of expert towards the party who hires them is always suspected.

Even though it might not be apparent, expert testimonies have been found to be susceptible to unconscious biases towards

the hiring party. Even otherwise, courts have relied upon the opinions of experts with abundant caution. The hazard in acceptance of opinion of an expert is not because it is unreliable evidence, but because human judgment is fallible.

The situation becomes more complex when each adversary brings its own expert and the opinions of those experts contradict each other.

Where the opinion of a medical witness is contradicted by another medical witness, both of whom are equally competent to form an opinion, the opinion of that expert should be accepted which supports the direct evidence in the case. However, there may be cases in which there is no other direct evidence except contradictory expert opinions on a particular technical fact.

Not just in India, doubts shroud over opinions of the experts around the world. An empirical study of judges conducted in Australia, the country where hot-tubbing was first introduced, reveals that 35 percent of judges believe that bias is a serious problem associated with expert evidence.

What is hot-tubbing?

In order to curb the inherent bias and to correct any misinformation provided by the opposing experts that might be missed during a cross-examination, evidence of two opposing experts are taken concurrently in a 'hot-tubbing'.

Origin of hot-tubbing

Hot-tubbing procedure was first introduced in Australian Trade Practices Tribunal sometime in the 1990s and gained enough popularity to justify its inclusion in the revised Federal Court Rules of 1998 (FCR). The FCR governs the practices of Federal Courts of Australia, in which most federal civil disputes and some minor federal criminal matters are handled.

Spread of hot-tubbing

Apart from FCR, other Australian jurisdictions also started exploring the Concurrent Examination procedure of hot-tubbing. For instance, in 1999 the NSW Supreme Court of Australia introduced hot-tubbing procedures such as pre-trial conferences and joint report, followed by a concurrent hearing.

Eventually, hot-tubbing found a place in the Supreme Court Rules in the year 2000. Thereafter, the NSW Land and Environment Court followed the Supreme Court and started issuing practice guidelines which included hot-tubbing procedures.

After achieving much popularity over the last few years in various court systems, the hot-tubbing procedure has been successful in seeking attention and appears to be gaining a position even in the ever growing field of Alternate Dispute Resolution (ADR). In 2003, a report was published by the Australian Institute of Arbitrators and Mediators, which mentioned, "the relaxing qualities of the hot tub are well known, and assuming that the experts are competent, honest and genuine, hot-tubbing will achieve narrowing of the differences between the parties".

Hot-tubbing procedures have slowly spread to other countries as well. Countries like Canada, Ireland, the US and India have either started considering implementation of this unique way of expert examination, or have actually implemented these features in some of the courts. In the UK, when Lord Justice Jackson reviewed civil litigation costs in December 2009, he suggested hot-tubbing procedures for expert examination as a pilot programme in his report in 2010. Apparently, hot-tubbing is gaining popularity and acceptance on global level while even evolving with each jurisdiction.

The Indian scenario

As per section 45 of the Indian Evidence Act, 1872, when the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to the identity of handwriting or finger impressions, opinions upon these points of persons especially skilled in such matters are relevant facts. Such persons are called experts.

Relevance of an expert's opinion finds place in the Indian legal system, but not as a witness of fact. Nonetheless, an expert furnishes necessary scientific information for enabling the judge to form an independent judgment.

However, without examining the expert as a witness in Court, no reliance can be placed on an opinion alone.

Quite recently, Delhi High Court Rules have been amended to incorporate the technique of hot-tubbing in which expert witnesses give evidence simultaneously in each other's presence and in front of the judge, who puts the same question to each expert witness.

So far, however, the procedure of hot-tubbing is applicable only in commercial suits.

As per the amendment: "When parties to a commercial suit wish to rely on the hot-tubbing method for deposition of expert witness, the Court may adopt procedures as outlined below:

- a. At pre-trial stage, expert witnesses from both sides meet at a place convenient to both and prepare a Joint Statement which shall be filed before the court.
- b. Joint statement is representation of agreed statement of facts and disputed issues.
- c. Thereafter, the parties shall file the suggested questions to be put to the expert witnesses.
- d. The hearing is fixed and conducted on the disputed issues.
- e. Counsels may put questions to the expert witnesses as may be permitted by the court.
- f. The court shall draw up the issues on which expert witnesses agree and disagree at the end of the hearing procedure.

On the issues where the expert witnesses disagree, the court shall record their statements.”

As already held by the courts, an opinion of an expert cannot be relied upon unless the expert is examined. Examination of an expert includes cross-examination of such an expert on his/her experience, domain of knowledge and opinion.

Does hot-tubbing take away the vital provision of examination of an expert, the absence of which might even vitiate the entire opinion?

Although hot-tubbing deviates from the old-fashioned examination and cross examination of an expert witness, it does not entirely exclude examination of the experts.

As per sub-rules d) and e) of rule 6 of the amended Delhi High Court rules, parties/counsels are allowed to put questions to expert witnesses and thus, it can be safely said that hot-tubbing is not contrary to the law relating to examination of witnesses.

Hot-tubbing in India is in nascent stage and the jurisprudence would evolve with time. It will not be a surprise if it might garner more praise in times to come, especially in the matters that involve issues of highly technical nature such as patents.

Can the court put questions to the experts at the time of hearing?

Apart from the introduction of amended rule 6, the procedure of hot-tubbing as outlined in the amended Delhi High Court Rules nowhere mentions that the Court can also put questions

to the experts. However, it does not mean that that the judges will only be silent observers. Even though rules on hot-tubbing don't provide so, various other provisions of law empower the judges to put questions to party.

Section 165 of the Evidence Act, 1872, gives power to judges to put any question to parties or witnesses in any form they please in order to discover or obtain proper proof of any relevant fact. Under order X rules 1 and 2 of the code of civil procedure, 1908, the court can orally examine any party appearing in person or present in the court. Further, section 311 of the code of criminal procedure, 1973 also empowers the court to summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined at any stage of any inquiry, trial or other proceeding under this code.

Thus, in the view of the forgoing provisions it is apparent that though the hot-tubbing procedure does not explicitly mention that the court can also put questions to the parties or witnesses, the court is empowered to ask questions at any stage of the proceedings.

Further, a situation may arise that parity of experts from both sides are not balanced either in number or in qualification. Would the court consider this disparity while forming an opinion on point of disagreements as envisaged in the amended Delhi High Court rules?

Experts acquire special knowledge either by practice, observation or proper studies. An expert's evidence is only an opinion and cannot take the place of any substantive evidence. The expert opinion must also be corroborated by direct or circumstantial evidence. Therefore, an opinion corroborated with other evidence would have more weightage than the qualification or number of experts produced by a party.

Conclusion

The hot-tubbing procedure of expert examination has been identified as an alternative to sequential examination of expert witnesses, which might be flawed due to inherent susceptibility to biasness. Hot-tubbing would certainly help in eliminating bias of experts and would certainly increase comprehension of judges on complex technical issues.

With increasing popularity of hot-tubbing around the globe, we believe that hot-tubbing in the Indian judicial system would also help in achieving its intended goal of reducing time, cost and stress involved in complex litigation.

Albeit, not until it has been implemented in few cases.