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# EXPERTS IN THE HOT TUB AT THE COURT OF ARBITRATION FOR SPORT

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The Games of the XXXII Olympiad (Tokyo 2020) have been postponed to 2021 as a result of the novel coronavirus, but litigation at the Court of Arbitration for Sport (CAS) is ongoing, as is the practice of some CAS arbitrators of "hot-tubbing" expert witnesses. As one legal reporter explained:

> Despite the name, it does not involve installing Jacuzzis to relax witnesses.
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> "Hot-tubbing," common practice in Australian courts, is also known by the less colourful label "concurrent evidence." It means that expert witnesses in a complex, technical trial — such as a patent dispute about pharmaceuticals, for example — can testify in court together on a panel, rather than one-by-one in the witness box. This allows lawyers and the judge to question the experts in each other's presence. It also allows the experts to directly challenge each other's evidence.
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> Ideally, a judge with only a layman's knowledge of complex technical matters can more easily pinpoint the key issues in a case.[1]

The CAS is a specialized forum that operates in an international setting; but its procedures and the nature of the evidence it receives are familiar, so it provides an interesting and accessible lens through which to view the production and management of concurrent evidence.

## SPORT'S SUPREME COURT

The CAS was established in Switzerland in 1984 by the International Olympic Committee (IOC) as a court with arbitral, "sports-specific jurisdiction."[2] Its administrative and financial ties to the IOC were mostly severed in 1994 following questions from the Swiss Federal Tribunal about its impartiality and independence. The CAS now operates under the auspices of the International Council of Arbitration for Sport (ICAS).

The ICAS remains tied to the Olympic Movement in that the majority of its independent jurist members are nominated by the IOC, the National Olympic Committees (NOCs), and the International Federations (IFs). And the CAS itself continues not only to focus on Olympic Movement issues but also to be headquartered in the IOC's hometown of Lausanne, Switzerland. Nevertheless, important enough changes were made in areas of concern so that the CAS's independence was confirmed by the Swiss Federal Tribunal in 2004, and has recently been re-affirmed by the German Federal Tribunal and the European Court of Human Rights.

Today, the CAS is governed by the Code of Sports-Related Arbitration and is divided into four divisions: (1) the Anti-Doping Division, which exercises first-instance jurisdiction over anti-doping cases; (2) the Ordinary Division, which exercises first-instance jurisdiction over other sports disputes; (3) the Ad Hoc Division, which sits at events such as the Olympic Games, the Commonwealth Games, and the FIFA World Cup, to resolve urgent disputes as to selection, qualification, disqual-

ification, etc.; and (4) the Appellate Division, which is the exclusive appeals forum for decisions rendered by the IOC, including at the Olympic Games, and for disciplinary decisions rendered by the IFs that are part of the Olympic Movement.

As a result of this broad jurisdiction, the CAS has been described as "sport's supreme court."[3] It has adjudicated some of the most important issues and cases in the field, including whether Russia's athletes could be excluded from the Olympics and the Paralympics as a result of the state-sanctioned doping program[4]; whether an elite sport could restrict eligibility for the female category on the basis of biological sex[5]; and whether the lengthy bans and fines imposed on FIFA's former President and Secretary-General for Code of Ethics breaches were lawful and proportionate.[6]

In addition to the Code of Sports-Related Arbitration, the CAS works with the domestic law applicable to the parties and the dispute, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the law of Switzerland. Thus, for example, in a case between an athlete and World Athletics, the international federation which governs the sport of track and field and which has its headquarters in Monaco, the CAS works with Swiss and Monegasque law. International law is applicable to the extent it has been incorporated into the laws of Switzerland and Monaco.

The CAS panels generally consist of three members, one nominated by each party from the closed list of arbitrators published on the CAS website, and a chair agreed by the two nominees (Ordinary Division) or appointed by the President of the Division (Appellate Division) from the same list.[7] Alternatively, the parties may leave the president of the relevant division to appoint a sole arbitrator, again from the closed list.

The IOC, IFs, NOCs, and their respective Athletes' Commissions may put forward candidates for appointment to the CAS's closed list of arbitrators. Candidates must have full legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general, and a good command of at least one of the CAS working languages (English, Spanish, and French). The arbitrators are appointed to the list by the ICAS for a renewable period of four years.

Reflecting the global nature of sport, the CAS list of arbitrators includes lawyers from all over the world, and particular panels appointed from the list often include both common law arbitrators (who are generally more familiar with the adversarial approach to dispute resolution) and civil law arbitrators (who are generally more familiar with the inquisitorial approach), which can sometimes present interesting challenges for advocates appearing before them.

## HOW HOT TUBS WORK

The nature of the matters before the CAS often requires the presentation of evidence through experts, including, among others, data scientists, biomedical experts, economists, and sports physiologists. As is the case in other forums, CAS arbitrators recognize not only that such expertise is relevant and useful, but also that it is expensive and — when given sequentially, under cross-examination — often inefficient and less helpful than it could be. The latter is especially true in circumstances where adversarial testimony unnecessarily complicates, restricts, or distorts the facts rather than elucidates them. The process is also entirely at odds with traditional scientific discourse, which is designed to resolve differences by identifying competing hypotheses and allowing a consensus of opinion to emerge and solidify behind the one that has the strongest arguments and evidence in support:

> One reason scientists are uncomfortable in the courtroom is that they are neither trained in nor comfortable with the formalism of the legal adversary proceeding as a mechanism to resolve scientific differences. One scientist discussed the modes of debate in science, which traditionally lead to consensus, not victory or defeat. When a group of scientists is asked to address a question, the group eventually recognizes the value of the strongest evidence and opinions. At that point, even if one or a few members of the group are at extreme ends of the bell-shaped curve of opinion, the custom is for all to join in a "consensus truth."
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> In the courtroom, the goal is not a consensus truth but a definitive ▸

THE PROCESS [FOR EXPERT TESTIMONY] IS ALSO ENTIRELY AT ODDS WITH TRADITIONAL SCIENTIFIC DISCOURSE, WHICH IS DESIGNED TO RESOLVE DIFFERENCES BY IDENTIFYING COMPETING HYPOTHESES AND ALLOWING A CONSENSUS OF OPINION TO EMERGE.

**INSTEAD OF AN ADVERSARIAL, LAWYER-DRIVEN PROCESS, THERE WAS A RESPECTFUL EXCHANGE THAT ENABLED THE EXPERTS TO DEBATE BACK AND FORTH, TO MAKE THEIR OWN POINTS AND TO COMMENT IMMEDIATELY ON WHAT OTHERS SAID.**

> decision. Although there may be a consensus in the scientific community about a particular question, this consensus is unlikely to appear in the courtroom. Instead, opposing attorneys search out experts from the tails of the bell-shaped curve so as to strengthen their particular arguments.[8]

Recognizing this problem, some judges have adopted the practice of having experts testify concurrently, also known as "hot tubbing" experts or a "conclave" of experts.[9] The practice has been described by Australia's Peter McClellan, previously a judge of the New South Wales Court of Appeal (the highest court in the State of New South Wales) and one of the practice's earliest and leading proponents, as

> a discussion chaired by the judge in which the various experts, the parties, the advocates and the judge engage in a co-operative endeavour to identify the issues and arrive where possible at a common resolution of them. Where 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.[10]

Judge McClellan's description of the procedure is standard fare:

> [T]he experts retained by the parties . . . prepare a written report in the conventional fashion. The reports are exchanged and . . . the experts are required to meet without the parties or their representatives to discuss those reports. This may be done in person or by telephone. The experts are required to prepare a bullet-point document incorporating a summary of the matters upon which they agree, but, more significantly, matters upon which they disagree. The experts are sworn together and, using the summary of matters upon which they disagree, the judge settles an agenda with counsel for a "directed" discussion, chaired by the judge, of the issues in disagreement. The process provides an opportunity for each expert to place his or her view on a particular issue or sub-issue before the court. The experts are encouraged to ask and answer questions of each other. The advocates also may ask questions during the course of the discussion to ensure that an expert's opinion is fully articulated and tested against a contrary opinion. At the end of the discussion, the judge will ask a general question to ensure that all of the experts have had the opportunity to fully explain their positions.[11]

McClellan argues that having experts testify concurrently maximizes transparency and the development of full factual information, which — better than the adversarial process — ensures the integrity of the evidence the court has as its basis for decision.[12] He suggests that the nature and quality of the evidence adduced through this process is especially valuable to those courts that are not only concerned with the interests of the private litigants but also imbued with a "public function."[13] Finally, McClellan offers that the peer engagement and review aspects of the conclave are appealing to experts themselves:

> [The] procedure has been met with overwhelming support from the experts and their professional organizations. They find that they are better able to communicate their opinions and, because they are not confined to answering the questions of the advocates, are able to more effectively convey their own views and respond to those of the other experts. Because they must answer to a professional colleague rather than an opposing advocate, experts readily confess that their evidence is more carefully considered. They also believe that there is less risk that their evidence will be unfairly distorted by the advocate's skill.[14]

Although the practice has now spread beyond Australia, including to other common law systems and to "a range of quasi-legal settings such as public inquiries," it is not without its critics.[15] Those wedded to the view that the adversarial system is the best way to adduce the facts often question the effectiveness of hot tubbing's collaborative aspects.[16] For example, Professor Gary Edmond of the University of New South Wales has argued that, contrary to McClellan's descriptions, hot-tubbing witnesses can "have a closing down effect" in a number of related respects: saving time can mean incomplete evidence and "funneling down to consensus . . . can lead to a closing down of issues . . . [which can be] especially problematic if there is a natural

hierarchy among the experts." Edmond suggests that advocates hold an "idealized" but not necessarily correct view that "open discussion and peer review will allow for a consensus on the 'truth' to emerge"; after all, experts are still selected by parties and so "biases may already be inbuilt."[17]

Ultimately, those who have experienced and evaluated the method tend to agree that having a skilled and interested judge can be determinative of its utility and success. That is, "whether it broadens out and opens up very much depends on how it is applied, interpreted and led. It would seem to have high potential where the overseers of the process are well informed on the issues, enthusiastic to explore them and have an understanding of inherent uncertainties in scientific evidence."[18]

## TESTING THE WATERS: REFLECTIONS ON THE USE OF CONCURRENT EVIDENCE AT CAS

Between the two of us, we have been involved in three high-profile sports disputes that have turned on complex scientific evidence. In each of these cases, experts gave their evidence concurrently. The two at the CAS exemplified this approach at its best.

In *UK Anti-Doping v. Tiernan-Locke*,[19] a national-level (not a CAS) case, the issue was whether abnormal biomarker values in a series of blood samples taken from an athlete over time were caused by blood doping. In the two CAS cases, *Chand v. IAAF* and *Semenya v. IAAF,* the issue was whether a "46 XY" athlete — i.e., a biologically male athlete with a normal complement of male chromosomes — who had been reared female due to differences of sex development derived performance advantages from their biology that made it unfair for them to compete in the female category.

In the *UK Anti-Doping* case, the advocates proposed that the expert evidence be given concurrently, and the tribunal chair allowed them to drive that evidence through their questions, rather than direct the proceedings himself. This may have been due to unfamiliarity with the process, and it meant the back-and-forth remained relatively adversarial, but still it enabled the experts to engage directly with each other, to ask each other pertinent questions, and to identify quickly assertions that were speculative rather than evidence-based.

In both the *Chand* and *Semenya* cases, the chair of the CAS panel was Annabelle Bennett, an eminent Australian federal court judge with a strong scientific background, including a biochemistry PhD. She was therefore both familiar with the technique of concurrent evidence and well able to shepherd the experts through the key issues. For example, over the five-day trial in the *Semenya* case in Lausanne in March 2019, in addition to extensive legal arguments and conventional testimony from fact and non-scientific expert witnesses, the panel received the oral testimony of 12 scientific experts split into six different hot tubs, hearing concurrent evidence from three to nine experts at a time.

This may well sound like a recipe for disaster, but the chair was able to take each group of experts through a list of issues pre-agreed by counsel for the parties, quickly identify areas of common ground, and test the reasons for the remaining differences. The experts were clearly more comfortable with this format than they would have been with individual cross-examination, and significant time was saved. The format discouraged the experts from making unsupported points, and made it harder for them to hedge their opinions, because they knew they would be immediately challenged by learned colleagues who were fully familiar with the peer-reviewed evidence in the field. Instead of an adversarial, lawyer-driven process, there was a respectful exchange that enabled the experts to debate back and forth, to make their own points and to comment immediately on what others said. Those who strayed from this collaborative approach were quickly reined in by their peers. This allowed the key points and evidence to emerge naturally, so that the panel could understand clearly which issues remained in dispute, and why.

The process undoubtedly tested the nerves of the parties' respective legal teams, who were all far more used to cross-examination, and were anxious about giving up the opportunity to score points. However, Judge Bennett gave counsel a fair opportunity to ask further questions, and they seldom felt the need to do so, given her skill in covering the necessary ground fully and fairly to all parties. In fact, after all the drama and controversy that the *Semenya* dispute had generated in public debate, it was a relief to see such constructive work by the experts in the privacy of the arbitration setting. The fact that the eventual award was more than 160 pages long indicates how much ground was covered, and the account given in the award of the hot-tub evidence illustrates how that process helped the panel to cut through the morass of detail to the key issues it had to resolve and the key evidence it had to consider.

There is no doubt that the huge success of the hot tubbing in *Chand* and *Semenya* was due in large part to Judge Bennett's familiarity with the technique, as well as her own scientific expertise. Judges without the benefit of that background may be more inclined to stick with sequential evi- ▸

**ULTIMATELY, IT IS IN THE CONTEXT OF CASES THAT HAVE SIGNIFICANCE FOR THE PUBLIC BEYOND THE CONCERNS OF THE PRIVATE LITIGANTS – CASES IN WHICH THE COURT SERVES AN IMPORTANT "PUBLIC FUNCTION" – THAT THIS "CONCLAVE" MODEL CAN BE MOST VALUABLE, ENSURING THAT THE FACTUAL BASES FOR DECISION ARE PEER-REVIEWED AND EVIDENCE-BASED.**

dence, or else might allow hot tubbing but leave the parties' counsel to drive the process, which can work but can also retain an adversarial tone that may hinder the search for "consensus truth." Given the nature of the cases that the CAS hears, however, and in particular its "public function" as "Sport's Supreme Court," it arguably has a responsibility to satisfy itself that the private disputants are not depriving it of the benefit of a complete and transparent evidentiary record, which may mean that hot-tubbing of experts stops being the exception at CAS and starts becoming the norm.

## COULD HOT TUBBING WORK WELL IN U.S. COURTS?

Others before us have written about the viability of hot-tubbing in U.S. courts.[20] Two related arguments emerge from this commentary. The first assumes that advocates and judges in the United States are especially wedded to the adversarial system in comparison with their colleagues in other common law countries. The argument is that the method, collaborative and consensus-driven as it is, should not, as a normative matter — or could not as a practical matter — be adopted on a widespread basis in the States. The second is that hot tubbing is especially likely to be problematic in the context of jury trials given the nature of the jury as an institution and the ways in which judges and advocates engage with jurors and each other in its presence. Both are ultimately reflections on the fact that hot tubbing involves deviations from standard American practice and thus appears to be an awkward fit, perhaps without a clear upside.

Still, some U.S. judges have undertaken the experiment — it is permissible under Rule 611 of the Federal Rules of Evidence[21] — and their experiences and reflections shed some additional light on its prospects. For example, Adam Butt, who is both a barrister in Australia and an attorney in the United States, has reported that

> Judge [Douglas] Woodlock (D. Mass) started using it after learning about the method from Australia's Justice Heerey. Judge [Jack] Zouhary (N.D. Ohio) started using it independently, only to later find out about the Australian method. Judge [Jack] Weinstein (E.D. NY) started using hot tubbing after we first discussed the subject [in 2016].
>
> Concurrent evidence has been used in toxics cases (e.g. *Daubert* hearing), a claims construction hearing, a class certification hearing and other civil matters. In general the method has not been seen as problematic in non-jury contexts; conversely, the judges and academics consulted or considered have endorsed the approach.
>
> … Judges [Alvin] Hellerstein (S.D. NY), Weinstein, Woodlock and Zouhary do not consider that the jury is off limits but they have their certain qualifications. For example, Judge Woodlock would need to be comfortable with who the experts were in order to use hot tubbing before a jury. Judge Zouhary would support using hot tubbing in jury cases where the expert evidence was complicated (it helps to comprehend such evidence), but would avoid using it in simpler matters. Judge Weinstein has actually now used hot tubbing in one jury trial, in a birthing case. Nevertheless, he states that he would intervene less in such settings, because his intervention may be demeaning to attorneys, the jury may give greater reliance to questions/positions put forward by the judge, and the concurrent presentation of evidence (*cf.* sequential presentation) may create complications in relation to burdens of proof and allowing attorneys to present their case.[22]

From our experience in sports cases, including at the CAS, hot tubbing would seem to be a promising mode for presenting expert testimony in U.S. courts. As in sport, a lack of familiarity with the process is a hurdle that can be overcome with practice by judges and advocates. And at least in theory, despite the fealty to the adversarial process generally, there should be no normative hurdle since the goals of concurrent evidence are the same as those of sequential evidence and specifically of Rule 611, i.e., to "determin[e] the truth," to "avoid wasting time," and to "protect witnesses from harassment or undue embarrassment."[23] Indeed, the case for concurrent evidence is that it can do more work than sequential evidence toward all three goals.

At the CAS what has been clear is that the better the quality and integrity of the experts, the likelier they are to recognize the benefits of concurrent evidence in building consensus and exposing speculative positions. And, for most experts, being able to engage with their colleagues in educating a lay

audience without having to be on the "hot seat" is certainly less stressful and more conducive to full and thoughtful statements and responses. The more confident the lawyers are of their case, the happier they may be to let their experts loose and allow the "consensus truth" to emerge. And for the judge who has the time to prepare properly so that he or she is ready and able to guide the debate, it may be the most effective and efficient way to identify the issues that are in dispute and the evidence that is most relevant to their resolution. Ultimately, it is in the context of cases that have significance for the public beyond the concerns of the private litigants – cases in which the court serves an important "public function" – that this "conclave" model can be most valuable, ensuring that the factual bases for decision are peer-reviewed and evidence-based.


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12 McClellan, *supra* note 11, at 266–67.

13 *Id.* at 262.

14 *Id.* at 266.

15 Charlie Dobson, *Methods Vignettes: Concurrent Evidence*, Steps Centre, https://steps-centre.org/pathways-methods-vignettes/methods-vignettes-concurrent-evidence (last visited June 7, 2020).

16 *See, e.g.*, John Emmerig et al., *Room in American Courts for an Australian Hot Tub?*, Jones Day: Insights (Apr. 2013), https://www.jonesday.com/en/insights/2013/04/room-in-american-courts-for-an-australian-hot-tub ("To reform the adversarial system in the United States by employing an evidentiary practice not fitted for its adversarial system could be a serious mistake. . . . If hot-tubbing has an American future, . . . it should be used in very limited, non-jury contexts where the technical issues are so complex that a 'discussion' by the experts is essential for a rudimentary understanding of the dispute . . . ."); *see also* Thompson, *supra* note 9 (summarizing the concerns that hot tubbing runs counter to America's adversarial system).

17 Dobson, *supra* note 15; *see also* Gary Edmond, *Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure*, 72 Law & Contemp. Probs. 159, 171–76 (2009).

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19 *UK Anti-Doping v. Tiernan-Locke*, July 15, 2014 (SR/0000120108) (UK), https://www.doping.nl/media/kb/2575/UKADvs_TiernanLocke_Decision_341%20(S).pdf.

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21 Fed. R. Evid. 611(a) (explaining that a "court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence" in order to "determin[e] the truth," to "avoid wasting time," and to "protect witnesses from harassment or undue embarrassment").

22 Butt, *supra* note 20.

23 Fed. R. Evid. 611.