

ICDR/CIArb/LACBA Conference - International Arbitration in the Pacific Rim: The Use of Reliance Documents & Expert Witnesses – Efficiency & Fairness

A New Focus For The Expert Witness Debate In International Arbitrations

By Robert A. de By*

A lot of the debate about expert witness evidence in international arbitrations focuses on whether a ‘neutral’ Tribunal-appointed expert is preferable over party-appointed experts.¹ While interesting, in the end it is a misguided argument.² Not in the least because one can be perfectly ‘neutral’ but, equally, perfectly wrong.³ Nor does two experts having diverging views need to mean that one is wrong, and therefore unhelpful to the Tribunal. There may simply exist different, but equally respectable, expert views or methodologies leading to different results. Few would argue that listening to different views on a complicated topic about which – by definition, if expert testimony is required – one has insufficient knowledge, is a bad thing. And if reputable experts with different opinions can be found, it is fair to say reasonable people may differ on the answer and the arbitrators should know about that.

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¹ Opinions held in this regard often merely mirror the different legal systems that the parties, and often the arbitrators, come from – the adversarial Anglo-American idea of a ‘battle of the experts’ versus the inquisitorial European notion of the ‘neutral’ expert appointed by the Court. *But, see*, J. Martin Hunter, ‘Experts’ in *International Arbitration*, Kluwer Arbitration Blog, Feb. 7, 2011 (“Intriguingly, most of the civilian lawyers present favoured the common law style ‘party-appointed’ expert witness approach . . . it seemed that the main reason for the preference of the civilians was antipathy towards the notion of the tribunal-appointed expert being the person who actually decides the case”).

² Creative solutions to the appointment debate notwithstanding, such as the ‘Sachs Protocol’ that Dr. Klaus Sachs proposed during the 2010 ICCA Annual Conference in Rio de Janeiro, under which the parties propose lists of possible experts and the Tribunal then select one expert from each list to serve on an ‘expert team’ advising the Tribunal. *See, also*, Alison Ross, *A Sachs-y new approach to expert evidence?*, *Global Arb. Rev.* (May 27, 2010); Hunter, ‘Experts’ in *International Arbitration*, *supra*.

³ W. Laurence Craig, William W. Park & Jan Paulsson, *International Chamber of Commerce Arbitration*, Booklet 5, Part. IV 404 (1990).

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Accordingly, equating the choice between party- or Tribunal-appointed⁴ experts with the Tribunal's ability to better find truth is a fallacy. The choice influences many important factors, not the least of which may be time and costs.⁵ However, to use an analogy, there is no logic in thinking one can more easily find out who is the better chess player by asking one of the players, rather than by letting them play chess.

Nor is the image – often associated with party-appointed experts – of the unscrupulous ‘hired gun’ expert witness realistic. No expert with credentials worth presenting to an international arbitration Tribunal will risk his reputation by providing false or intentionally misleading testimony. Nor should counsel be sanctimonious and pretend it just so happens that the party-appointed expert comes out in a way that supports her client's argument. No counsel worth her salt would present an expert witness who does not support her case.⁶ Equally, attacking the opposing expert simply because he holds a contrary opinion is unhelpful. Fact is, the questions presented to experts cover complicated subject matter as to which one can hold varying opinions – if not, there would be no point in asking for expert testimony to begin with.

That said the reality is that Tribunals do appoint expert witnesses and that one of the parties is bound not to like the resulting expert opinion. In that regard, the Tribunal and party-appointed expert witnesses do not differ.

Re-Focusing The Debate

The more productive and practical focus, when it comes to expert witnesses in international arbitration, is not on who appoints them but on whether sufficient opportunity exists to test the reliability of the witnesses' expertise and his opinion – be it a party- or Tribunal-appointed expert. The proper focus is on how to go about doing so. Of course, there exists a risk that if the Tribunal appoints the expert, it will regard him as ‘their’ expert and may look askance at such efforts. Arbitrators should guard against such sentiment, as no such validation should attach to an expert's Tribunal-appointment,

⁴ Using the terminology ‘neutral’ to indicate a Tribunal-appointed expert as opposed to a party-appointed expert is misleading. Party-appointed experts need not lack neutrality, and most of them do not. It is simply the case that able counsel will find an expert whose views are in line with the interests of her client.

⁵ That such efficiency may come at a high price, including bias, is widely recognized. See, e.g., José I. Astigarraga, *A Few Words On The Tension Between Efficiency And Justice*, Kluwer Arbitration Blog, June 2, 2011.

⁶ In some jurisdictions an expert witness who does not stand by his opinion, and who goes along with an opposing expert during a witness conference, can be held liable by the party who employed him. *Jones v. Kaney*, [2011] UKSC 3 (UK Sup. Ct., Mar 30, 2011). This is especially troublesome where the Tribunal engages in witness conferencing, the oft-criticized “witness hot-tubbing.”

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as the reliability of the expert's opinion with regard to the question presented has not yet been tested at the time of appointment.⁷

Either way, few arbitration Tribunals will rule expert witness evidence inadmissible but instead may accord more or less weight to an expert's opinion.⁸ Accordingly, the way to avoid inappropriate and unwelcome expert testimony from influencing the award is to (i) test the qualifications of the expert to render the specific testimony and (ii) the methodology used to arrive at his opinion.

That an expert was appointed by the Tribunal should not mean that such an expert needs to be accepted as qualified in the technical sense or that his testimony should be accepted unquestioned. Accordingly, the parties and their counsel should be given the opportunity to question the expert at the hearing. Most, if not all, arbitration rules afford such a right.⁹ And even where they do not do so, such a practice is nevertheless recommended.¹⁰ Nor should arbitrators take umbrage if counsel engages in a vigorous examination on that basis. After all, the expert was appointed by those who are not experts themselves. Or who, if they are, apparently felt that their own 'expert' opinions did not suffice.

In embarking upon the task of refuting an expert's testimony, counsel should keep in mind that the overriding objective of expert testimony is to assist the Tribunal. The same

⁷ While Tribunal appointment is thought to save time and cost as it involves one, rather than two experts, this too is often a fallacy. For whichever party's point of view is not supported by the expert, will need to engage its own expert to at least inform it as to what questions to ask to test the reliability of the Tribunal-appointed expert's qualifications and methodology. As neither party knows how the testimony will come out, both are likely to engage their own expert, thus necessitating costs associated with three experts.

⁸ The Tribunal's reluctance to limit what evidence may be introduced often finds its origin in the provision of the New York Convention that allows a national court to refuse recognition and enforcement a foreign arbitral award if a party was "otherwise unable to present his case." Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958, art. V(1)(b), 330 U.N.T.S. 38.

⁹ See, e.g., LCIA Arbitration Rules, Art. 21.2 ("... the parties shall have the opportunity to question the expert on his report"); AAA International Arbitration Rules, Art. 22.4 ("At the request of any party, the tribunal shall give the parties an opportunity to question the expert at a hearing"); ICC Rules of Arbitration, Art. 25.4 ("At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert"). The 'Sachs Protocol' also "envisages at least one 'open' session at which the parties' counsel may address and/or question the expert team in the presence of the arbitral tribunal."

Hunter, *'Experts' in International Arbitration*, *supra*.

¹⁰ For example, Section 37 of the English Arbitration Act 1996 does not give parties the right to put questions to the expert at a hearing. *But, see*, Chartered Institute of Arbitrators, *CI Arb Guideline 10: Guidelines on the use of Tribunal-Appointed Experts, Legal Advisers and Assessors*, sub 3.7.4 ("[n]o... objection attaches to a provision that the tribunal-appointed expert is to attend the hearing and that the parties may question him on his report").

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spirit should inform counsel's efforts, as partisan attacks on an expert's opinions are unlikely to gain traction with the Tribunal.

A New Focus For Expert Witness Testimony In International Arbitrations

With the frequent mix on panels of arbitrators with civil and common law backgrounds, and because in civil law countries expert witnesses are routinely appointed by the Courts and thus often beyond reproach, the arbitrators' views of experts may be more deferential than warranted. Accordingly, challenging an expert witness in an international arbitration is a delicate task. However, respect and politeness need not go hand-in-hand with deference. But, equally, nor should counsel turn challenging an expert witness's testimony into a personal attack on the expert witness himself.

Counsel's role is to focus the Tribunal evaluating the expert witness testimony on whether the proffered evidence is 'good enough', scientifically speaking, to warrant consideration and, if so, how much weight it should be given.¹¹ After all, counsel's argument that the outcome is 'wrong' serves no purpose when it comes to assisting the Tribunal, as it already knows the respective party's positions.

Accordingly, counsel who challenges an expert witness should primarily focus not on the conclusion reached by the expert – which is, in the end, an opinion – but on objectively verifiable matters such as the expert's qualification and methodology.¹² Rather than attack the expert's opinion, counsel would do well to assist the Tribunal by concentrating on how it was reached. Counsel should assist the Tribunal in evaluating the reliability, or lack thereof, of the expert testimony as that will directly affect the weight it will be accorded, if any.

Nor is it helpful to argue that an expert, and even less so a Tribunal-appointed expert, is 'not qualified' in the colloquial sense of that term – meaning 'incompetent'.¹³ Such an approach will merely serve to irritate because truly 'incompetent' experts are virtually non-existent in international arbitrations. Moreover, disrespect has no place in effective advocacy.

¹¹ Once, after a colleague asked him whether a certain scientific paper was wrong, physicist Wolfgang Pauli replied, "That paper isn't even good enough to be wrong." Peter W. Huber, *Galileo's Revenge: Junk Science in the Courtroom*, 54 (1991). Not wrong or right but (scientific) reliability is the proper focus.

¹² There are exceptions. In particular where the expert's "opinion, despite its dazzling sheen of erudition and meticulous methodology, reaches a result which any average person could readily recognize as preposterous." *Johnson Elec. N. Am. Inc. v. Mabuchi Motor Am. Corp.*, 103 F. Supp. 2d 268, 286 (S.D.N.Y. 2000). For "no 'expert' opinion can negate what common sense dictates." *Rock v. Oster Corp.*, 810 F. Supp. 665, 666-67 (D.Md. 1991), *aff'd*, 983 F.2d 1057 (4th Cir. 1993).

¹³ See, <http://www.merriam-webster.com/dictionary/incompetent>, listing both as synonyms.

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Taking a page from the reasoning of the United States Supreme Court when it comes to expert testimony, if the subject of the challenge is the “validity and thus the evidentiary relevance and reliability” of the expert’s opinion “[t]he focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.”¹⁴

While much will depend on the specific expert’s report and area of expertise, there are a number of areas that deserve special consideration in testing the evidentiary validity of any expert’s testimony. However, because, absent specific agreement to the contrary, no set of evidentiary rules applies in international arbitrations, it is unclear what standard applies in this regard.¹⁵ Or what leeway counsel has. That said, the IBA Rules on the Taking of Evidence in International Arbitration state that a Tribunal-appointed expert “may be questioned . . . on issues raised in his or her Expert Report, the Parties’ submissions or Witness Statement or the Expert Reports made by the Party-Appointed Experts.”¹⁶ The right to cross-examine both Tribunal- and party-appointed experts is further found in Art. 8(3)(b) of the IBA Evidence Rules that states, in relevant part: “With respect to oral testimony at an Evidentiary Hearing . . . following direct testimony, any other Party may question such witness.”

This then raises the question how best to approach refuting unwelcome expert testimony. What lines of inquiry will be effective and allowed. While, as always, much will depend on the specific facts of the case, the particular expert’s report, and the Tribunal, there are various avenues that can be explored that may assist the Tribunal to place the appropriate weight on an expert witnesses report and testimony.

1. The Expert Witnesses’ Experience With The Specific Question Or Test

The questions put to an expert – the terms of reference – in an international arbitration will often be very specific. So much so, that it is not inconceivable that while the questions posed fall within the general area of the witness’s expertise, the expert may never before have done the particular test or have faced the specific problem. Accordingly, counsel should explore whether this is the case. And, if so, why and on what basis the expert has chosen the specific test or methodology. In particular, inquiry needs to be made whether the expert has tried any other methodologies or tests before or

¹⁴ See, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594-95 (1993).

¹⁵ *Allied Professionals Ins. Co. v. Kong*, No. 10–56968, 2012 WL 3525353, at *2 (9th Cir. Aug. 16, 2012) (“argument that the arbitrator demonstrated manifest disregard of the law by allowing the report of . . . expert witness in violation of Federal Rule of Evidence . . . is unavailing . . . [e]ven if such a violation occurred, it would not constitute a basis upon which to vacate the arbitration award”); see also *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997) (“[i]n making evidentiary determinations, an arbitrator need not follow all the niceties observed by the federal courts”) (internal quotation marks omitted).

¹⁶ Art. 6(6) of the IBA Rules on the Taking of Evidence in International Arbitration, as revised in 2010 (“IBA Evidence Rules”). Art. 8(3)(d) IBA Evidence Rules accords a similar right but leaves out the words “Witness Statement”. What, if anything, is the significance of this remains to be seen.

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after deciding on the one employed in the expert witness report. If so, counsel should explore whether those efforts led to different results and, if so, why the expert has not mentioned these or rejected them. If, on the other hand, the expert employed only one test, this raises the question as to how the expert chose the methodology employed and why?

If, on the contrary, the expert witness has faced the same question or issue before, counsel would do well to explore whether this was always in an arbitration or litigation context. If so, it may be useful to explore whether the expert has been on both sides of the issue. After all, the image of an expert witness routinely called in to perform a test to prove the same point, may suggest that the test's outcome represents absolute certainty and is a given rather than the result of a test that could go both ways – a 'party trick' of sorts, rather than an objective, scientific test.¹⁷

2. Possible Alternative Explanations

Counsel should inquire whether there exist alternative explanations as to cause and effect. If an expert witness refuses to acknowledge that possibility, counsel would do well to pursue why the expert has done any test or review at all. Mostly, experts will admit to this – and, equally, will insist that those alternative explanations do not apply under the circumstances of the case. The latter should not deter counsel. It is imperative to have the expert witness list possible alternative explanations, and to explore why he believes they do not apply in the case at hand.¹⁸ The expert witness should have adequately accounted for and dealt with alternative explanations in his report. If he did not, counsel may ask the Tribunal to ignore the expert's report and testimony on the basis that he failed to follow generally accepted scientific procedures by neglecting to investigate other possible causes of claimant's damages.

If an expert did account for alternative explanations, counsel may helpfully explore the level of certainty the expert had both in excluding alternative causes and selecting the one in his report. For very few conclusions can be drawn with 100% certainty, and a succession of less than certain conclusions significantly increases the risk for error in the final opinion. Accordingly, counsel would do well to ask for the known or potential rate of error in using a particular scientific or testing technique. All the time keeping in mind that what is at stake is the amount of weight that will be accorded to unwelcome expert testimony.

¹⁷ See *United States v. Crisp*, 324 F.3d 261, 278 (4th Cir.), *cert. denied*, 540 U.S. 888 (2003) ("Professions of absolute certainty by an expert witness . . . out of place in today's courtroom").

¹⁸ See, e.g., *Claar v. Burlington Northern R. Co.*, 29 F.3d 499, 502 (9th Cir. 1994) (excluding expert evidence where expert did not make "any effort to rule out other possible causes for the injuries plaintiffs complain of").

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3. *What Kind Of 'Expert' Or 'Expertise' Is This?*

While many experts will be part of a well-recognized discipline, some may testify as to issues only tangentially related to their true expertise. What may best be described as 'experts' for the particular occasion or, worse, opportunism. Where the facts or the particular questions posed are unusual, counsel should guard against allowing otherwise highly qualified witnesses to pose as 'experts' in novel fields only tangentially related to their own.

For an expert opinion to be reliable the facts or data must be of a type reasonably relied upon by experts in the particular field. Accordingly, when the question posed lies at the periphery, or beyond, the witness's true – or any recognized – field of expertise, counsel would do well to challenge the expert's experience and methodology. Informatively, the expert opinion of an "accidentologist" as to the point of impact in an automobile collision based on statements of bystanders,¹⁹ testimony based on "clinical ecology",²⁰ and "theories grounded in any so-called generally accepted principles of astrology or necromancy" have been rejected as sufficiently reliable.²¹ While astrology and necromancy are unlikely to play a role in any international arbitration, so-called and also truly *generally accepted principals* do. Either way, if the witness is not a true expert in that field or if the field itself is of dubious scientific merit, the witness should not be opining on them nor should such opinions be accorded weight.

While expert witnesses in international arbitrations will generally be sophisticated enough to avoid 'expert titles' that give away this phenomena to 'stretch' their expertise to cover the issue or question at hand, that does not negate the underlying problem. For example, testimony by an 'expert' witness with various engineering degrees, expertise in product liability including design defects, and related publications to his name but who "had no *specific experience* with respect to analyzing or evaluating concrete mixing drums or similar machines" has been rejected as unreliable.²² Nor should counsel accept such an 'expert' witness because they have reviewed materials and literature, or testified on the subject matter in another arbitration.²³

While in international arbitrations this stretch-phenomena may be far less obvious, there is no reason why counsel should allow an international arbitration to be turned into a playground for unreliable testimony masquerading as part of an otherwise well

¹⁹ See Comment, Cal. Law Rev. Comm'n, *Recommendation Proposing an Evidence Code* 148–150 (1965).

²⁰ See *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988).

²¹ See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151 (1999) (general acceptance . . . does not "help show that an expert's testimony is reliable where the discipline itself lacks reliability").

²² *Martinez v. Terex Corp.*, 241 F.R.D. 631, 639 (D. Ariz. 2007).

²³ See, e.g., *United States v. Paul*, 175 F.3d 906, 912 (11th Cir. 1999) (an individual's "review of literature" in an area outside his field does "not make him any more qualified to testify as an expert . . . than a lay person who read the same articles").

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recognized discipline. After all, Tribunals must be arbiters of truth, not junk science and guesswork.

4. *The Professional Witness*

Expert witnesses have become big business.²⁴ Large audit organizations have specialized divisions offering expert witnesses for hire who will provide “persuasive arguments” to support a party,²⁵ who will lend “irrefutable support to your court case” and “will refute reports previously presented by the other party,”²⁶ and who stand ready to provide “behind the scenes advice in the preliminary stages of a dispute” and “[i]f disputes continue into arbitration . . . expert witness services in arbitration hearings.”²⁷ The experts provided are highly qualified, sophisticated individuals backed up by large support organizations. Some of them are full-time expert witnesses, some not.

Everyone knows virtually all expert witnesses get paid. And while counsel may wish to point it out, for “the compensation they receive may bias their opinions, bias . . . is a measure of credibility to be considered . . . [even if] not a means by which [to] exclude” the expert testimony.²⁸ That said, it is not by itself going to refute any expert testimony. However, whether or not an expert witness has done his research and testing, and has formed his opinion, specifically for the arbitration or whether it is part of unrelated scientific inquiry, is a legitimate and important area of inquiry.²⁹ Counsel would do well to remind the Tribunal considering whether and how much weight to accord an expert witness’s testimony, that courts have repeatedly held that “expert testimony prepared

²⁴ See, generally, John Markoff, *A Boom in Expert-Witness Firms*, N.Y. Times, Oct. 2, 2005.

²⁵ Grant Thornton Forensic & Investigation Services, webpage at www.grant-thornton.co.uk/en/Services/Forensic-and-Investigation-Services/Expert-Witness (on Jan. 13, 2013).

²⁶ PwC Forensic España, webpage at www.pwc.es/en/servicios/forensic-services (on Jan. 13, 2013).

²⁷ Deloitte, webpage at http://www.deloitte.com/view/en_us/us/services/consulting/feature-offerings/3a70947a53924210VgnVCM200000bb42f00aRCRD.htm (on Jan. 14, 2013).

²⁸ See, e.g., *Daugherty v. Chubb Group of Ins. Companies*, No. 3:08–CV–48–R, 2011 WL 5525738, at *8 (W.D. Ky. Nov. 14, 2011).

²⁹ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir.), cert. denied, 516 U.S. 869 (1995) (“One very significant fact to be considered is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying . . . in determining whether proposed expert testimony amounts to good science, we may not ignore the fact that a scientist’s normal workplace is the lab or the field, not the courtroom or the lawyer’s office”).

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solely for purposes of litigation . . . should be viewed with some caution.”³⁰ After all, irrespective of whether or not they are an “‘expert for hire’ . . . [such] opinions are *more likely* to be biased.”³¹ Accordingly, it “is worth noting that [the expert witness] is not the professorial type witness who finds himself yanked from the halls of academia and thrust into the unfamiliar adversarial process . . . [but is] recruited . . . from an expert witness referral company [and] is an expert-for-hire.”³² And equally useful to alert the Tribunal to “the hazards to [its] truth-finding abilities . . . that are traditionally associated with ‘experts-for-hire’.”³³

Of particular interest in this regard are experts who are almost always testifying on either the defense or the plaintiff's side. Their opinions have as much to do with their or their firm's “client base” as anything. Hence, this is a fruitful area of inquiry and often comes up in the context of expert testimony regarding damages.

Another area of investigation and inquiry for experts who testify with some regularity is whether the expert has previously taken a position incompatible with his current testimony. While many if not most arbitrations are confidential, deposition and trial testimony from prior litigations may provide a useful resource in such instances. Further, there are experts who have been criticized by courts in published decisions, or whose expert reports were excluded as lacking a credible foundation or basis, and who have been disqualified as an expert in another case.

As a result, while virtually all expert witnesses are compensated, those that rarely testify or have never done so, do not advertise their availability as testifying experts, and who have significant experience in the field unrelated to arbitration or litigation stand to be regarded as more reliable. Of course, some expert witness consulting firms make it their business to supply just that kind of witness.

Conclusion

The notion that the manner of appointing an expert witness is determinative of the reliability of the resulting expert testimony is a fallacy, as is the notion that a single expert will lead the Tribunal to the truth. For the reality, when it comes to expert

³⁰ See, e.g., *Johnson v. Manitowoc Boom Trucks, Inc.*, 484 F.3d 426, 434 (6th Cir. 2007); see also *Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398, 408 (6th Cir. 2006) (“We have been suspicious of methodologies created for the purpose of litigation”).

³¹ See, e.g., *Newton v. Roche Labs., Inc.*, 243 F. Supp. 2d 672, 679 (W.D. Tex. 2002) (emphasis added); see also *National Bank of Commerce (of El Dorado, Ark.) v. Dow Chemical Co.*, 965 F. Supp. 1490, 1516 (E.D. Ark. 1996) (“an experts motivation for his/her study and research is important”).

³² See, e.g., *Topliff v. Gross*, 9 F. Supp. 2d 1247, 1249 (D. Kan. 1998).

³³ See, e.g., *Pope v. Chevron U.S.A., Inc.*, Civ.A. No. 93–2949, 1994 WL 179938, at *3, n.3 (E.D. La. Apr. 28, 1994).

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witnesses, is that “there is hardly anything, not palpably absurd on its face that cannot now be proved by some so-called ‘experts’.”³⁴

The danger on focusing on how an expert is appointed is that a measure of reliability will be associated with it. However, neutrality is no guarantee for the soundness of an expert opinion. Testing it is. And while it has been argued that a ‘battle of the experts’ or various ways of having the expert witnesses square off, is a way of doing this, it turns expert witnesses into advocates. The risk inherent in a battling or hot-tubbing expert witnesses, is that it places emphasis on the expert witness having skills more akin to a lawyer’s. As a result, focusing on various problems associated with the ways an expert witness is appointed, and the concomitant solutions, merely risks introducing a whole new set of problems.

Instead, counsel and international arbitration Tribunals would do well to focus on testing the witnesses’ and expert opinion’s reliability. Irrespective of how or by whom the expert witness was appointed. Tribunals should afford counsel ample leeway in this regard. Perhaps even more so in the case of Tribunal-appointed experts, so as to counteract any possible bias in favor of a witness the arbitrators themselves have chosen. For Tribunals should guard against according any indicia of reliability to an expert witness’s testimony on account of the expert having been appointed by the Tribunal. While the lack of neutrality in an expert witness may be significant in assessing his reliability, the presence of neutrality is irrelevant when it comes to assessing the correctness of the expert witness’s opinion.

When it comes to finding the truth, especially truth as seen through the eyes of an expert witness, there is no substitute for the rigorous test provided by the questioning of an expert by parties’ counsel and the Tribunal itself. In this regard there is no reason to treat an expert witness any differently from any other witness.

³⁴ *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 382 (7th Cir. 1986) (Posner, J.); see also 29 Wright and Gold, *Federal Practice and Procedure*, § 6262 at 183 (1997); Weinstein, *Improving Expert Testimony*, 20 U. Rich. L. Rev. 473, 482 (1986) (“An expert can be found to testify to the truth to almost any factual theory, no matter how frivolous.”); Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Assurance of Trustworthiness*, Ill. L. Rev. 43, 45 (1986) (“[t]oday practicing lawyers can locate quickly and easily an expert witness to advocate nearly anything the lawyers desire”); Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 Colum. L. Rev. 277, 333 (1985) (“[a] Ph.D. can be found to swear to almost any ‘expert’ proposition no matter how false or foolish”).