

Kiev Arbitration Days 2013: Think Big!!

The Expert in International Arbitration: Role on the Chessboard?



Defining Expertise

- How can you ensure that the expert in fact is the expert?
- Should there be a basic qualification requirement to experts?
- Should there be sanctions if the expert lies about their qualifications?
- It is no secret that the international arbitration proceedings are a battleground for experts: what happens if an expert is clearly abusing his position, stating nonsense in his testimony that is not based on the law?



"I know nothing about the subject,
but I'm happy to give you my expert opinion."

Do as we do in the Great State of Texas: SKEET

Skills

Knowledge

Education

Expertise

Training



Daubert vs. Merrell Dow Pharmaceuticals, Inc. (1993)

Identified criteria for the admissibility of scientific and technical expert testimony:

Testability: Whether the theory or technique in question can be (and has been) tested.

Peer Review: Whether the theory or technique has been subjected to peer review and publication.

Error Rate: Whether the theory or technique has a known or potential error rate and the existence and maintenance of standards concerning its operation.

Widespread Acceptance: Whether the theory or technique has attracted widespread acceptance within a relevant scientific community.



"Is this really necessary, Your Honor? I'm an expert."

Hi Ho, Kumho!!!

Kumho Tire Co., Ltd. v. Carmichael 119 S.Ct. 1167 (1999)

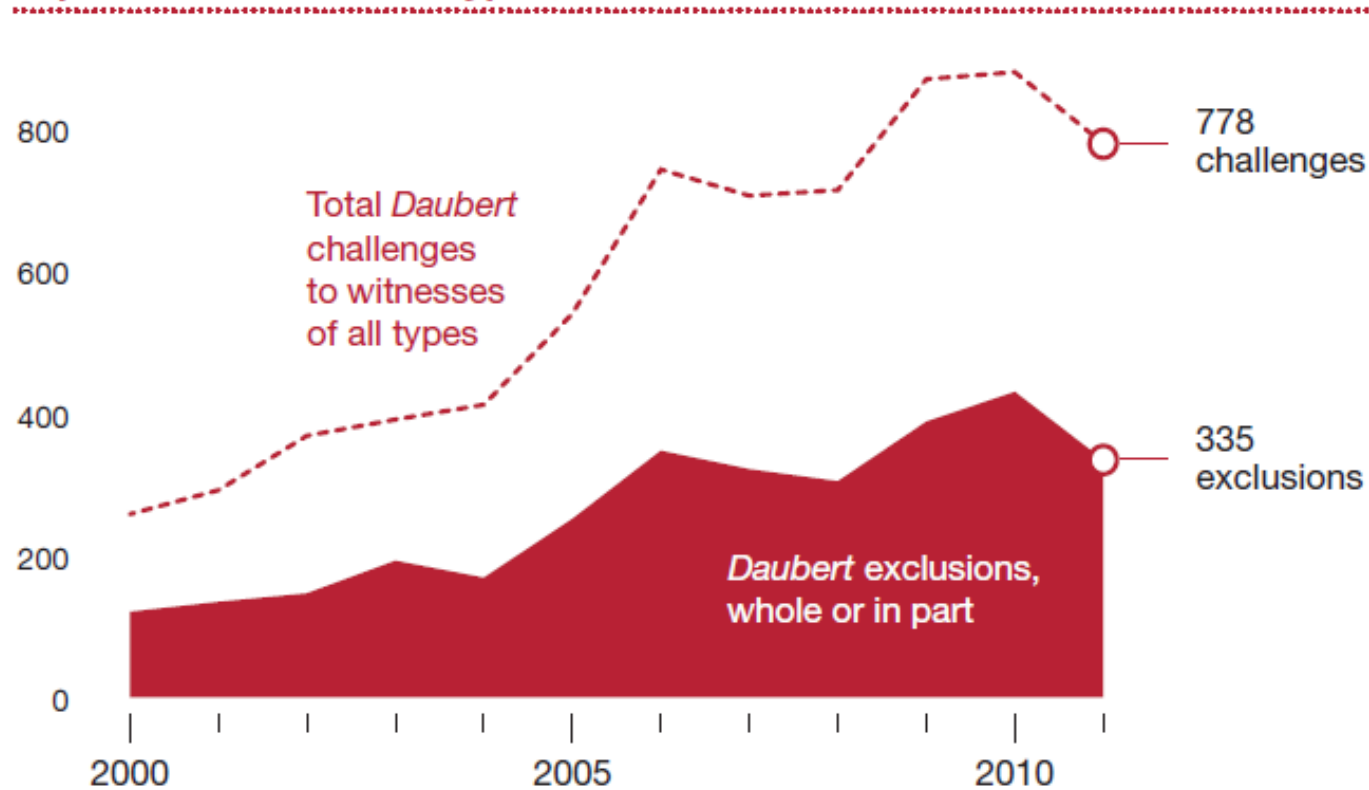
- After Daubert, confusion remained over application of Daubert to other types of experts (other than scientific).
- Technical testimony regarding cause of tire failure.
 - District Court excluded expert testimony under Daubert.
 - Eleventh circuit reversed - Daubert only applies to scientific experts.
- Supreme Court held:
 - Daubert applies to all experts - “technical” and other specialized experts are subject to the same rules.
 - Each case requires a fact-specific “flexible” inquiry.



“I see you brought the pie charts.”

Daubert Challenges 2000-2011

Figure 2: *Daubert* challenges and exclusions to expert witnesses of all types, 2000–2011



Source: *Daubert Challenges to Financial Experts: A Yearly Study of Trends and Outcomes*, PricewaterhouseCoopers 2012

Expert Witnesses: Hired Guns?

What Rules Exist in International Arbitration to dictate the ethical behavior and Independence of Party-Appointed Experts?

Claimants Damages: \$1.5 Billion



Respondent's Damages: \$1,500.00



Code of Conduct/ Ethical Rules for Experts

UK Civil Procedure Rules (CPR):

- Part 35 of the UK Civil Procedure Rules (CPR) (Experts and Assessors) expressly provides:
 1. It is the **duty of experts to help the court** on matters within their expertise.
 2. This **duty overrides any obligation to the person from whom experts have received instructions** or by whom they are paid.
- Practice Direction for CPR Part 35.3 further specifies that 'Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation' and that '**Experts should assist the court by providing objective, unbiased opinions on matters within their expertise**, and should not assume the role of an advocate'. Moreover, '**Experts should consider all material facts, including those which might detract from their opinions**'.

Source: -Mark Kantor, *A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One be Found?*



Code of Conduct/ Ethical Rules for Experts

Little Guidance from Arbitral Institutions on Ethical Requirements for Party-Appointed Experts:

The prominent arbitration rules in international use do not address the responsibilities of party-appointed experts, nor do they set out the ethical duties of party-appointed expert, including:

- Arbitration Institute of the Stockholm Chamber of Commerce,
- Swiss International Arbitration Rules,
- ICC Arbitration Rules,
- ICDR International Arbitration Rules,
- LCIA Rules
- ICSID Arbitration



"I swear to tell the truth, the whole truth, and nothing but the truth, from my perspective."

Source: -Mark Kantor, *A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One be Found?*

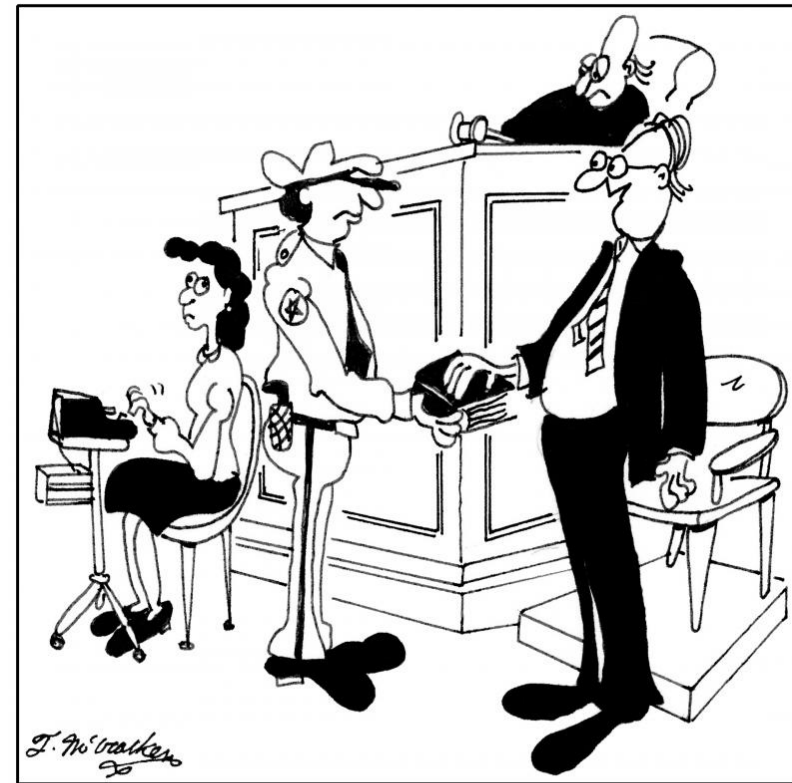
Code of Conduct/ Ethical Rules for Experts

IBA Rules on the Taking of Evidence in International Arbitration as Revised 2010

Article 5 Party-Appointed Experts

2. The Expert Report shall contain:

- (a) the full name and address of the Party-Appointed Expert, a statement regarding his or her present and past relationship (if any) with any of the Parties, their legal advisors and the Arbitral Tribunal, and a description of his or her background, qualifications, training and experience;
- (c) a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal;
- (e) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions.



"I swear to tell the truth, the whole truth and nothing but the truth ... almost."

Code of Conduct/ Ethical Rules for Experts

Code of Conduct of Expert Organizations: Chartered Institute of Arbitrators Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration

.Article 4 – Independence, Duty and Opinion

1 An expert's opinion shall be impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any Party.

2 Payment by the appointing Party of the expert's reasonable professional fees for the work done in giving such evidence shall not, of itself, vitiate the expert's impartiality.

3 An expert's duty, in giving evidence in the Arbitration, is to assist the Arbitral Tribunal to decide the issues in respect of which expert evidence is adduced.

4 An expert's written opinion should:

- (a) contain the full name and address, background, qualifications, training and experience of the expert;
- (b) **state any past or present relationship** with any of the Parties, the Arbitral Tribunal, counsel or other representatives of the Parties, other witnesses and any other person or entity involved in the Arbitration;



Code of Conduct/ Ethical Rules for Experts

Code of Conduct of Expert Organizations: Chartered Institute of Arbitrators Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, *continued*

.Article 8 Expert Declaration:

(d) I confirm that I have referred to all matters which I regard as relevant to the opinions I have expressed **and have drawn to the attention of the arbitral tribunal all matters, of which I am aware, which might adversely effect [sic] my opinion;**



Code of Conduct/ Ethical Rules for Experts

AICPA Code of Professional Conduct

Section 102 - Integrity and Objectivity

.01 Rule 102—Integrity and objectivity.

In the performance of any professional service, a member **shall maintain objectivity and integrity, shall be free of conflicts of interest, and shall not knowingly misrepresent facts or subordinate his or her judgment to others.** [As adopted January 12, 1988.]

Interpretations under Rule 102

—Integrity and Objectivity

.02 102-1—Knowing misrepresentations in the preparation of financial statements or records.

A member shall be considered to have knowingly misrepresented facts in violation of rule when he or she knowingly—

Makes, or permits or directs another to make...Signs, or permits or directs another to sign, a document containing materially false and misleading information.



Code of Conduct/Ethical Rules for Experts

SPE Professionals Guide for Professional Conduct

SPE Professionals Guide for Professional Conduct

1. Offer services in the areas of their competence and experience affording full disclosure of their qualifications.
6. Disclose to affected parties known or potential conflicts of interest or other circumstances which might influence-or appear to influence-judgment or impair the fairness or quality of their performance.
7. Are responsible for enhancing their professional competence throughout their careers, for promoting others to advance their learning and competence, and not falsely obtaining competency credentials through misrepresentation of experience or misconduct.
8. Accept responsibility for their actions; seek and acknowledge criticism of their work; offer honest and constructive criticism of the work of others; properly credit the contributions of others; and do not accept credit for work that is not theirs own work.



Code of Conduct/Ethical Rules for Experts

NACVA Professionals Guide for Professional Conduct

A. INTEGRITY AND OBJECTIVITY

A member shall remain objective, maintain professional integrity, shall not knowingly misrepresent facts, or subrogate judgment to others. The member must not act in a manner that is misleading or fraudulent.

B. PROFESSIONAL COMPETENCE

A member shall only accept engagements the member can reasonably expect to complete with a high degree of professional competence.

D. UNDERSTANDINGS AND COMMUNICATIONS WITH CLIENTS

... A member shall inform the client of conflicts of interest, significant reservations concerning the scope or benefits of the engagement, and significant engagement findings or events.

J. FINANCIAL INTEREST

A member shall not express a Conclusion of Value or a Calculated Value unless the member and the member's firm state either of the following:

1. "I (We) have no financial interest or contemplated financial interest in the subject of this report."; or
2. "I (We) have a (specify) financial interest or contemplated financial interest in the subject of this report."



Code of Conduct/Ethical Rules for Experts

Summary of Certain Guidelines for Professional Conduct

| Rules | Independence from parties, triers, etc. | Objectivity and unbiased approach | First duty to Trier of Fact | Requirement of Expertise | Test of Expertise | Disclose adverse information |
|----------|---|-----------------------------------|-----------------------------|--------------------------|-------------------|------------------------------|
| CPR | √ | √ | √ | √ | | √ |
| Rule 702 | √ | √ | √ | √ | √ | |
| IBA | √ | √ | | √ | | |
| CIArb | √ | √ | √ | √ | | √ |
| AICPA | √ | √ | √ | | | |
| NACVA | √ | √ | | √ | | √* |
| SPE | √ | √ | | √ | | |

The Lure of Ethical Drift

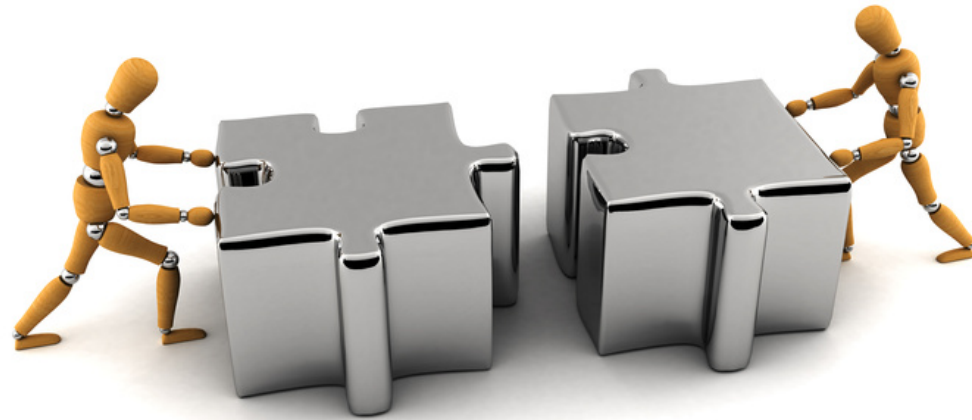


“The incentive (the moral hazard) to present an opinion harmonious to the engaging party is in fact present from the very first contact with the party or counsel regarding the expert’s possible engagement, regardless of the obligation to maintain objectivity. Some prospective experts resist that lure while others succumb.”

-Mark Kantor, A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One be Found?

The Sachs Protocol

- Instead of relying exclusively on party-appointed experts or appointing its own expert of choice, the tribunal could consult with the parties at an early stage in the proceedings and invite them to each provide the tribunal and the opposing party with a short list of candidates who they consider could serve as an expert to give evidence on the issues at stake.
- The tribunal should then invite the parties to briefly comment on the experts proposed by the other party, in particular as to whether there are any conflicts of interest.
- Then the tribunal chooses two experts, one from each list, and appoints these experts jointly as an “expert team”. Following such appointment, the tribunal will meet with the expert team and the parties in order to establish a protocol on the expert team’s mission.



Protocol on Expert Teaming: A New Approach to Expert Evidence, Dr. Klaus Sachs