

EuroExpert e-bulletin

Another year legal year is about to begin in the UK and as ever there have been a number of changes to the world of experts and dispute resolvers. Case law is continually evolving; this year has been no exception with cases around the globe highlighting the work and the importance of the expert witness.

In some of the cases the role of the expert as an independent and impartial person has been challenged.

In England and Wales and across all common law jurisdictions the role of the expert was clearly defined by Hon Mr Justice Cresswell in 1995 in a case about a ship called the *Ikarian Reefer* and they have become enshrined in what are known as the *Ikarain Reefer* rules. The rules are still as pertinent today and I believe that experts, irrespective of the jurisdiction in which they work, will find these basic principles of great assistance in their role. So what are these basic principles? In his judgement Sir Peter said:

- Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of the litigation.
- An expert witness should provide

independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise.



- An expert witness in the High Court should never assume the role of an advocate.
- An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
- An expert witness should make it clear when a particular question or issue falls outside his expertise.
- If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness, who has prepared a report, could not assert that the report contained the truth,

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EuroExpert

The Organisation

EuroExpert (EE) is a membership organisation whose members are representing substantial bodies of Experts in their own country. Each organisation must demonstrate to EE that they have appropriate standards for Experts.

Philosophy

EuroExpert's philosophy is self-regulation by Experts and the establishment of agreed common professional standards in the best interests of society.

The e-Bulletin is published periodically. It provides useful information for those who are either acting as an expert, who use their services or are in charge of setting standards for experts. EuroExpert (EE) is a point of contact between national and European judicial and legal authorities, government departments, official and private bodies and other appropriate tribunals.



Geographical Society of Lisbon

A paper given by Philip Newman representing EuroExpert to the 4th National Congress of APEA on 3rd October 2014

The Importance Of Improving Expert Standards On A Pan-European Basis

It is my great honour to have been invited to speak to you today.

I am a practising barrister, arbitrator and mediator from London in England.

I practice mainly in the fields of commercial and chancery litigation and also act in professional regulatory and disciplinary matters (either prosecuting or defending a wide range of professionals such as medical practitioners, accountants, engineers,

surveyors, solicitors and barristers in regard to issues over professional conduct or performance).

I am a former Deputy Chairman of the Academy of Experts and was Vice President of EuroExpert. In my day-to-day legal practice I work with expert advisers and expert witnesses very frequently and am well aware of the problems which can confront them as professionals.

I was a member on

the Ministry of Justice sponsored Working Group which developed the Practice Direction and Expert Witness Protocol under Part 35 of the CPR.

The English Position For Expert Witnesses

I approach this topic initially from my home viewpoint of the jurisdiction of England and Wales where we have a set of Civil Procedure Rules ("CPR") which have been in place since April 1998 and were introduced

following what were called the Woolf Reforms (named after one of our former top judges - Lord Woolf). In the CPR we have Part 35 which deals with the matter of expert evidence. The Practice Direction to Part 35 sets out certain principles which are derived from English common law case law and in particular from what became known as the "Ikarian Reefer" guidelines (taking the name of the reported case). Under these provisions:

- ❑ Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation
- ❑ Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate.
- ❑ Experts should consider all material facts, including those which might detract from their opinions.
- ❑ Experts should make it clear:
 - (a) when a question or issue falls outside their expertise; and
 - (b) when they are not able to reach a definite opinion, for example because they have insufficient information.
- ❑ If, after producing a report, an expert's view changes on any

material matter, such change of view should be communicated to all the parties without delay, and when appropriate to the court.

The EuroExpert Code For Expert Witnesses

EuroExpert has formulated its own Code (see www.euroexpert.org) drawing on the valuable experience and aspirations of representatives of its various member organisations in different member States within Europe.

The Distinction As To The Use Of Experts In A Common Law Jurisdiction & Civil Law Jurisdictions

The UK has three distinct legal jurisdictions: England & Wales, Scotland and Northern Ireland. The differences between England & Wales and Northern Ireland are very small as to the practices in litigation whereas the situation in Scotland is very different and would be alien to an English lawyer such as myself. However in all the UK jurisdictions the basis of selection and appointment of expert witnesses is that the Court will provide permission in suitable cases where expert evidence is reasonably required and the parties themselves will contractually engage the expert witnesses to provide expert evidence.

It is not a case of expert witnesses being appointed by the Court itself and the case remains party driven but under increasingly strict control of the Court in what is called "active case management". This is a real distinction between England & Wales as a common law jurisdiction to many European States such as Portugal with a Civil Legal system heritage where experts may be (and usually are) Court appointed.

My Basic Understanding Regarding Expert Evidence In Portugese Litigation

I have endeavoured to acquire a very basic understanding of how expert witness issues are dealt with in Portugese litigation and summarise my understanding as follows:

Expert evidence is permitted at trial (Cf. Article 467 and 604, paragraph 1 (c) of the CPC).

Expert evidence is conducted by means of a written report to be presented to the court and sent to both parties before trial, and is based on certain specific questions posed by the parties and relevant data and documentation provided for that purpose.

The expert evidence may be given by just one expert appointed by the court or by three experts: one

appointed by each party, and one by the court.

The request for such evidence should be made with the initial written statement and no later than the preliminary hearing. Nonetheless, the court itself may request such evidence, if deemed necessary, even if that requires suspending the trial hearing for that purpose.

Experts may be summoned in order to clarify their statements, but they will not be examined as witnesses (Cf. Article 604, paragraph 1 (c) of the CPC). Their input will be limited to the scope of the report without rendering an opinion on the facts.

Nonetheless, in some cases, the court enables the parties to call as a witness someone with no particular awareness regarding the case but with specific knowledge useful for the comprehension of the technical facts at issue or for the explanation of certain technical documents that were filed. However, the testimony of any such witness will be weighed by the court and will undoubtedly be given less weight than actual expert evidence.

I also understand the following:

- ❑ After an expert report is filed in court, the parties can request that the experts be

Croatian Association of Court Expert Witnesses joins EuroExpert

Hrvatsko društvo sudskih vještaka (CACEW) is a voluntary based, non partisan, non governmental, non profit association which is operating on the whole territory of the Republic of Croatia. The court expert witnesses, who permanently or periodically perform the expert witness activities in the area of each county or commercial court, join the CACEW for the sake of improvement and insurance of public interest in the field of expertise.



HRVATSKO DRUŠTVO
SUDSKIH VJEŠTAKA

CROATIAN ASSOCIATION OF
COURT EXPERT WITNESSES

The CACEW performs its activities in accordance with Constitution, laws and regulations of the Republic of Croatia, and pursuant to moral standards, code of ethics and he oath of the court expert witness given at the competent court.

The CACEW was founded in 1980 and currently has 1350 full time members which operate in 42 different professions, through 16 subsidiaries organised on territorial principle throughout the Republic of Croatia."

summoned for the hearing in order to clarify the statements made in that report under oath

- Experts are generally appointed by the court if it is determined that the facts require special expertise. A court-appointed expert must be impartial and qualified. Written expert opinions by party-appointed experts – which are unusual in Portuguese court proceedings – are not treated as expert evidence, but as part of the respective party's pleadings.

I give credit to the litigation team at the Portuguese firm of Morais Leitão, Galvão Teles, Soares da Silva & Associado for my understanding that I have gathered as expressed above.

Differences And Similarities

So there are plainly certain similarities (as well as differences) between the position in England & Wales as compared with Portugal.

The key importance of the written report is clearly common to both countries. This is the case with most European States. I take the view that the expert report is the fundamental foundation of the expert evidence to be presented in the case. If the report is flawed - the whole evidence of the

expert will be tainted.

The expert report in the form of a statement in Portugal can be the subject of clarification by the expert being summoned (but apparently they will generally not be examined as witnesses). In England the expert report can be the subject of questions put in writing for the purposes of clarification.

The concept of having multiple expert witnesses in a case with one appointed by the court and the others by the parties on either side is unknown in litigation in England & Wales - but has similarities to the way in which some arbitration panels are formed, for instance as one finds with the International Chamber of Commerce ("ICC") with the Chairman being appointed by the ICC itself and the "wing-men" being appointed by each side. In that scenario I have frequently seen an independent and objective approach by the Chairman and an unfortunately partisan or biased approach by the wing-men members of the panel. I would be interested to know to what extent that is replicated in any Portuguese litigation and how common it is for there to be three experts in a case and whether that is reserved only for very high value and complex cases.

The idea of court appointed experts was

considered by Lord Woolf in the 1990's but was not taken up. It was seen as far too authoritarian. The nearest one got to that in England & Wales, was the provisions in the CPR for what are called Single Joint Experts ("SJE's"). This is usually limited to relatively low value cases and involves permission being granted for the parties (not the Court) to appoint a sole expert witness who is either agreed between them or nominated by the Court in the event of no agreement being achieved on his/her identity. That SJE is then jointly instructed by the battling parties. This can sometimes be a "nightmare" for the parties and for the expert concerned.

Sometimes the parties cannot agree on the joint instructions and the SJE ends up receiving two sets of instructions. The expert frequently needs to look at his or her task based on two often wildly differing accounts of the underlying facts and issues in the case.

Unfortunately because these cases where SJE's are appointed are usually low value, it tends to attract relatively junior experts who may have insufficient experience to deal with the pressures exerted by hostile parties.

Many parties do not trust having a SJE and feel more comfortable with their own party appointed expert but the problem is that the Court will often

not grant permission for individual party appointed experts in a low value case.

It is generally only in what is called "multi-track litigation" (i.e. more complex and higher value cases) where a party appointed expert witness not only produces an expert report but also attends court to give expert oral testimony. Such evidence is given on solemn oath and is the subject (usually) of cross-examination where the expert's evidence can be subjected to rigorous examination in open court in front of the judge and also where he or she may be questioned directly by the judge in open court and where the public and the media may be present.

Concurrent Expert Evidence - "Hot-Tubbing"

There is now a new process of what is called "concurrent expert evidence" referred to colloquially as "hot-tubbing" - whereby two or more experts give oral evidence at the same time in a meeting chaired and largely run by the judge. Typically counsel for the parties take much more of a background role and are limited to asking follow-up questions after the judge has conducted the meeting and obtained what he or she wants out of the experts.

This new approach is gaining considerable popularity in England

and has been quite controversial as an innovation. It was recommended to Lord Justice Jackson by members of the Australian judiciary in Queensland and he was plainly impressed with it. It certainly gives the judge more control and influence in the running of the case - and perhaps that is why it is popular with most judges!

The Benefits Of Expert Associations Across Europe

The benefits of expert associations across Europe and a key advantage of EuroExpert is the ability to promote the advancement of proper standards for experts in each jurisdiction such that their reputation will be enhanced based on a bedrock of common suitable standards. This hopefully means that expert evidence should be given respect by the judiciary and members of the public on the assumption that the evidence of experts will be impartial, independent and objective and hence can properly be relied upon. This does not mean that every expert in any given case will come to the same conclusion as it is possible that there may be differing "schools of thought" on a particular technical issue or an aspect of professional or industry practice.

The encouragement of transparency is another

common feature so that if an expert is an adherent to one school of thought, he should make that clear and recognise the other school of thought but then give reasons as to why he considers his approach to be the preferable one.

Another area of common standards is the duty owed by an expert witness to the Court - this will be the overriding or paramount duty of the expert. This duty is stressed in expert witness training given by the Academy of Experts. It is designed to endeavour to minimise any opportunity for a party to use what has sometimes been called a "hired gun" expert.

The danger for a hired gun in the era of experts focussing on objectivity is that such a so-called expert can be more easily exposed during the trial process. It is thought that in England the new judicial toy of hot-tubbing is more likely to see the hired gun sink and drown in the hot tub! However there is a potential counter argument that the more persuasive and articulate individual (but who may choose to promote a point without merit) may thrive in the debate conducted in the hot-tub (witnessed by a non-expert judge) when compared to a "boring boffin". Time will tell as to this.

Certainly, in every jurisdiction it is likely that some experts will have gained a reputation for



being intelligent and trustworthy. In England with its penchant for cricket such an expert might be called a "safe pair of hands" (i.e. is reliable) or be said to be someone who "plays with a straight bat" (i.e. is trustworthy). However other experts may become known for giving evidence slanted towards Claimants or Defendants or being prepared to run arguments which have little merit on behalf of their clients. Such an approach by those experts is in reality self-defeating, as their unreliable and slanted reputation will become known to lawyers and the judiciary alike and so their evidence will be given little, if any, weight by the Court. (This I suppose is why in Portugal much more weight will be given to Court appointed independent experts than to party appointed experts and I will be interested to hear from delegates as to this).

The Reach Of EuroExpert Within Europe

EuroExpert includes representation in its membership from the following countries:

- Austria
- Croatia
- Czech Republic
- Germany
- Hungary
- Portugal
- Spain
- Russia
- Switzerland
- United Kingdom

The Russian Federation and Switzerland associate members of as they are not EU States.

EuroExpert requires that each individual applicant to a member organisation must show that:

- (i) The person shall (with proper supporting documentation such as

reports and references) the appropriate qualifications, training, and practical experience for his or her area of expertise.

(ii) The person has given evidence of his or her competence as an expert by oral, written and/or practical methods to a committee of instructed specialists in the appropriate field of expertise.

EuroExpert also requires its Code to be maintained by all experts in its member organisations.

The EuroExpert Code of Practice is based upon principles of high qualifications, personal and professional integrity, independence, impartiality, objectivity, and respect for confidentiality.

The EuroExpert Code For Expert Reports

EuroExpert also has a Code for Expert Reports to promote a logical structure as well as objectivity and consistency of approach through verifiable justification for all expressed opinions contained in the reports. Clarity of expression is also highlighted.

It is sometimes said in England that an expert is someone who can express a complex issue in simple terms – unfortunately one still finds experts who have a particular fondness for

expressing a simple issue in very complex terms! – and this is not very useful for judges or for clients. This is where appropriate expert witness training can undoubtedly assist.

In a time of increasing centralisation of power in Brussels, EuroExpert is an important point of contact with the European Commission, European Parliament and European Court.

Closing Remarks

My own view is that expert witnesses throughout EU States should have very similar qualities:

- Objectivity
- Logical reasoning and clarity of expression
- Diligence
- No conflict or potential conflict of interest
- Impartiality in reaching opinions
- A paramount duty to the Court or tribunal

Philip Newman is a Barrister practising from 42 Bedford Row, London, UK. He was called to the Bar in 1977. For several years he practised as a litigation solicitor and partner in central London before returning to practise at the Bar in 1995.



12TH ANNUAL INTERNATIONAL CONFERENCE Construction and real estate: expertise and appraisal Prague 27 – 28 November 2014

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Have you heard the one about the dog...

In France

Spotted recently under the headline of "Golden Labrador 'expert witness' in French murder trial" the case of a golden Labrador named Tango who was called to the stand in court in Tours, France in an effort to identify the defendant who is alleged to have killed the dog's owner.



The defendant was ordered by the Judge to threaten the dog so that his reactions could be used to identify or rule out the suspect. Another dog was used as a control.

The defence lawyer asked "So if Tango lifted his right paw, moved his mouth or his tail, is he recognising my client or not"?

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the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.

- If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court.
- Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports (Guide to Commercial Court Practice).

The rules are, I believe, relatively straightforward and easy to comprehend and, as I know from personal experience, recognised in a number of jurisdictions, England & Wales, Singapore, Hong Kong and Malaysia to name but a few. They emphasise the need for standards and commonality for those acting as experts in the legal arena.

Expertise and qualifications may vary but the principles applied when assisting the courts and tribunals should be the same. It is fundamental that the Courts have to be able to rely on the integrity of those giving evidence before them. This was one of the basic principles behind the establishment of EuroExpert in 1998 and this is, perhaps, an ideal opportunity to review our role.

Each member of EuroExpert has to demonstrate that they have appropriate standards for experts in place.

This allows for those acting as Expert Witnesses in Europe to be able to work across national boundaries knowing the minimum standards that are required of them. This has been made easier by the adoption of a simple EuroExpert Code of Practice. For those acting as experts in different jurisdictions we find that there are often more similarities than differences. EuroExpert allows both experts and those instructing them to share their experiences and compare best practice.

One practical difficulty of working in cross-border disputes can be the use of language. This can be further complicated when translation (and interpretation) are involved easily leading to misunderstandings in what is already a fraught arena. With this in mind EuroExpert has published an international glossary of commonly used terms which has proved to be of great benefit to both experts and users of experts. I have no doubt that the glossary will continue to expand to meet the challenges we are presented with.

It is against this backdrop that I am very pleased to formally welcome two new members, Croatia and Hungary, to EuroExpert. I have no doubt that we will all learn much from their experience.

Nicola Cohen is
Chairman of EuroExpert
and Chief Executive of
The Academy of Experts
in the United Kingdom

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United Kingdom
The Academy of Experts

Secretary General:
Bernhard Floter
+49 (0)221 9127710
secretary-general@euroexpert.org

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Russia
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Chairman:
Nicola Cohen CAE
+44 (0)20 7430 0333
chairman@euroexpert.org

www.EuroExpert.org
For further information about the
e-bulletin or EuroExpert