

EuroExpert e-bulletin

The world of Experts and Dispute Resolvers has, as ever, been both an interesting and a busy one. A number of our members have reported changes to practices over the last year whether by formal regulation or simply the 'industry' reviewing its working practices. The one thing that is particularly highlighted to me over the last few months as I have been working with Experts in Europe, Asia, Australia and the Middle East is the ever increasing need for common standards and in many ways more importantly common terminology. This was particularly brought home to me at a recent lecture I attended in Hong Kong given by the Secretary for Justice on the future development of the role of Experts and ADR. The use of language and the art of communication is one of the most fundamental things for those in the dispute resolution world. More often than not the lack of clarity is what causes misunderstandings and dispute. EuroExpert has of course tried to minimise this problem by producing a simple glossary of terms regularly used and I am sure it will expand and develop over the coming year. As always EuroExpert welcomes views and suggestions from both Experts and those instructing them.

The year has again seen pressure placed on Experts' fees, in England & Wales

publically funded expert work is about to have a 20% reduction imposed. This has led to real concerns particularly in some sectors as to the quality of the work that will be produced and the number of Experts willing to undertake the role both now and in the future. We have noticed that there appears to be a marked reluctance from younger professionals to become involved in this arena as they perceive that the potential risks outweigh the remuneration available. If this trend persists in many areas there will be limited, if any, quality expert evidence available to assist the Courts and Tribunals in their role. Is there a risk that despite the increased standards and regulations that we will see a return to what the Americans refer to as the "Hired Gun"? I hope not - only time will tell.



As I mentioned in the last ebulletin Croatia has now joined the ranks of the EU and I am of course looking forward to discovering more about their legal system and how experts operate within it and to their active participation in EuroExpert. In

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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.

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 is in the best interests of society.



Statue of Justice at the Supreme Court of Austria

The Role of the Expert and use of Technology in Austrian Courts

Experts and e-Justice

Introduction

At present, there are 9,210 generally sworn and court-certified experts in Austria, who have been entered into the electronic List of Generally Sworn and Court-Certified Experts and Interpreters ("SDG List") in accordance with the provisions of the Court Experts and Court Interpreters Act (SDG). 7,625 (about 83%) have joined, as full members, one of the regional associations of the *Hauptverband der allgemein beeideten und gerichtlich zertifizierten Sachverständigen Österreichs* - Central Austrian Association of Generally Sworn and Court-Certified Experts (*Hauptverband der Gerichtssachverständigen* - Central Association of Court Experts [CACE]). This association is the umbrella organization which, in line with its by-laws, represents the interests of court experts working for courts throughout Austria.

In my capacity as legal consultant and legal counsel of the Association it is quite natural that I have many points of contact with courts and

the Federal Ministry of Justice. The joint activities in the IT area will be outlined below.

Court Experts and Courts

There is nothing comparable in Europe to the relationship between courts in Austria and the experts working for them. Many countries envy Austria's court experts for their excellent position within the structure of the judicial system. There are two reasons behind the 'secret' of this success: optimum organisation and excellent cooperation. The CACE and its four regional associations copy the federal structure of the Austrian court system. In the course of many years, the associations have regarded themselves as partners of the courts; the result is a very intensive and practical cooperation, which is one further important prerequisite for the success achieved to date.

Court Experts and ICT

Austria's court experts have an open-minded approach to the use

of information and communication technologies (ICT). However, it must also be borne in mind that court experts are an extremely heterogeneous group: the scope of their activities covers the entire spectre of human knowledge in the liberal and natural sciences, their access to a case ranges from using sound craft skills and experiences, to top scientific research and its practical application. The links to the courts also vary to a great extent: Quite a few court experts produce an expert opinion for a court only very infrequently, while other court experts always work on several parallel court assignments. Little wonder therefore that the attitude taken vis-à-vis the use of new technologies in information processing is sometimes quite different.

The Association tries to take account of these differences in its members' working conditions by, on the one hand, promoting new technologies but, on the other hand, not overtaxing those members who have little or no use for them. The main emphasis is therefore on leaving it to members' discretion whether they will apply a new tool. This is based on the underlying consideration that meaningful technologies will find their way into practical applications in any event, given the specific market situation in which court experts must pursue their activities. Time and again the CACE has promoted new projects, whenever such projects are obviously of general benefit to the concerns of court experts as a group, or to the courts as the partner of court experts.

Projects

Real-Estate Valuation

As early as 1 January 2002 a specific form of electronic communication was launched for a major sub-area of

activities by court experts, namely the valuation of real-estate for forced sale proceedings: In keeping with §141 (4) of the Forced Sales Regulation (Exekutionsordnung = EO) court experts must deliver their expert opinions, as well as a short summary thereof, to the courts also in electronic form. The technical feature in this connection is that users can access a separate court experts' page on the internet by using a certificate. Court experts will find there the court cases assigned to them and can upload their files to this page. The courts benefit from the added value that the data provided by court experts become part of the forced sale order which is published on the internet. This provides interested parties with a very convenient option to retrieve information, which spares the courts many of the repeated inquiries previously addressed to them, and which has considerably enhanced the efficiency of the sales procedures on account of more publicity.

Unfortunately, after 12 years (!) and to this very day the problems remain unresolved that relate to the remuneration which should be paid to court experts for the extra work required for this procedural format. It is a justified demand by all court experts dealing with real-estate valuations that the additional

requirements deriving from the implementation of the amendment to the Forced Sales Regulation (equipment, extra work, assistant staff, etc.) are adequately remunerated. Unfortunately, this has not been the case so far.

Electronic List of Court Experts and Court Interpreters

There can be no doubt that one of the ground-breaking innovations of recent times was the conversion of the SDG List to an IT format. Time and again court experts, but also judges, lawyers and involved relevant stakeholders raised the demand for setting up an adequate database, the benefit of which is uncontested for courts, court experts and all those in need of such services. In the course of amending the SDG in 1998, the necessary provisions were finally adopted that could facilitate the launch of an electronic database of court experts and court interpreters. These were guided by the design of the company register and thus also entailed the payment of a fee for every access (§14a to §14e of the SDG in the version of Federal Law Gazette I 1998/168). Regrettably, the transitional provision of §16b of the SDG did not set any deadline for implementation. As a result, no use was made of the option to convert to an electronic list.

Finally, an electronic list of court experts and court interpreters was established as of 1 January 2004. It is maintained as a database and covers all of Austria. The following data are recorded in the list on a mandatory basis (§3a (2) of the Act):

- full name
- year of birth
- occupation
- address for service of documents
- telephone number
- specialty and sub-specialty, including any possible restrictions
- term of certification

The following data may also be entered on an optional basis (§3a (3)):

- field of specialization within a sub-specialty
- second address for service of documents
- additional telephone and facsimile numbers
- e-mail addresses
- information facilitating accessibility
- restrictions on the geographic scope

Court experts can use the appropriate certificate (§2 item 8 of the *Signature Act – SigG*), which is available on their identity card, to personally enter changes concerning their address for the service of documents, telephone number and optional

information items, except for their specialization (§3a (4) of the SDG). This ensures that, to the extent possible, the data are kept up to date.

Moreover, court experts can present their personal profiles in the list (§3a (5) of the SDG): Court experts can personally enter the following data in a separate section, using a certificate (against payment of €192 for the first year and €39 for any further calendar year):

- educational background and professional career
- infrastructure
- scope of activities as a court expert to date (number of assigned cases, subject of the expert opinions)

It is also admissible to create a link to the court expert's own website for a more detailed presentation of the above data.

The court experts and court interpreters lists, previously maintained in paper form by the court presidents, were transferred to a database published on the courts' intranet and also on the internet, where it can be generally viewed without any costs and where it is accessed with high frequency. It can therefore be said that this project was crowned by resounding success.

Chip card

When a court expert is admitted to the court experts' list, he receives an identity card in the form of a chip card, carrying his/her photograph. The card contains the following information (§8 (1) and (2) of the SDG):

- competent court
- period of validity (up to the end of the 5th calendar year following upon the issue date of the card)
- full name
- day of birth
- specialties, sub-specialties if applicable

The identity card is also provided with an appropriate certificate to produce electronic signatures (§2 item 8 of the *Signature Act*). The court expert must bear the cost of the card (§8 (3) of the SDG). When delivering expert opinions in electronic form, the certificate replaces the use of the round seal (§8 (5) of the SDG).

The chip card has the following practical functions:

- official identity card with photograph
- electronic means of identification vis-à-vis the courts (data maintenance, delivery of expert opinions)
- electronic signature on expert opinions

- access to internal technical pages at wien.gerichts-sv.at
- citizen card functionalities (if designed accordingly)

Court experts are required to carry their identity card with them when acting in their court-expert capacity and show it when requested. When a court expert is deleted from the list, they must return the card without delay. It must also be returned when a new card is issued (§8 (4) of the SDG).

While court experts deplored the demise of the customary paper ID cards during the period following upon the introduction of chip card and occasionally did not see any justification for paying the fees collected for issuing the new card and the certificate, they have been increasingly adopting the view in the meantime that the electronic component of the card also offers advantages to court experts. For example, they can now update their own data in case of changes, or deliver their expert opinions in electronic form.

Document Delivery Service

Since 1 October 2010 all court experts have had the possibility to deliver their expert opinions to courts in electronic form. This application, called Dokumenten-einbringungsservice (Document Delivery Service – DES), was developed by extending the access previously developed for court experts producing real-estate valuations. It makes it possible to deliver expert opinions to a court or public prosecutor not only by mail but also electronically.

Prerequisites:

- card reader
- identity card of court expert with valid certificate

Procedure:

The system is accessed via an internet page which contains detailed information and a test area where one can try out the application without having to send data.

Expert opinions are delivered in electronic form in the following manner: After entering the PIN number, the item

to be emailed can be entered and dispatched. First, the respective court is selected, then the case file number and a defined identifier (usually the court case) must be indicated; accompanying text may optionally be entered. Next the files to be delivered (expert opinion, note of fees, possibly attachments) are uploaded. Only signed files in PDF format are suited for electronic delivery; the total volume is currently limited to 10MB. Larger file volumes need to be delivered in several batches.

When entering the files, the case file number is checked for validity. After the transmission command has been successfully operated, a transmission protocol is communicated. The court then confirms acceptance of delivery by sending an automated message.

All deliveries are shown in a table, which helps to find and view them easily. After one year the entries are archived.

This newly launched form of transmission replaces the sending of expert opinions in paper form with affixed round seal



(§8 (5) of the SDG) and is an admissible form of communicating with the courts in electronic form (§1 (1b) of the Regulation by the Federal Minister of Justice on Electronic Communication with Courts – ERV 2006).

The Document Delivery Service cannot only be used to transmit expert opinions but also for other correspondence with courts or prosecutors. In addition to notes of fees, it is also feasible to send the following documents:

- ❑ warnings about insufficient advance funding for court expert work
- ❑ applications for advance fee payments
- ❑ requests for extension of delivery deadlines
- ❑ comments on a motion to reject a court expert
- ❑ appeals or complaints against a decision on fees
- ❑ reminders concerning fee payments

The new form of communication primarily offers major advantages to the courts, as they can send expert opinions to the parties' counsels in electronic form. It can also be of advantage to court experts who produce their expert opinions largely by means of IT tools, since it is not necessary to print out several copies, and as no mail handling is necessary. However, it

was described earlier that court experts have widely heterogeneous interests, as a result of which it should not become an obligation for the whole group of court experts to use this electronic tool. This is planned, for example, for any electronic communication (ERV) between the legal professions as well as state-run or partly state-run institutions and the courts. Martin Schneider, Head of the Department for Legal Information in the Federal Ministry of Justice, once gave a very appropriate definition in a working group when he said that he wished the further future for this form of communication to be "soft coercion with exceptions".

Electronic Access to Court Files

According to §89i of the Court Organisation Act (Organisationsgesetz – GOG) parties may also have electronic access to all data related to their case that have been stored in the Automated Court Procedures System (Verfahrensautomation Justiz), provided that there are the technical possibilities, as well as when simple and economical handling procedures and sufficient security against abuse by third persons are ensured.

This form of electronic communication is therefore open to litigating parties, as well as to their counsels. At present, it

is being offered against a fee in the form of an online inquiry, which facilitates access to the electronic case registers and procedural data in civil-law cases, labour and social-law proceedings, forced sale, and probate proceedings.

Court experts enjoy a special position of confidence. §170 (2) of the Internal Rules for First and Second-Instance Courts (Geo) expresses this in a very illustrative way:

"Court experts who are known to the court as reliable persons may be handed files for a certain period of time."

One should therefore envisage that, in the future, the group of persons working as court experts should also have the possibility of accessing files electronically. In line with the aforementioned differences in working conditions and interests, which deviate considerably from those of parties' counsels, this access should again be available on a voluntary basis.

Big Brother?

However, the increasing use of IT, which does not stop short of court experts, also has certain down sides: As the Automated Court Procedures System lists all court experts assigned to cases as parties involved in a case, and also indicates the date of their assignment to a

case and the delivery date of their expert opinion or any other termination of their activities, it is fairly easy to draw up statistics which show on how many expert opinion assignments a court expert is working at any given time, or how long it takes a court expert to finish working on a case.

Of course, you can also show which court experts use the Document Delivery System (DES) and exert soft (?) pressure on those who, for various reasons, are not so enthusiastic about it.

When used meaningfully, all these instruments are important tools to increase the expediency and efficiency of the work of court experts. However, there is also an inherent trend to use purely formal statements to push quality concerns, which are important, to the background and to considerably restrict the work of the heterogeneous group of court experts that frequently resorts to only little IT support. However, in view of the traditionally positive cooperation with the Federal Ministry of Justice it is to be hoped here, too, that a constructive dialogue will make it possible to find a solution that is satisfactory to both sides.

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Judges of the Court of Justice of the European Union

A new judge in the European Court of Human Rights takes his seat in Luxembourg

Life in Luxembourg

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Graya is the magazine for and about Gray's Inn and its Members

On the 8th October 2012, I was sworn in as a judge at, what I have called for over a quarter of century and will continue to refer to as the European Court of Justice, even though its official title post the Treaty of Lisbon is the Court of Justice of the European Union. The swearing in took place in the Grande Salle of the Court in front of the all 35 members of the Court, that is to say 27 Judges and 8 Advocates General, including my predecessor as the UK Judge, Sir Konrad Schiemann. The other new members sworn in that day were the new Portuguese Judge and the Belgian Advocate General. In the audience, were my wife and members of my family together with members of the General Court, and members of the civil service tribunal, ambassadors and other dignitaries. I managed to take my oath without fluffing my lines¹. After the ceremony, the first person to congratulate me was Her Majesty's Ambassador to the Grand

Duchy of Luxembourg, Alice Walpole. Happily, the swearing in took place without any mortar or rocket attack of the kind that she had witnessed in her previous posting in Basra in Southern Iraq.

The next day my first task was to participate in the election of the President of the Court and the Presidents of the five judge Chambers for the next three years. The electorate for choosing the President consists solely of the judges. As the most junior member of the Court, my role was to act as returning officer together with the most senior judge, Antonio Tizzano, the Italian Judge.

After finishing this task I then returned to my cabinet. Each judge has a cabinet which includes three legal secretaries. The legal secretaries, or to give them their proper French name *référéndaires*, are lawyers who assist the judges in preparing preliminary reports

on cases and then subsequently judgments as well as researching legal points. French is the one and only working language of the Court. This means that all internal notes and draft judgments that circulate among the judges have to be produced in French. I took over two legal secretaries from Sir Konrad Schiemann. One of them, is Carsten Zatschler, is a member of the Bar who did a pupillage in London before coming to the Court. He has proved invaluable not only for his legal skills but also for guiding me through the dos and don'ts in the lore of the Court. My other legal secretaries are Belgian and Hungarian. Equally important to the effectiveness of my work is my French teacher who comes twice a week to improve matters such as the use of irregular verbs, pronouns and the subjunctive. She is also trying to modulate what she calls my charming British accent.

A typical week begins with me looking at all the preliminary reports on cases that have been prepared for the weekly Réunion Générale that takes place each Tuesday evening. Every case is assigned to a reporting judge, or to use the French terminology, *juge rapporteur*. The first task of the *juge rapporteur* is to prepare a preliminary report of the case which contains the legal and factual background, the arguments of the parties, and the views of the judge as to how the case should be dealt with. The Court sits in three formations, Grand Chamber (comprising of 15 judges), five and three judge chambers. The important cases should generally go to the Grand Chamber and then in order of importance to a five or three judge chamber. The *juge rapporteur*, in conjunction with the Advocate General, will also propose whether or not the case merits an opinion of an Advocate General. At the Réunion Générale any judge or Advocate

General is entitled to question the proposal of the juge rapporteur in which case the proposal is debated and a collective decision is then taken.

Hearings are generally held on Tuesdays, Wednesdays, and Thursdays. Hearings are much shorter than in England. It is rare for a hearing to last more than three hours and often they are shorter. Hearings are conducted in the language of the case which can be any of the 21 official languages. Naturally there is simultaneous interpretation and as a judge one can ask a question in one's own language, although many will ask questions in French. In order to make hearings more useful, the parties are often asked in advance to concentrate their oral submissions on specific points.

After the hearing and after the Opinion of the Advocate General (in a case where there is an Advocate General's Opinion), it is then necessary for the juge rapporteur to draft a judgment. Unlike in common law jurisdictions, there is only one judgment and no dissenting opinion. The judgment is then circulated to the other judges of the formation who then have the opportunity of commenting on the judgment in writing before meeting to deliberate on the judgment. This

meeting is called a délibéré.

Debate can be vigorous both as to the reasoning and result. In difficult cases there may need to be a second délibéré to consider a revised draft. If we cannot agree on a particular point, then those in the majority will prevail. It is these deliberations that I have sworn to keep secret.

The workload of the Court is heavy. About 600 cases a year are lodged at the Court, with the majority being references for a preliminary ruling from a national court and the remainder made up of direct actions or appeals from the General Court. The pace can be intense. Quite often a day will consist of a couple of hearings plus a délibéré as well as some drafting to do on one of my cases.

Happily life as a judge at the Court does not end there. We also have a number of visits to the Court from judges, practitioners, academics and students. Since my arrival in October, I have participated in visits from the German Constitutional Court, the European Court of Human Rights, and the UK Supreme Court and other members of the UK higher judiciary. I was particularly pleased to welcome Master Stephen Richards as part of that delegation who presented a paper on the preliminary reference procedure. More recently I spoke to a

group of students from my alma mater, Cambridge. There are many student visits. Indeed in virtually all Grand Chamber cases there is one or more group of students attending the hearing.

Away from the Court we have been sampling the delights of the Grand Duchy of Luxembourg. I am happy to report that just two weeks after our arrival here the population of the city of Luxembourg reached 100,000. This landmark was proudly announced in a local press release informing readers that Luxembourg now has the official status as a "grande ville".² While a fraction of the size of London, it is equally cosmopolitan. 65% of its residents are foreigners, and it is home to 153 nationalities, including 2,100 Brits. In addition it attracts a large number of migrant workers who commute each day from Belgium, France and Germany. For such a small "grande ville" it has an amazing number of amenities including a wonderful new concert hall just five minutes' walk from the Court. Outside the city lies some beautiful

countryside including the vineyards on the Moselle. So if litigation at the Court does not appeal or one's practice does not encompass EU law, there are still many reasons for members of the Inn to make the trip here. They will be made very welcome, particularly if they use the Luxembourgish greeting "moien"³.

Christopher Vajda QC practised as a Barrister for thirty years. He was appointed Queen's Counsel in 1997 and a Bencher of Gray's Inn in 2003. He sat as a recorder within the Crown court for eight years and has significant expertise in the fields of both UK and European law, and the corresponding European and legal systems.

As a Barrister he appeared in front of both the Supreme Court and the European Court of Justice on a number of occasions.

References

- 1 *"I swear that I will perform my duties impartially and conscientiously; I swear that I will preserve the secrecy of the deliberations of the Court"*.
- 2 www.luxembourg.public.lu/fr/actualites/2012/10/25-ville/index.html
- 3 Luxembourg has three national languages, French, German and Luxembourgish.



Zagreb - Location of the 3rd International Congress of Expert Witnesses in Croatia

Expert Witnesses In the UK And Other EU Countries And Euroexpert

Experts Around Europe

Extracts from a paper given at the 3rd International Congress
of Expert Witnesses held in Zagreb on 27th September, 2013

Let me introduce myself. I am a retired solicitor (lawyer) from London, England where I specialised in litigation for over 30 years. My case load principally consisted of defending claims against architects, engineers, surveyors, lawyers, accountants and other professional men and women on behalf of their professional indemnity insurers. As a result, I spent a great deal of my career instructing experts in these areas of professional practice and also in considering the expert reports prepared for other parties in the litigation.

I am currently the Secretary of The Academy of Experts which is a founder member of the organisation known as EuroExpert. I would like to talk about the way in which experts are engaged in the litigation process in the UK and to attempt to contrast that with the process in other parts of the European Union.

The Similarities

First of all, what are the similarities between experts in the UK and those in other jurisdictions? In my opinion all experts should regard themselves as being bound always

- ❑ To be properly qualified to give expert evidence. This means not just having relevant qualifications but also acquiring and maintaining a high standard of technical knowledge and practical experience within their speciality.
- ❑ To avoid any actual or potential conflicts of interest.
- ❑ To prepare their evidence or reports thoroughly and properly.
- ❑ To give their evidence honestly.
- ❑ To stay within the areas of their expertise.
- ❑ To assist the court when giving evidence to a court or tribunal.
- ❑ To maintain confidentiality about their work.

These seven principles are common to the wording of the Code of Practice of EuroExpert, the Civil Procedure Rules that govern the way that litigation is conducted in England and Wales. They are also within the Code of Practice of the members of The Academy of Experts. I feel sure that you will recognise them as principles applying in Croatia.

The Differences

There are however differences between the way that experts work in the UK with its tradition of common law and the way that experts work in civil jurisdictions

In the UK there are three separate jurisdictions, England and Wales, Northern Ireland and Scotland. There are minimal differences between the rules of court in Northern Ireland and those that apply in England and Wales but litigation procedures in Scotland are distinctly different. One common feature between all three jurisdictions is the fact that experts are generally selected and instructed by a party to the litigation although the court must still give its approval to the chosen expert being called to give evidence.

In civil law jurisdictions, particularly in Europe, experts are generally appointed by the court from official lists that are maintained by the country's Ministry of Justice, courts and mandated organisations such as the Chambers of Commerce in Germany.

In the UK lists of experts are kept, by The Academy of Experts for example, as well as by the expert's primary professional body but these do not have the status of official lists and merely provide the appointing party with a convenient access point for finding an expert. I understand that in Spain, where the court will

appoint the expert, the judge will have access to a list of relevant professional bodies but these lists do not have the status of the court lists of other EU countries.

The difference between the ways in which experts are appointed is not so marked when one considers how they actually work in practice. All experts are only of assistance to the court where there is some artistic, scientific or technical issue that has arisen which is outside the competence of the court or tribunal to decide.

Independence

In civil law jurisdictions experts directly work for the court or tribunal. In the UK, despite being appointed by a party, the expert is required to produce an independent opinion and to acknowledge that his overriding duty is to assist the court. He must not be influenced in any way by any sense of obligation to the party who may have instructed him. So you will readily understand that in practice, the expert's role in being of assistance to the court is no different in the UK or in a civil jurisdiction.

Qualifications

In the UK, an expert becomes qualified to act as such by reason of an assessment made by the court. The court will first consider submissions

from each party as to why an expert might be needed. Once the court has accepted that there is an issue upon proven facts that could be satisfactorily resolved by expert opinion, the court will then consider the qualification of the expert to act. One or more parties to the litigation will then need to show that the expert that they propose to use has the relevant professional qualifications, technical competence and experience to act as an expert upon the issue.

Single Joint Expert

The court will also consider whether it might be appropriate for there to be a single jointly instructed expert or whether each party should be allowed to have their own appointed expert. A single joint expert might be appropriate in some cases but not in others: for example, to provide an opinion as to the analysis of a particular building material. Where the issue arises from differences of professional opinion; such as which of several different methods of construction should be used to solve a particular building problem or which of different methods of successfully treating a sick patient was appropriate, the court is likely to agree that each party be allowed to call evidence from their own appointed expert. This is because in such cases, a single joint expert is less likely to be

able to provide the court with a properly balanced view of the full range of professional opinion from which the judge may make his decision.

Instructions

Once the expert has been chosen he must be instructed. In the UK, the court will provide a general direction as to which issues the expert should address in his report or evidence but it will be for the party who has been given permission to call that expert to draft the actual written instructions and to provide all the relevant background documents. It is also the party who will arrange access for any necessary inspections.

In civil jurisdictions, I understand that it is the court that instructs the expert and directs that any necessary inspections take place. When instructing the expert, the court of a civil jurisdiction will take into account any particular matters that a party may wish to have answered.

Reports & Meetings

Normally, in both the UK and in other jurisdictions the expert will produce a written report. In the UK where experts have been appointed by each party, a meeting of the experts will usually be directed by the court at which the experts are required to discuss any areas of common ground between them and to identify any areas of

disagreement. The experts' reports can then address these difficult areas in detail.

In civil jurisdictions there will generally only be one expert selected by the court and so meetings will not be relevant but the parties are usually able to submit questions to the expert in order to clarify his views. In the German system, if either of the parties or the judge is dissatisfied with the report because, for example, it fails to answer the questions that have been put satisfactorily, another expert may be appointed – an '*Oberexperte*', literally an 'upper expert'. The *Oberexperte's* report will then have to deal with the points that were made in the course of the rejection of his predecessor's report.

Duty to the Court

There is really no difference between the UK and civil law jurisdictions with respect to an expert's duty to the court. In the UK, as I have mentioned, the expert has an overriding duty to the court that transcends any allegiance he might otherwise feel to the party who has instructed him.

Experts who are members of The Academy of Experts are made well aware of the need to be impartial at all times and to write reports and give evidence in a neutral and even-handed way. Failure to do so is in any case counter-productive.

An expert's professional reputation will suffer if it becomes known that he can be 'bought' by a party and is prepared to shade his views or conceal his doubts in order to 'improve' that party's case. On the other hand, the expert who produces a properly researched report that answers fully the questions that have been put to him and who is also able to provide complete and acceptable answers to any questions that might subsequently arise, will gain the respect of the court and everyone concerned. Such experts are not only likely to be more persuasive in their opinions but they are also more likely to acquire the reputation that will win them further work.

Immunity

The expert in the UK will also have a duty to the party instructing him and as a result of recent case law, the expert in England and Wales no longer enjoys immunity from suit by the party instructing him where he is in breach of duty although immunity is still retained under Scots law. As we have seen, the party in the UK instructs the expert and the expert owes duties to that party to fulfil his instructions and to comply with his overriding duty to the court. In the case in question there was no doubt that the expert was in breach of her duty to the court, as well as to the party who had instructed

her. In consequence, the Supreme Court felt that she did not deserve to shelter behind the immunity that the courts had extended to experts for the past 400 years. The only immunity that an expert will now have in England and Wales is immunity against claims for defamation in respect of anything that he or she may say in court.

Additionally, experts in the UK are liable for the wasted costs of proceedings where these arise through the "*reckless and flagrant disregard of [their] duties to the court*" and, exceptionally, the expert may be liable to terms of imprisonment or fines either for contempt of court for serious misbehaviour towards the court or for perjury if they tell lies in court.

Insurance

Experts will normally have professional indemnity insurance and indeed members of The Academy of Experts and all members of EuroExpert, the majority of whom will practise in civil jurisdictions, are required to have such cover against claims for negligence.

Costs

In the UK, it is the party instructing the expert who will be responsible for paying his fees. If he wins the case then he will be entitled to ask the court to make an order under which he can recover

those fees from the losing party. Unless the losing party agrees that the fees are reasonable, the court will assess the amount of the fee that may be recovered from the losing party, although that assessment will not alter the amount for which the party has to account to the expert.

In France and Germany, I understand that it is the court that will determine the amount of the expert's fee. In France this fee will always be paid by the claimant. If the claimant eventually wins his case, he then acquires the right to ask the court to order that the defendant reimburse him the amount of the fee.

Income Tax

I have been asked to add a note about the liability of experts to income tax in the UK on their fees. Taxation is a complex area as you may imagine but the basic principles are simple. An individual expert practising alone will be taxed on the fees that he receives at normal income tax rates up to the maximum which is currently 40%. He will not be taxed on his recoverable expenses, for example the expenses incurred in travelling to court to give evidence to a site to examine a building. He will also be allowed to set off against his tax liabilities on the fees he is paid relevant expenses provided that they are "*wholly, necessarily and*



exclusively" incurred in the course of enabling him to carry out his professional work through maintaining his professional standing or technical expertise. Such expenses might include subscriptions to professional bodies or the costs of keeping up to date with professional training.

Where an expert is employed by a registered company, it is the company that will be taxed at corporation tax rates upon the profits it makes through supplying the services of its expert employees. The employed expert will only be taxed on the salary paid to him by the company. He will not personally have the benefit of any allowances for expenses because he will have ensured that these were paid by the company and it will be the company that will be entitled to claim these against its tax liabilities.

Charles Gardner

Secretary of The
Academy of Experts

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September the Croatian Association of Court Expert Witnesses held their 3rd International Congress of Expert Witnesses. The list of speakers attending was most impressive and they had over 200 delegates participating in an extremely busy programme. Sadly I was not personally able to participate however Charles Gardner, the Secretary of The Academy of Experts, attended and participated on behalf of EuroExpert. An extract from his paper is reproduced in this edition. He emphasised that irrespective of the jurisdiction that the Expert operates in there are common themes:

- ❑ To be properly qualified to give expert evidence. This means not just having relevant qualifications but also acquiring and maintaining a high standard of technical knowledge and practical experience within their speciality.
- ❑ To avoid any actual or potential conflicts of interest.
- ❑ To prepare their evidence or reports thoroughly and properly.
- ❑ To give their evidence honestly.
- ❑ To stay within the areas of their expertise.
- ❑ To assist the court when giving evidence to a court or tribunal.
- ❑ To maintain confidentiality about their work.

This points are all drawn together succinctly by EuroExpert's Code of Practice (*see opposite*). In this world of increasing Judicial criticism an Expert abiding by this simple code should significantly reduce the ability of the Courts or those instructing him to criticise the role he has performed.

All that remains for me to do is to send you seasons greetings and hope that 2014 is a very good one for you all.

The EuroExpert Code of Practice for Experts

1. Experts shall not do anything in the course of practising as an Expert, in any manner which compromises or impairs or is likely to compromise or impair any of the following:
 - a) the Expert's independence, impartiality, objectivity and integrity,
 - b) the Expert's duty to the Court or Tribunal,
 - c) the good repute of the Expert or of Experts generally,
 - d) the Expert's proper standard of work,
 - e) the Expert's duty to maintain confidentiality.
2. An Expert who is retained or employed in any contentious proceeding shall not enter into any arrangement which could compromise his impartiality nor make his fee dependent on the outcome of the case nor should he accept any benefits other than his fee and expenses.
3. An Expert should not accept instructions in any matter where there is an actual or potential conflict of interests. Notwithstanding this rule, if full disclosure is made to the judge or to those appointing him, the Expert may in appropriate cases accept instructions when those concerned specifically acknowledge the disclosure. Should an actual or potential conflict occur after instructions have been accepted, the Expert shall immediately notify all concerned and in appropriate cases resign his appointment.
4. An Expert shall for the protection of his client maintain with a reputable insurer proper insurance for an adequate indemnity.
5. Experts shall not publicise their practices in any manner which may reasonably be regarded as being in bad taste. Publicity must not be inaccurate or misleading in any way.

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