

EuroExpert e-bulletin

2016 is moving towards a close and has been an eventful year for experts and those involved in dispute resolution. I have no doubt that the coming year will again bring new challenges for experts and their users be it the Judiciary, Arbitrators or the legal team.

One of the interesting features of 2016 has been an increasing worldwide trend of challenging experts and their admissibility. In a number of cases this has resulted in experts being excluded. This meant that no expert evidence was given, to the detriment of the case, depriving the judge of technical assistance.

There has also been a rise in the number of cases which have reported judicial criticism about Experts and how they have conducted themselves whether in the courtroom or in their reports. In many cases the criticism has been very direct and expressed in forceful terms which can only be regarded as entirely justified. There is a positive side effect as these judicial comments provide other experts a very valuable learning opportunity.

In many cases it has demonstrated that those offering their services as experts clearly do not understand their role or responsibilities in the legal environment. This shows that training in the work and duties of the expert is essential, not just for the novice but also for the

experienced expert, all of whom should undertake refresher training at least once each year. Now that expert services can be offered in so many different jurisdictions and many Experts are working away from their home jurisdiction training has become even more important.



Whilst the opportunity for an expert to offer their services on the global market is exciting it can also be challenging. Experts need to be aware of the pitfalls they might encounter. Jurisdictions, whether they are common law or civil law, have different requirements for expert evidence and this may also vary dependant on the type of matter such as family or criminal. Experts need to ensure that they confirm with those instructing them what, if any, requirements there are relating to expert evidence. Ultimately it is for experts to satisfy themselves regarding compliance. For example, is the expert required to include a declaration or statement of truth in their report and, if so, is the wording prescribed.

It is now mandatory in a number of jurisdictions for experts to include a declaration in their report setting out

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EuroExpert Finder



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.

Contributions are received in English from across Europe. For many of the authors English is a second language. Whilst some editing does take place it is kept to a minimum in order to best reflect and reproduce the original intentions of the author.

If you would like to submit a contribution for consideration please email: editor@euroexpert.org

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that they have understood their role and duty and do not have any conflicts of interest. A very recent example of this is the November amendment to the Criminal Rules Practice Direction (19) in England & Wales which now requires that a statement is made in all expert reports.¹

Irrespective of whether it is a mandatory requirement, it is always considered good practice for experts to include an appropriate statement of standards and compliance in their reports. However, care must be taken to ensure that it is appropriate and complies with all local requirements.

Experts need to remember at all times that the use of language is very important and that their primary role is to assist the court understand technical subject matter. Recently an English Judge stated in his judgement that both experts and lawyers should, if necessary, use words of one syllable in order to ensure that the judge can understand the technical content. Clarity and accuracy in the written word is essential. The correct choice of the words to use is extremely important and even greater care must be taken if the Report is for use in a different jurisdiction and may have to be translated. The work must be carefully proof read and the language (and spelling) needs to be consistent and correct.

- ❑ Experts risk devaluing their role and expertise with simple errors and inaccuracies.
- ❑ The judiciary needs to be able to rely on the expert giving evidence.

'Errors' that can easily be seen on non-technical issues will tend to raise questions relating to the reliability of the expert's technical evidence which is less easy to spot. This has been highlighted by a number of recent cases relating to either misleading or false qualifications. For example, a doctor was removed from the medical register as a result of how he had shown his specialist qualifications. He had stated that he was a member of the Surgical Research Society (SRS) but omitted to state that this was in Nigeria. A disciplinary tribunal took the view that this had been done deliberately to get "a greater volume of medico-legal work at a significantly higher rate.". Experts spend their careers building their professional reputation but this can easily be undone if due care and attention are not paid to even the smallest of detail.

Fees

A subject that is of equal interest to both experts and their users is the question of Experts fees -the rate of charge and the payment terms. In order to assist and to help better understanding how experts work in different jurisdictions EuroExpert has again conducted its remuneration study. The study was formally published and launched at the General Assembly hosted in Madrid by *Asociación Española de Peritos Tasadores Judiciales*. The use of standard questions makes it possible to evaluate where the systems are similar and of course their differences. The current study was responded to by the following countries: Austria, Croatia, Czech Republic, Germany, Hungary, Netherlands, Poland, Portugal, Russia, Spain and the United Kingdom (UK). It is important to note that all but one of the respondents operate under the Civil Law System (the exception being the UK) where there is

generally more codification and regulation than in the Common Law System. Interestingly, despite the differences in the basic system of laws, the analysis has shown that the deviations of the systems are slight and there are more similarities than might be expected. As a general rule the remuneration of Court Appointed Experts or Experts appointed by public authorities is primarily based on a legally prescribed scale of charge. The UK is an exception in that, whilst there are prescribed charges for publicly funded (Legal Aid) work, Experts are primarily appointed privately with the basis for fees being agreed by market forces and contract. EuroExpert is very grateful to those who participated as it provides a useful knowledge resource particularly in the current economic climate.

The one thing that is certain is that Experts and those instructing them need to keep up to date on both their technical knowledge as well as the legal arena in which they are operating. The next 12 months will undoubtedly bring new challenges not least of which will be to see whether the recent Brexit vote in the UK will increase or reduce the opportunities for expert witnesses. Another interesting question will be the role of technology in the courts and the increasing use of technology in the courts. In June 2017 this will be the topic for EuroExpert's symposium in Vienna.

On behalf of EuroExpert I thank those of you have contributed to our work. It only remains for me to wish you season's greetings and hope that 2017 will be a very successful year for all.

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

¹ see www.academyofexperts.org for full details and the declaration



Fast Track Mediation Rules have been introduced in the Milan Chamber of Arbitration, a useful settlement tool for parties.

Mediation in Milan

The Milan Chamber of Arbitration recently enacted its Fast Track Mediation Rules (FTMR). The FTMR represent a useful tool for the purpose of reaching an out-of-court settlement between the parties. Under the FTMR the parties are given the opportunity of appointing the mediator, which is particularly helpful when it comes to parties from outside of the jurisdiction. As a matter of fact, the parties can decide to appoint a mediator of a given nationality for the purpose either of increasing the level of impartiality (a principle by which mediators must always abide) or of choosing a mediator who speaks the parties' mother tongue fluently.

There is also the advantage for the parties of being able to choose the mediator from a selected list, comprising professionals with specific skills and competencies. It goes without saying that having a mediator who has the appropriate technical background with respect to the subject matter of the dispute may significantly increase the chances of the parties reaching a settlement. The mediation process is driven by the mediator on an informal basis. The mediator will convene separate and/or joint meetings with the parties with the purpose of facilitating an amicable process. Usually the meetings are held at

the offices of the Milan Chamber of Arbitration or, subject to the agreement of the parties, the mediator and the Chamber, in any other different venue. When the parties cannot all be physically present, such meetings can be held also remotely (eg via videoconference). The mediator's role is to be a facilitator and not to act as judge. In fact, he is not to rule or take any decision on the merits of the case and only the parties request it can he provide them with a non-binding settlement proposal if it is deemed possible and appropriate in the circumstances. Confidentiality is ensured to the widest extent possible, in that recording

and transcription of any statement and/or settlement proposal made by either party, their respective lawyers and consultants and/or the mediator is strictly prohibited. In addition, any facts relating to the mediation process, any statement or declaration made by either party, their respective lawyers and consultants and/or the mediator, as well as the existence of the ongoing mediation, must be kept strictly confidential and cannot be disclosed to any third parties, nor can they be used and/or reported in full or in part in any other present or future judicial or arbitral proceedings, save with the prior consent of all the parties. The FTM procedure offers a great deal of flexibility, since it can be used either to avoid litigation as well as to quickly settle a dispute, with very limited costs consequences, after court or arbitration proceedings have been issued. This an additional benefit of this ADR remedy, which can efficiently combine considerable time and cost savings with obvious benefits for the parties, whether they be individuals, corporations or other legal entities.



Vrhovni sud Republike Hrvatske

The Supreme Court of the Republic of Croatia is the highest court in the country.

Croatia takes the Presidency of EuroExpert

EuroExpert Annual General Assembly

The Croatian Association of Court Expert Witnesses and Valuers is the newest member of EuroExpert – an organisation that gathers the representatives from across Europe. Many may find it surprising that EuroExpert's membership requirements are met by a relatively small number of countries.

CACEWV

Let me tell you something about our Association and the issues we are faced with in our work:

The Croatian Association of Court Expert Witnesses and Valuers (CACEWV) was established 36 years ago (in 1980), with the aim of gathering court expert

witnesses and valuers of all professions. Today, according to the records of the Ministry of Justice, we are the largest and most significant association of this kind in the Republic of Croatia with 3,500 registered court expert witnesses and valuers.

Throughout the years, we have organised symposiums for different professions and we have actively participated in public discussions on regulations of importance for all the professions included in our Association. Since 2008, we have organised a biennial Congress of Court Expert Witnesses and Valuers.

The 4th Congress of Court Expert Witnesses and Valuers (the most recent one) was held on 23rd - 24th October 2015, under the high patronage of the Croatian President, Mrs Kolinda Grabar Kitarović. The Congress gathered 610 participants in two days, proving just how important such meetings of court expert witnesses and valuers are for the exchange of professional opinions with the invited representatives of legislative and judicial authorities.

In addition to our guests from Slovenia, Serbia and Montenegro, our distinguished guests also included Bernhard Floter, Secretary General of

EuroExpert, and Krzysztof Grzesik REV, Chairman of TEGOVA, the largest institution of European valuers, based in Brussels.

After the 3rd Congress of Court Expert Witnesses, held in September 2013, we changed our name. In April 2014 we added the term "valuers" to it. This was because the term 'real estate valuer' was, along with the term 'court expert witness for real estate valuation', specially defined in new regulations adopted in 2014¹, despite the fact that ever since the 1980's, valuations have been an integral part of the work of court expert witnesses for civil engineering, architecture, geodesy, agronomy and forestry.

We have actively participated in drafting the proposal of the Act on Court Expert Witnesses. This Act, as a comprehensive document, was intended to regulate all aspects of our activities. In addition to the the establishment of the 'Chamber of Court Expert Witnesses and Valuers' or their mandatory association it was supposed to cover and regulate the work of court expert witnesses and valuers.

The document was submitted to the

1 'Regulation and Ordinance on Real Estate Valuation Methods', and the latest Act on Real Estate Valuation, adopted in July 2015

Parliament of the Republic of Croatia in April 2014 with support of certain Members of Parliament.

However, the Ministry of Justice of the Republic of Croatia did not support the Act. They deemed that it was sufficient that the field of expert court witnesses and valuers be regulated by the Ordinance on Permanent Court Expert Witnesses and the Ordinance on Permanent Court Valuers, rather than by an Act. The Ministry expressed their point of view to the Parliament of the Republic of Croatia. Unfortunately, in September 2014, a majority of members of the Croatian Parliament voted against adopting the Act, without more detailed consideration of such a complex issue.

On 23rd December 2014, we requested a review of the Ordinance on Permanent Court Expert Witnesses from the Constitutional Court of the Republic of Croatia, for two important reasons.

Reason 1 - Remuneration

In the Ordinance on Permanent Court Expert Witnesses (Official Gazette 38/2014), the price list and value of points has not changed since 1998.

Remuneration for the work of court expert witnesses is inadequate. Their hourly rate is 7 times lower than the hourly rate of an authorized engineer or

a medical doctor in their professional Chambers, and 7 times lower than an attorney's hourly rate.

The following is considered illegitimate:

provision of the Ordinance (Article 24, paragraph 3) according to which the remuneration for the work of court expert witnesses that is paid from the funds of the court or the State Attorney's Office is decreased by 20% from the point value determined in paragraph 2 of the same Article.

According to the above mentioned provision, instead of the gross amount of HRK70 (€9.33), the hourly rate of a court expert witness would be the gross amount of HRK56 (€7.46), which is the net amount of HRK31.58 (€4.21). Even if the objective of the said provision is to protect the state budget (which court expert witnesses and valuers believe not to be the case, as the provision is unreasonable), the Croatian Association of Court Expert Witnesses and Valuers wishes to emphasize its disproportionality. It puts court expert witnesses and valuers in an unfair position and leads to inequality between expert witnesses paid from the state budget and those paid from other sources.

We wish to point out that

by being prevented from efficiently participating in the advisory activities related to the Ordinance proposal, court expert witnesses and valuers have also been prevented from having any say in determining the value of points for activities they perform, which additionally diminishes the legitimacy of the Ordinance. As for being prevented from participating efficiently in the public discussion, the Croatian Association of Court Expert Witnesses and Valuers has commented on that in its objections to the Ordinance.

It is absurd that in certain situations the position of judges is equal to that of court expert witnesses, specifically in situations unfavourable for expert witnesses and valuers (initiation of criminal proceedings as the reason for termination of work). However, on the other hand, in situations related to property rights of court expert witnesses and valuers, their rights are violated through arbitrary determination of their hourly rates and the value of points for calculation of their remuneration, which leads to their inequality before the law.

Court expert witnesses and valuers are, as a rule, experts with university qualifications, and it is unacceptable for the price of their work not to correspond to the price



EuroExpert President
Melita Bestvina

of work of other experts, unacceptable for the price to remain unchanged for eighteen years and for its determination to be left entirely at the discretion of one person – the Minister.

When observing the legislation chronology in terms of remuneration, one can notice a constant trend of reducing the rights of expert witnesses and valuers.

Reason 2 -

Suspension of Practice

Court witnesses are deprived of their rights in yet another situation.

The initiation of criminal proceedings results in actions taking place at the outset of those proceedings that should only occur after the final judgement.

Compared to the Legal Profession Act (Article 59, item 9 of the Legal Profession Act), it can be seen that court expert witnesses and valuers are at a disadvantage when

compared with attorneys, whose right to practice law is terminated only if they receive a non-suspended prison sentence for the duration of more than six months and their legal practice is suspended only in case of imprisonment. In other situations an attorney's legal practice may be suspended if a criminal procedure has been initiated against him or her for an act that by its nature makes him or her unworthy of the legal profession. Therefore, the decision on suspension of practice is adopted based on the circumstances of a particular case, and not automatically due to initiation of criminal proceedings.

The Ordinance, as an implementing regulation, should only elaborate statutory provisions, and the body issuing the Ordinance must act within the framework of authorization given to it by the law, which is not the case.

According to Article 126, paragraph 6 of the Courts Act, the Minister is authorized to prescribe the requirements and procedure for appointment, the rights and obligations and remuneration. However, the Minister is not authorized by the Act to impose a temporary ban for a permanent court witness or a valuer to perform their duties, and he is not authorized to prescribe the effects and

duration of such a ban, as it is prescribed by Article 21 of the Ordinance.

According to the Notaries Public Act (Article 19), a notary public's right to practice will be terminated if they have been convicted of an offense motivated by gain or of any other severe or particularly dishonourable offense for which they are prosecuted ex officio, or if they have received a non-suspended prison sentence. A notary public is automatically temporarily suspended from his/her service only if criminal proceedings have been initiated against him/her for an offense for which a punishment of 5 years of imprisonment or a more severe punishment has been foreseen (impending), or for an offense which, due to its nature, renders the notary public unworthy of performing the notary public duties, up until the valid termination of the criminal proceedings. Therefore, the notary public is not removed from duty automatically, i.e. due to the mere fact that criminal proceedings have been initiated for an offense for which one is prosecuted.

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In this particular situation, the treatment of court expert witnesses and valuers is unjustifiably equal to the treatment of judges (institute of temporary suspension), even though their constitutional and legal rights, their duties, social relevance, as well as their constitutional position, cannot be compared in any way. In addition, judges against whom criminal proceedings have been initiated are entitled to receive half of their salary (Article 75 of the State Judiciary Council Act) during the period of temporary suspension, while the court expert witnesses and valuers whose sole professional activity is performing expert analysis or evaluation are completely deprived of their source of income. Civil servants suspended from duty due to criminal proceedings initiated against them are also in a better position than court expert witnesses and valuers, since they are entitled to receive 60 to 80% of their salary.

Of course, court expert witnesses cannot be compared either to civil servants or to

judges. Judges and civil servants are permanently employed, have guaranteed salaries and benefit from all available resources, such as work premises and equipment provided by the state, while court expert witnesses conduct their business as "private" entities and can, in accordance with Article 49 of the Constitution, be categorised as entrepreneurs, which means that their earnings depend completely on their personal involvement and efforts invested, in circumstances of constant competition.

Considering the importance of the work performed by court expert witnesses and valuers, the number of court expert witnesses and valuers in the Republic of Croatia, as well as the absence of any obligation on their part to organise either a chamber or a compulsory association with the aim of monitoring the work and education of new expert witnesses and valuers, this domain should be governed by a special Act on Court Expert Witnesses and Valuers, in order for court expert witnesses and valuers to establish

their own Chamber as a compulsory form of association aimed at improvement of work performance and better work monitoring, similar to what has been prescribed for lawyers and notaries public.

Having established a link between each provision of the Ordinance the constitutionality of which is being disputed, and the provisions that govern the position of lawyers and notaries public in the same situations, it is clear that court expert witnesses and valuers are put in the least favourable position, since their right to perform work is terminated by the mere fact that criminal proceedings have been initiated against them. Moreover, unlike in the case of judges and civil servants, there is a direct connection between the fact of initiating criminal proceedings and loss of income.

Our Association continues to organise professional training for our members as well as educational programmes for new expert witnesses and valuers. This helps with the difficulties that all expert witnesses and valuers encounter when wanting to charge their expert analysis and evaluation services.

By joining EuroExpert and the TEGoVA association, we have fulfilled our wish and realised our efforts aimed at keeping up with the achievements

in our profession in other European countries, and we have managed to enable our members to use the information about international standards valid in all fields of expertise in their everyday work.

Alternative Dispute Resolution

In Croatia, there has been an increasing trend of using mediation in dispute resolution, and our Association has been a member of the Croatian Mediation Association for a number of years.

According to the Decision of the Ministry of Justice of the Republic of Croatia, the Croatian Mediation Association is an accredited institution for mediation and training of mediators, amongst whom there are many court expert witnesses and valuers.

At the beginning of June, we started working together with the Ministry of Justice on the Court Expert Witnesses and Valuers Act. We hope that the future creators of laws and regulations of the Republic of Croatia will realize that the prosperity of the country and its citizens cannot be achieved unless we enable the experts to develop and thrive. Such development also requires full support of politicians who are replaced every 4 years and who will hopefully not put us once again in a position where we have to use

constitutional complaints to fight for our rights and the rights of the citizens.

Congress 2017

All EuroExpert members will be invited to the Fifth Congress of Court Expert Witnesses and Valuers in 2017, with the aim of exchanging useful experiences and harmonising the practices of our professions.

Throughout the duration of the Congress, we plan to have interesting lectures on the role of court expert witnesses and valuers in the Criminal Procedure Act and the Civil Procedure Act. In addition we will look at their role within the mediation process, as well as lectures on the relationship of court experts and valuers with other participants in court cases and other non-legal subjects.

Our professional sections for civil engineering and architecture, geodesy, medicine, traffic and vehicles, together with our forensic expert witnesses will give presentations on current topics, interesting not only to court expert witnesses and to valuers, but also to judges, state attorneys and lawyers.

I would like to mention the work of our distinguished member, Mr Vojin Maštruko, MPhys, a long-time court expert witness specialising in ballistics, mechanoscopy, physics and chemistry, 3D forensic reconstruction and the modern method of gunshot residue testing (GSR analysis).

GSR analysis was introduced into Croatian forensics in the period between 1998 and 2004 and it replaced the classical method of gunshot residue testing known as the paraffin test. The introduction of GSR analysis was a big step forward towards an objective and scientifically based method, and towards better harmonisation with European forensic practices.

I expect we will begin good cooperation with all our colleagues from EuroExpert and I hope we will meet again both at the EuroExpert Annual General Meeting in 2017 and at the Fifth Congress of Court Expert Witnesses and Valuers of the Republic of Croatia in October 2017!

Melita Bestvina, MSc CE is an Authorised Court Expert Witness – Valuer.

She is President of the Croatian Association of Court Expert Witnesses and Valuers



Cologne Cathedral and the Hohenzollern Bridge

Registered in Luxembourg, with members across Europe, EuroExpert has its base in Cologne, Germany

EuroExpert Secretary General, Bernhard Floter, reports on the year

A year in review

General Assembly - Madrid

The Annual General Assembly took place on 28th June 2016 in Madrid. Chairman, Nicola Cohen, presented a report about the successful work of EuroExpert over the preceding year.

At the Assembly Cástor Iglesias Sanzo of Spain handed over Presidency of EuroExpert to Melita Bestvina from Croatia.

Prior to the meeting starting delegates were received by the President of the higher regional court in Madrid, Mr Francisco Javier Vieira Morante.

Remuneration of Experts in Europe

EuroExpert again surveyed its members on the remuneration of experts during 2014 and 2015. What is striking

is that, especially in some Eastern European countries, the already low remuneration rates for experts had not been adjusted for nearly 20 years. The Secretary General, Bernhard Floter, had presented the preliminary results of the study at the Croatian Conference of experts in October 2015 in Zagreb. In addition to the members of EuroExpert both the Netherlands and Poland participated in this study for the first time.

EuroExpert supports European events

In addition to the Expert Conference in Zagreb EuroExpert supported events in Portugal and the German Expert Day in Leipzig.

In Lisbon Philip Newman (England) explained the fundamental importance

of impartiality in expert services. The German Expert Day focused on ADR in Europe highlighting the importance of different ADR procedures and the role Experts play.

EuroExpert in European standardisation

EuroExpert's member associations have taken part in national and European standardisation committees. Many representatives of EuroExpert participated in the drafting of the EN 16775. The standard for General requirements for expert services adopted in February 2016 incorporated the Code of Practise developed by EuroExpert.

EuroExpertFinder – Finding Experts easily across Europe

EuroExpertFinder helped again in finding experts from different countries with cross-border implications.

For a long time other institutions have been working on harmonisation attempts and have had considerable difficulties with the various disciplines and their translation. EuroExpertFinder has chosen a pragmatic way and helps clients usually within several days to find an appropriate expert. For this EuroExpert relies on its network of more than 50,000 experts.

Clients so far have included courts in Austria and Germany, most often seeking real estate valuations.

Effective Management structures

A change in the statutes of EuroExpert has meant that the Presidency now changes every six months mirroring the approach taken by the European Union.

The major advantage is that each member country can bring its priorities more quickly into the day to day work of EuroExpert. Thus, the Czech Republic, Germany and Spain have so far had the opportunity to introduce their chosen topics.

E-JUSTICE IN EUROPE

2017 SYMPOSIUM

VIENNA

30TH JUNE 2017

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