

EuroExpert e-bulletin

The world of Experts and Dispute Resolver has yet again been both interesting and busy this year. The end of the year brings a natural opportunity to review and take stock of the changes that have occurred and the impact on working practices over the last 12 months. As ever in EuroExpert we are fortunate to be able to learn from each other and from jurisdictions outside the European Union to ensure that standards and best practice are updated.

Last year we held our symposium in Vienna and took our first look at E-justice, how it is developing and the impact it might have on Experts. This was again the theme of the Symposium held in Lisbon in March this year hosted by the APAE. The symposium provided us with an opportunity to meet, to learn and to share our experiences whether they be good or bad. One thing is certain - the digital era is here to stay and it will undoubtedly bring many changes to Experts. They will as ever need to adapt. It remains to be seen whether the changes will be mirrored in all jurisdictions whether they be civil or common law. I am sure that this is just the beginning of the digital era. Only this month a conference "The cutting edge of digital reform" was organised by the Society for Computers and Law and HM Courts and Tribunal Service and held in London with over twenty countries represented. The forum's focus was to find out what is actually going on at the

cutting edge of court technology around the world. It took a look at online courts, including: submission of legal evidence and argument online, online decision-making by judges, ODR within court systems, online help and diagnostics for court users, and other advanced technologies. It was noted by the Secretary of State for Justice, David Gauke MP who addressed the event that:



"As technology revolutionises our lives, it is imperative not just that our justice systems keep pace – but that actively seek to make the most of opportunities to build on the enduring principles of justice using new ways of doing things which can be better than what has gone before at putting people first, and building the system around them."

In this edition we feature an article by Kelly Heath which gives an example of how electronic filing is being used in England & Wales. It gives an insight into some of the issues that may be encountered.

It is important that we as Experts make sure that our voice is heard so that we can actively participate in the development of new systems. David Gauke went on to say:

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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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“We all know that the technological revolution is a global one and our future success will hinge on how we respond to it. By continuing to work together and sharing our experiences, we can pool our collective expertise to our mutual benefit and, in doing so, we can ensure all our justice systems flourish”

If an organisation is to succeed it must flourish and grow. I am very pleased to report that this summer saw the return to EuroExpert of one of its founding members – Conseil National des Compagnies d’Experts de Justice from France. Their return is very much welcomed, and I personally look forward to meeting my colleagues at a EuroExpert

event in the future as I am sure they will have much to contribute.

It would be remiss of me not to mention the International EuroExpert Symposium that was again hosted in Prague last month by Komora soudních znalců ČR and supported by the Russian Chamber of Construction Expert Witnesses. The event was, as ever, informative, and the collection of speakers brought much to the table for us to consider. Our thanks to Jindrich Kratena the current EuroExpert President for his efforts in ensuring a successful event. Some photos of the event can be found below.

We must continue to pool our collective expertise as we move forward into 2019

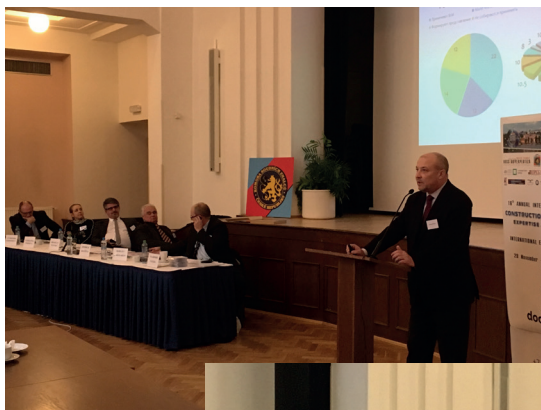
and look forward to the challenges it may bring as well as opportunities. We should not lose sight that those practising as Experts need to adhere to simple principles irrespective of the jurisdiction in which they operate:

- ❑ 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 evidence or reports thoroughly and properly.

- ❑ To give evidence honestly.
- ❑ To stay within the areas of their expertise.
- ❑ To assist the court or tribunal when giving evidence.
- ❑ To maintain confidentiality about their work.

I should like on behalf of EuroExpert to wish you all the very best for the festive season and for a successful 2019.

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



E-filing in England & Wales

In 2017 electronic filing became compulsory in all Rolls Building courts (eg TCC) for legal representatives only.

Whilst this development has been largely welcomed by the legal profession, the system itself is not without teething problems and it is important for any party utilising electronic working to familiarise themselves with the various procedures and be aware of the potential pitfalls.

The Chancery Guide sets out the procedure for electronic filing in London and whilst a number of district registries require parties to adhere to the prescribed practice, it is worth checking with the court in question what the preferred approach is.

All individual users must register for an account on the CE-File system. Each user is allocated a username and password. If it is anticipated that there will be more than one person involved with a specific claim within an organisation it is also sensible to have accounts set up for each individual in order to ensure that all relevant personnel can access the electronic case file. This also avoids problems arising if, for example, a user is temporarily locked out of the system whilst trying to process an urgent filing.

Once an account has been set up, users are able to comply with the requirement on legal representatives to file all documents (apart from original documents), in all courts in the Rolls Building. This applies to

issuing proceedings, pre-action applications and filing documents in existing cases, regardless of whether the case was commenced electronically or not. Whilst litigants in person are encouraged to use e-filing wherever possible they currently still have the option of filing documents in hard copy.

There are specific requirements regarding the format of documents and the process of filing. If a document is in the incorrect format or not filed in the required way then it may be rejected. Users are informed via email, usually within an hour of submission, however, no reasons are given in the notifying email and it is usually necessary to contact the court to ascertain the reason for rejection if it is not immediately apparent. For obvious reasons this is unsatisfactory, especially if the filing is time critical and it is therefore important for users to familiarise themselves with the CE-File system and its requirements in advance.

Specific points to note about the process include:

- ❑ All documents must be uploaded in Word or PDF format.
- ❑ The maximum capacity for a document is 10MB. If a document is too large it must be uploaded in sections.
- ❑ It is also advisable to file covering letters or any exhibits separately in order to avoid the risk of rejection.
- ❑ The standard form categories when filing do not necessarily accord with the document being filed, for example in cases where a party is making an application of an unusual nature. It is unlikely that the court will reject a filing purely on these grounds but it is good practice to make a note in the comments section highlighting the position.
- ❑ Where a fee is required this may be paid using a debit/credit card.
- ❑ Parties filing documents using CE-File should not duplicate filing the documents by another means unless directed to do so, for instance, bundles for applications hearings, directions hearings or trials.
- ❑ If an original document is required to be filed at the same time as issue of the claim form, the court will accept an electronic copy of the document but the original must then be lodged with the court within 48 hours.
- ❑ Normal day to day communications with the court, such as sending in draft orders or dealing with case management issues, do not generally need to be filed and will generally be accepted by email, as may documents such as skeleton arguments and chronologies. The court may, in certain circumstances, accept other documents via email

but permission must be obtained in advance.

One important development to note is that non-parties who are registered can search and obtain available documents directly via an “office copy request” function on payment of a small fee. The function will display a list of those documents which a non-party is entitled to request as an office copy, as set out under CPR 5.4C. Whilst such documents have always been available in theory, the new system makes them more accessible and readily available than ever before.

From a practical perspective, when filing a claim form with schedules it is worth considering whether to file the schedules as separate documents, due to the fact that whilst non-parties may obtain a copy of a statement of case they are not entitled to any attached documents.

The CE-File system also gives parties the option of requesting that documents are classified as confidential. On receipt, the court will review your request for your documents to be confidential. If accepted then the document/case will be highlighted in red. This confirms that the document/case is confidential, albeit this does not replace the need to make an application.

As highlighted above, the introduction of electronic filing has resulted in a more streamlined and efficient process. However, it is important that parties not yet involved with the system take steps to ensure that both they and their colleagues are familiar with its requirements.

French version of SCL protocol

The Society for Construction Law (SCL) has launched its French translation of the SCL Delay and Disruption Protocol in the first step in the process of producing a version harmonised with French law.

The SCL protocol was originally launched in 2002 as a guide to courts to determine delay and disruption claims. Although it was developed with a focus on the UK construction market and English common law, it has proven helpful in disputes around the world even where civil law applies.

The French translation of the protocol is not the first

time the document has been exported to other jurisdictions. It has obtained judicial recognition in countries such as Australia and Hong Kong, and the local SCL chapter in Malaysia launched a Malaysian supplement to the protocol to harmonise it with local laws and encourage further use.

While the UK court system has a specialised court for construction disputes, the Technology and Construction Court, in France such cases rarely have specialised judges.

Delay and disruption issues are typically outsourced to court-appointed experts.

Source Material for Experts

In a staggering turn of events in a recent case in Australia (**Guy v Crown Melbourne Ltd (No. 2) [2018] FCA 36**) it transpired that the Expert Witness had copied much of his expert report from Wikipedia without acknowledging the source.

Despite these revelations, the Expert told the Court that he was "very comfortable" with the way he had prepared his report given that he was not trying to have his work published in an academic journal but was rather providing an "education" to the court.

The judge concluded that his evidence lacked any semblance of balance and that accordingly no weight could be attached to it.



New English Language Dutch Commercial Court

The Netherlands Commercial Court (NCC), the new Dutch court due to handle international commercial disputes in English, is now ready and is expecting its first cases in early 2019.

The NCC was passed by the Dutch Senate easily as there was broad support for the new court in the government, judiciary and among Dutch legal practitioners. Legislators had voiced concern over the cost-aspect of the NCC, which the government allayed with assurances that the NCC will remain cost-neutral and will in fact prove cost effective by taking complex international cases away from the busy

Dutch judiciary.

NCC court fees (€15,000 for first instance, €20,000 for appeal) are substantially higher than those of the regular Dutch courts. This has raised questions of equal access to justice, particularly for smaller and medium-sized parties, and fears that higher court fees may become a precedent. The government responded that the NCC is a specialised service meant for sizeable and complex international disputes, which justifies the higher court fees.

The government also pointed out that the court fees are fixed and published, making NCC costs fully transparent.

This will set the NCC apart from other courts and international arbitration, where litigation costs are often unpredictable.

Conducting legal proceedings in the NCC will be voluntary for parties, who will need to explicitly agree to have their case heard there.

With the NCC due to commence in January 2019, interested parties will soon be able to bring disputes before this new court, and can confer jurisdiction on it in contracts by using the following standard forum-selection clause provided in the NCC's rules and procedures:

"All disputes arising out of or in connection with this agreement will be resolved by the Amsterdam District Court following proceedings in English under that Court's Rules of Procedure of the Chamber for International Commercial Matters ("Netherlands Commercial Court" or "NCC"). Application for provisional measures, including protective measures, available under Dutch law may be made to the NCC's Preliminary Relief Judge in proceedings in English in accordance with the Rules of Procedure of the NCC."

If this clause is not included in a commercial contract, it is possible to confer jurisdiction on the NCC after a dispute arises or if proceedings are pending before another Dutch court.



The Use Of Neutral Experts In Litigation For Effective Dispute Resolution In Large Construction Projects

Introduction

The main problem is that during the contract performance the Contractor very often (to be more exact – always) discovers that design documentation, site geological survey documentation etc. are incorrect. In this case, many additional works have to be done. Moreover, the contract price should be increased accordingly. The key problem to be solved in such situation – is there a real reason for increasing the scope of works and contract price? This is mostly important in the contract with the fixed price where the Contractor must not only prove that there is an additional scope of works, but show that he has a right for additional payment. The answer can be found only after a special analysis of all the project documentation, contract, special codes, governing law and site inspection.

Typical construction disputes:

Plans and specifications/scope of work - Disputes over the contract scope of work, represented by the plans and specifications (as modified or amended), are some of the most significant areas of dispute on a construction project. Typically occurring between the owner and the general contractor/subcontractor, contractors and design professionals often interpret the documents differently,

particularly if the description of the work in the plans/specifications is unclear or ambiguous — or when the plans are contradictory to the specifications. Typically, there is an implied warranty on the part of the owner that the plans/specifications are correct, adequate, accurate, and buildable. Of course, there are always exculpatory clauses in the contract by which the owner attempts to shift that responsibility to the contractor. The battle is often between the implied warranty and the enforcement of the exculpatory clause.

The scope of work between the contractor and subcontractor. Often, the contractor will ask the subcontractor to bid for a particular scope of work by identifying a specific sub trade of work without specifying in detail the plans and specifications applicable to that scope of work. Thus, the subcontractor is determining what that scope means. When the subcontractor bids for only a portion of the work - but the contractor had the expectation that the subcontractor bid on a different and larger scope - a dispute arises.

Shop drawings and submittals - A corollary to disputes arising from the plans/specifications are disputes arising over shop drawings and other submittals. Primary among these are delays, either in the timeliness of the contractor/subcontractor submitting shop drawings and submittals or in the design professionals responding

back in a timely fashion. The other common problem is the interplay between the design professional and the contractor/subcontractor, with the design professional rejecting submittals without adequate explanation and the contractor/subcontractor providing inadequate submittals.

Change orders/extra or out-of-scope work - typically, disputes over change orders and extra work or out-of-scope work boil down to the change order price and whether or not the contractor/subcontractor is entitled to extra time. Frequently, the owner requests pricing for the changed work but then disagrees with that price and time extension request — ordering the work to proceed as scheduled. This situation leaves the parties to fight over the amount and time at project's end.

Differing site conditions - there are two different approaches regarding the owner's responsibility for existing site conditions. The majority approach is that the owner has the duty to disclose all information in its possession. Even if there are no studies, the owner warrants that the construction is feasible and cannot contract away that implied warranty. Therefore, general exculpatory clauses arguably do not relieve the owner of its warranty.

Construction sequencing/project access - the owner typically warrants that the contractor/subcontractor will have access to the project site. Disputes arise, for example, when the owner fails to provide access particularly in remodels of occupied buildings, to obtain required permits or easements, to coordinate multiple prime contractors, or to timely provide owner-supplied equipment.

Construction defects - during the course of construction, the owner may identify work that is not in conformance with the plans/specifications. If the contractor/subcontractor does not agree with the owner's assertion of that defective construction, a dispute arises.

As you can easily see all these kind of disputes a related to disputes which needs "special technical knowledge".

Dispute resolution methods in construction contracts

There are various types of dispute resolution methods in construction.

Negotiation - It is the most effective method and doesn't need any mediator, arbitrator or jury.

I am not speaking about Mediation because from my point of view mediation is the same procedure as negotiation but it has formal law regulation.

ADR methods such as architect/initial decision maker, neutral expert fact finding, expert determination, etc. without formal dispute resolution procedure.

ADR methods such as Adjudication, Dispute Resolution/ Review Board, with formal dispute resolution procedure and formal award.

Arbitration - Well known dispute resolution method and I will not describe it here.

Litigation - the process of taking a case to a court of law so that a judgement can be made. It is generally understood (peremptory norm) that all persons have an ability to bring their claims before a court. I will speak here about civil law courts.

My favorite dispute resolution method in construction disputes when the parties are not able to solve their problems without a third party's decision is Dispute Resolution Board (DRB). Especially when the disputes relate to special technical problems – construction defects for example. Mostly because the panel of dispute resolvers is comprised of specialists and experts who are actively involved in the construction industry. Dispute resolvers on the DRB have a "special knowledge" in construction and can professionally understand the arguments of the parties and expert reports. Moreover, if the rules allow, they can make their own "expert investigation/examination".

In recent years, the construction industry has taken steps to avoid litigation and control disputes on projects through a variety of methods, which can be used at almost any stage of a construction project. The primary goals are to resolve the conflict professionally and in a less confrontational manner.

However, it is the owner who dictates the form of dispute resolution.

As a matter of fact today a lot of owners (customers) in construction contracts insist of resolving disputes by litigation in the court of law. For example, in Russia, it is forbidden to resolve disputes in any other institution than a court of law when in the project are funds from the state budget.

Litigation in court of law and construction experts

So, let's go to a court of law and see how the judge or jury will resolve a construction dispute. For example if the dispute concerns the scope of fulfilled/not fulfilled construction works and construction defects. Of course, I

have no doubt that the judge will need expert assistance.

Classic schemes in civil law courts in most European countries look like this:

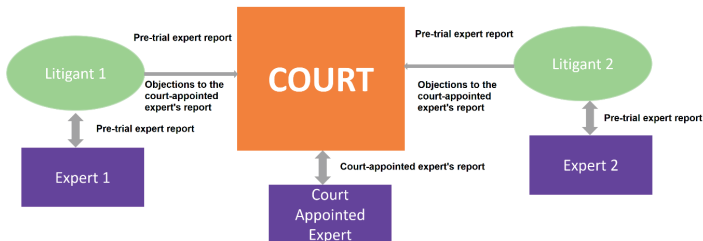


Figure 1

Each litigant has the right to order pre-trial expert report. As the parties of the case are already in litigation it is hard to imagine that results of expert examinations made by experts of each party will be the same. They will be opposite and I don't know another situation.

It is interesting why. If these two experts are qualified, have the same documentation, and all other conditions are the same why the results of expert examination are always opposite? It is a big and very old question and we will not discuss it in this paper. But it is a reality, otherwise the parties will stop litigating.

In this case there is no other way for the court to establish a scope and quality of construction works than the appointment of a court expert. From my practice there are 3 possible results of court expertise which we will see in the court-appointed expert's report:

- The court expert will confirm the position of Litigant 1.
- The court expert will confirm the position of Litigant 2.
- The court expert will have his/her own position which differs from the position of litigants.

What happens next? The party which is not satisfied with the court expert's report will raise objections to the court expert's report. But how will the judge understand them? I can show certain example of such a situation. Please look at the figures following.

If the case is simple (construction defects in an apartment for example) and expert evidence is clear (see Figures 2-5) there is no problem for the judge to understand what the expert report is about.



Figure 2



Figure 3



Figure 4



Figure 5

However, we speak about large construction projects and they have their special aspects.

In figure 6 there is a general view of a construction site (industrial plant) and in figure 7 there is a an assessment of structural reliability of the structures of this plant.



Figure 6

Assessment of structural reliability

4. EXAMPLE OF ASSESSMENT OF STRUCTURAL RELIABILITY.

The purpose of the model assessment of the structure reliability is to show possible optimization techniques and, in turn, to ensure the occupation time.

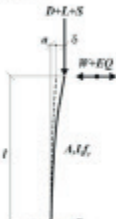


Fig. 3. Structure under study.

Fig. 3 shows the static representation of a cantilevered column the probabilistic reliability of which has been assessed in ProbCalc. The height (H) of the column is 6 m. In the cross-section, the column consists of welded steel sections (HEB 500, EN100253) with Young's modulus $E = 2.1 \cdot 10^5$ MPa. The initial maximum imperfection of the column (a) is equal to ± 20 mm; in the calculation, there are five loading components. Table 1 shows the proposed values.

Table 1: Input Loading Data

Identification	Type of loading	Proposed value [kN]
D	Dead load	350
L	Long-lasting load	75
S	Short-lasting load	75
W	Wind load	40
EQ	Earthquake load	$\frac{1}{20}(D+L+S) = 25$

The formula derived in [11] has been used to calculate the maximum horizontal displacement pursuant to the second order theory whose initial imperfections have been taken into account:

$$\delta = \frac{W + EQ + \frac{a}{l} F}{K}$$

$$\text{where } K = \frac{1}{1 + \frac{F}{E I}}$$

The bending moment in the critical cross-section (at the fixed end of the column) and normal stress in steepest fibres of the cross-sections are:

$$M = \frac{F(1 + E) F}{K}$$

$$\sigma = \frac{|M|}{W} + \frac{F}{A} = F \left[\frac{(1 + E)}{K W} + \frac{1}{A} \right]$$

The calculation below analyses the reliability function for carrying capacity limit state.

$$SP = R - Q$$

where R is the limit state normal stress that corresponds to properties of the material and Q is the extreme normal stress at the fixed end of the column - see (12). The survivability of the structure relates to the permitted value of the horizontal deformation $d_{lim} = 35$ mm. The reliability function for the serviceability limit state is:

$$SP = d_{lim} - \delta$$

where δ is the real maximum horizontal deformation of the column pursuant to (10). In Table 1 above, W is the wind load, EQ is the earthquake load, F is the axial force in the column which consists of the variable dead load, long-lasting random load, and short-lasting random load.

In formulas, a is the imperfection in the column, l is the column length, I is the inertia moment of the column, W is the cross-section modulus of the column, E is Young's modulus of elasticity, and R is the yield stress.

In the calculation, there are eight variables: five load components (the variability of their effects is given in the histograms in [4]), variable cross-section that may exist because of under/over rolling (as in the histogram pursuant to [5]), initial imperfections in the column (normal distribution - 1 through +1, histogram from [4]), and yield stress f_y (histogram Py2301.DXS in [12]). The probabilistic assessment of the reliability has been carried out in two steps for the both limit states (13) and (14).

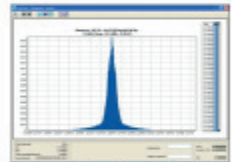


Fig. 4. Resulting histogram of the critical maximum horizontal deformation of the column.



Fig. 5. Resulting histogram of the reliability function SP for the serviceability limit state.

Figure 4 shows the resulting histogram of the real maximum horizontal deformation of the column δ pursuant to (10). Figure 5 shows the resulting histogram of the reliability function SP for the serviceability limit state (13), the resulting value of the failure probability P_f and classification within the resulting reliability level pursuant to [8]. Figure 6 shows the resulting histogram of the reliability function SP for the carrying capacity limit state (14), the resulting value of the failure probability P_f and classification within the resulting reliability level pursuant to [8].



Fig. 6. Resulting histogram of the reliability function SP for the carrying capacity limit state.

It is evident from the figures above that the structure complies with the reliability criteria for the both limit states. The failure probability for the carrying capacity limit state is $P_f = 4.99168 \cdot 10^{-6}$. This represents an increased level of reliability. The failure probability for the serviceability limit state is $P_f = 5.315890036 \cdot 10^{-5}$. This represents a normal level of reliability.

The results above have been achieved on the basis of the probabilistic calculations without application of any basic optimization techniques. When calculating the failure probability for the carrying capacity limit state, the computing time has been really long, and application of any of the aforementioned optimization steps seems to be unavoidable.

5. ANALYSIS OF OPTIMIZING TECHNIQUES.

As mentioned in Chapter 3 it is possible to apply the optimization techniques so as to decrease the

Figure 7

Look at these figures and try to imagine that you are a judge in this case. Do you understand what the expert report is about? Can you decide if the assessment is right or wrong? Moreover - not-satisfied with the court expert report the litigant says "This model is wrong! In the table 1 the Dead load must be 450 - see national standard 1234!". And the court expert responds: "It is you that are wrong! In this kind of models the dead load must be not more than 400 - see European standard 4321!".

Did you imagine this situation? What you will do? Many specialists in law say that it is the dispute and the judge must take the position of an expert, which is more convincing. What does it mean, "convincing" in this case? Of course - more convincing orator, but not the expert with "correct results".

According to the law in many civil law countries a court-appointed expert's evidence has the same power as other evidences. In fact the court expert plays the role of a judge in technical questions. But these technical questions are the topics of the dispute and in fact the court expert becomes a judge not being appointed to solve the dispute!

Best practice of using construction experts in Litigation in different countries

How to avoid the problems of non-competence of judge/jury in the field of construction? I think today it is not possible to almost avoid them but is possible to use all the methods which the law of certain country allows.

Below I will give a list of interesting methods of using experts that are used in different countries.

1. Russia. The most interesting in Russian law today concerning experts is the provision that facts confirmed by a notary in the notarial act do not require any proof in a trial. According to the law the notary can appoint an expert to prepare an expert report. This means that pre-trial expert report will be issued with notary conformation and it will have "more power" than "ordinary" pre-trial expert report (see Figure 8).

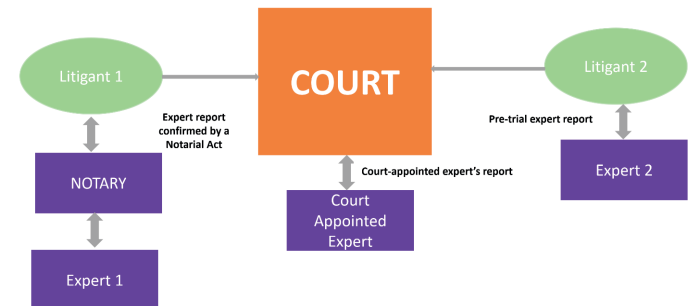


Figure 8

2. Czech Republic.

2.1. According to the civil procedural codes an expert report prepared by judicial expert (registered in a national public directory) on the request of litigant has the same power as a report of a court appointed expert.

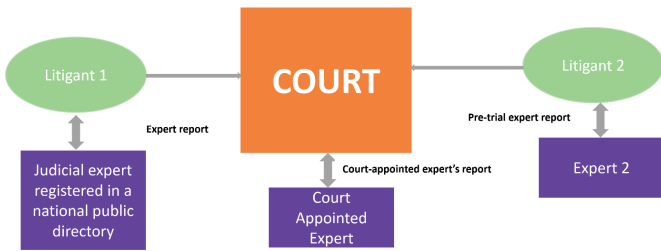


Figure 9

2.2. If there is doubt about the accuracy of the court-appointed expert's report, or if the expert evidence is unclear or incomplete the court will review the expert report/evidence by another expert.

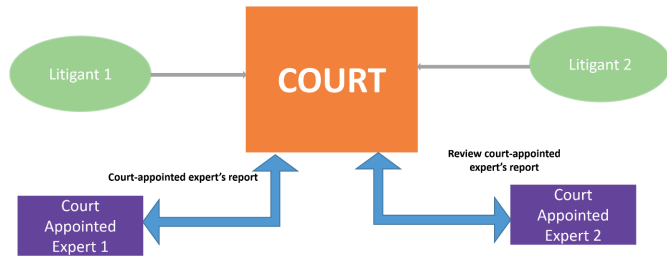


Figure 10

3. Spain. From the year 2000, the opinions that the litigants wish to put forward and which they consider necessary or appropriate for the explanation of the case, are prepared by experts appointed by them and must be provided with the initial claim or the response to the claim. That means that a civil party are now obliged to provide all the expert opinion to the Court, and if they do not present these means of proof in the appropriate time in the proceedings, the judge will be entitled to reject a later proposal. This is the effect of article 336 LEC 2000, which implies that a lawyer, once he takes a case, has the responsibility and the obligation to decide what expert speciality is required, and identify the name of the expert who will write that expert opinion.

The advantage of this system is that the “private” judicial expert will defend his report at an oral hearing, where he will most likely have to challenge and confront the different or opposite opinion of one or more experts, appointed by the other parties, and he will have to explain his work and his conclusions in front of the Court, where he will be subjected to an intense “cross examination” which will be recorded by video.

But the civil judge cannot make a decision on what expert opinion will be necessary, so that if during the preliminary oral session (where the parties present their means of evidence), he considers that the evidence put forward by the parties could turn out to be insufficient to clarify the facts at issue, he can only inform the parties of this, stating

the facts at issue which, in the court's opinion, could be affected by insufficient evidence. Upon making such a statement, the court may also point out the evidence which it may deem appropriate, taking into consideration the probative elements whose existence is reflected in the documents.



Figure 11

4. UK. According to current legislation a party to a construction contract has the right to refer a dispute arising under the contract for adjudication. The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement. The parties may agree to accept the decision of the adjudicator as finally determining the dispute. If the parties, after the adjudicator's decision, then refer a dispute to the court it will be a Technology and Construction Court which is specialized on construction disputes.

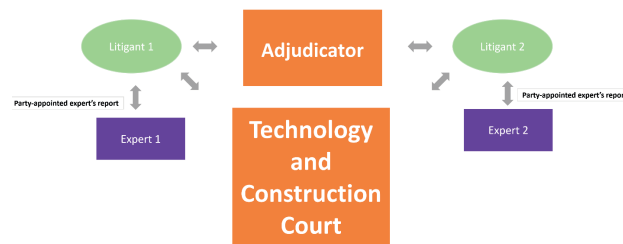


Figure 12

Expert Remuneration

One of the most important problems in preparing expert reports in large construction projects is the possibility of advance and stage payments for experts. It is important because the minimum cost of preparing expert report in such cases is about €100,000 and the minimum time is about 6-9 months and very often it is not possible to prepare expert reports of high quality standards without advance and/or stage payments. When the party appoints an expert there are no problems for advance and stage payments because it depends only on the agreement of the instructing party and the expert. However, in the case of court appointed experts the conditions of payment are regulated by the law.

You can easily see from the table below in what countries it is possible for court experts to receive advance/stage payment.

Country	Advance/stage payments for court experts	
	Principle answer	Detailed answer
Austria	YES	If the Expert applies for it an adequate amount in advance must be paid. There is also the possibility to apply multiple advance payments, when the work of the Expert takes a longer period of time. Although the Fee Entitlement Act prescribes, that there should be only one single decision about the Expert's fee to cover his remuneration, the case law of first-instant courts allow the settlement of fees in several stages.
Croatia	YES	The court advances half of the envisaged amount to the Expert, provided that the client has to pay the full amount after issuance of final invoice. This amount remains on the court's account. In most difficult cases, the Attorney's office shall pay the advance to the Expert according to the agreement.
Czech Republic	Partly YES	Especially to compensate his cash expenditures, eg in cases of travel and other costs, among them photocopies, tests and costs related to the cooperation with a consultant.
Germany	YES	The CAE as well as the PAE can claim fees in advance and stage payments. The CAE has to request the advanced payments, especially when the work takes a long time. The PAE has to make an agreement with his client. If he doesn't, he can only claim the compensation after he finished his expert opinion.
Hungary	Actually NO	An advance payment (from the court) is already possible, up to a certain limit.
Netherlands	YES	Only in civil/private law cases, article 195 Dutch Code of Civil Procedure. In civil procedures the Court Appointed Expert is told not to start with his assignment before having had notice from the court. The judge first has to rule which party has to pay the advance (usually the plaintiff, but exceptions may be possible, the consequence of not paying for the party may be that he loses the case). If the Expert has started prematurely there are no grounds for payment. The advance is always a matter of discussion between the court and the Expert (hours needed, expenses, hourly rates etc.). Parties may be involved in this discussion if the amount of the advance is exorbitant. Payment will be done through the courts themselves, but only as an intermediary
Poland	NO	
Portugal	Actually NO	However this is commonly only used when Experts are needed overseas (Madeira or Azores).
Russia	NO	
Spain	YES	
United Kingdom	YES	It is usual for fees to date to be payable when the report is completed. In long assignments the practice of advance or regular amounts 'on account' is quite common. It is particularly found in cases in the construction industry.

Conclusion

From my point of view

1. The first task for litigants in litigation is to provide a court with many expert evidences, which judge/jury, can hardly ignore. For this purposes it is very important to use all the possibilities that gives to litigants the law of certain countries.
2. It is important to improve the law and expert procedures that will allow solving disputes by professionals in the field of construction.
3. It is also important to provide legal opportunities for court appointed experts to receive advanced and stage payments such as party appointed experts can.
4. Alternative dispute resolution is a scope of most effective methods for using experts and dispute resolution in construction. It is important to put into construction law the legal possibilities for using ADR in construction dispute resolution.

Dr Sergey Zakharov

President of the Russian
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expert witnesses

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