

The Use of Experts in Europe -
Developing international Expert Competence



2nd November 2012 Prague

THE ORGANISATION
FOR EUROPEAN
EXPERT ASSOCIATIONS

Symposium Documents

Programme

EuroExpert Symposium 2nd November 2012 Prague

During the 10th Annual international Conference
"Construction and real estate: expertise and appraisal"

hosted by:

Czech Chamber of Forensic Experts and the Russian Chamber of construction expert witnesses

Venue: Czech Technical University, "Masarykova kolej", Thákurova str. 1, Prague

Chairman: Michael Cohen, Chairman Emeritus, The Academy of Experts

09:45 **Registration, coffee and networking**

10:15 **Welcome to Prague**

Representatives of Czech Authorities
President of Czech Chamber of Forensic Experts
Nicola Cohen, President of EuroExpert

10:30 **Civil and Common Law Systems - practical differences between them as they affect Experts**

Peter Taylor, Solicitor, Consultant to Hogan Lovells

11:00 Coffee break

11:30 **The use of Experts in Russia - an introduction to practise, procedures and problems**

Dr. Sergey Zakharov, President of the Russian Chamber of construction expert witnesses

12:00 **The use of Experts in England (and Common Law Countries) - an introduction to practice, procedures and problems**

Michael Cohen, Past President EuroExpert, Chairman Emeritus
The Academy of Experts

12:30 **Expert concepts: Expert Determination; Hot tubbing**

Wolfgang Jacobs, Chief executive, BVS Germany
Charles Gardner, Secretary, The Academy of Experts

13:15 **Lunch**

14:15 **Court Appointed Expert versus Single Joint Expert**

A panel including The President EuroExpert and other Symposium Speakers

14:45 **The use of Experts in Arbitration**

Dr. Turán, President of the Budapest Chamber of Experts

15:15 **EuroExpert - the way ahead**

Nicola Cohen, President EuroExpert
Bernhard Floter, Secretary General EuroExpert

15:40 **Open Forum and Closing**

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Content

Programme	2
Civil and Common Law Systems - practical differences between them as they affect Experts.....	4
The use of Experts in Russia - an introduction to practice, procedures and problems	6
The Use of Experts in England and other Common Law countries.....	11
Expert Concepts: Expert Determination.....	14
Expert Concepts: ‘Hot tubbing’	17
Court Appointed Expert versus Single Joint Expert	21
The Use of Experts in Arbitration	23
EuroExpert - the way ahead	27
The Speakers.....	31
Attachments	36

All papers are in English but many have been prepared in the Speaker’s mother language and translated into English. It is possible that there are word/concept variants as a result.

Civil and Common Law Systems - practical differences between them as they affect Experts

Peter Laverick Taylor, Solicitor, Consultant to Hogan Lovells

EXPERT EVIDENCE: PRACTICAL DIFFERENCES BETWEEN CIVIL AND COMMON LAW SYSTEMS

PETER TAYLOR
PRAGUE, 2 NOVEMBER 2012

EXPERT EVIDENCE: PRACTICAL DIFFERENCES BETWEEN CIVIL AND COMMON LAW SYSTEMS

- The role of the expert
- Selection of an expert witness
- Approaches to the evaluation of evidence

THE ROLE OF THE EXPERT

- To inform the Court
- Scientific information
- Outside the Court's knowledge or experience

SELECTION OF THE EXPERT

- Accreditation and official lists
- Court-appointed expert
- Party-appointed expert

EVALUATION OF EXPERT EVIDENCE

- Admissibility of evidence
- The role of the Court as "gatekeeper"
- "Testing" the quality of the evidence

ADMISSIBILITY

- Relatively "late" evaluation in UK
- Standards of admissibility
- "Junk Science"? Or Mainstream theory?

ROLE OF THE COURT (1)

- Inquisitorial – civil law systems
- Adversarial – common law
- Case preparation and procedures

ROLE OF THE COURT (2)

- Management of the work of the expert
- Elimination of bias and the “hired gun”
- Transparency and disclosure

TESTING THE EXPERT’S EVIDENCE

- Meetings and reports before trial
- Cross-examination
- Disclosure

SUMMARY

- Adversarial process, controlled by judge
- Duties to Court and to Client
- Oral evidence and cross-examination

The use of Experts in Russia - an introduction to practice, procedures and problems

(on the example of Commercial Procedure Code)

Dr. Sergey Zakharov, President of the Russian Chamber of construction expert witnesses

In case any questions requiring special professional knowledge in various fields of science, technology, art, craftsmanship occur in a course of legal proceedings, the court appoint court expertise. The expertise may be committed to the state or non-governmental expert institution, some specific expert or several experts. In any case the expert is an individual person issuing expert opinion his (her) expert advice on behalf of his (her) name, and the expert organizations appointed by court perform simple administrative functions.

Procedure of appointment and order of the expertise in civil, arbitration or criminal trial is governed by different laws (Commercial Procedure Code, Civil Procedure Code, Criminal Procedure Code), while the nature of the process remains the same. Russia has a law in force named "About the state court expertise". This law also provides for non-governmental judicial experts. To conduct court expertise neither expert nor his organization should have any special licenses or state permits. In fact, only "special knowledge" is required. The fact that this "special knowledge" is actually in place has to be defined by the court as the case may be. And there are no any other forms of regulation with regard to court expertise.

According to Civil Procedural Code an expert has no right to divulge information which has become known to him in connection with preparing his expert opinion, or to inform anyone about the results of the appraisal, with the exception of the court which has appointed it.

According to Criminal Procedural Code an expert has no right to divulge the data of the preliminary investigation, which have become known to him in connection with the participation in the criminal case in the capacity of an expert, if he was warned to this effect in advance in accordance with the procedure, established by the Code; There is no this restriction in Commercial Procedural Code.

The basic provisions of Commercial Procedural Code concerning court expertise.

An expert in the court is a person with special knowledge in matters concerning the case under consideration, and appointed by the court to state an opinion in the instances and in the manner provided by this Code.

The person, entrusted with conducting a court expertise, is obliged to appear, when summoned, before the court, and to issue an objective opinion with regard to the questions posed.

Experts are entitled, by authority of the court, to access the case materials, to participate in court sessions, to pose questions to the persons participating in the case and witnesses, to file motions for the presentation of additional materials.

Experts are entitled to refuse to state an opinion regarding the matters, exceeding the limits of their special knowledge, and if the presented materials are insufficient to state an opinion.

The expert is criminally liable for deliberately stating a false opinion, is warned about it by the court, and gives a recognizance in respect of the warning.

In the event of non-fulfillment of the court's demand to submit an expert opinion to the court within the term, fixed in the ruling on the appointment of a court expertise, in the absence of a reasoned statement from the expert or the state forensic-expert

institution, stating the impossibility of conduction of a court expertise in due time for the reasons, indicated in the Code the court imposes a court fine on the head of the state forensic-expert institution or on the expert, guilty of such violations, in the manner and amount established the Code.

There is a special participant in the court proceedings – Specialist.

A specialist in the court is a person with special knowledge in the corresponding field, providing consultations in the matters concerning the case. The person summoned by the court in the capacity of a specialist is obliged to appear before the court, answer the questions posed, provide oral consultations and clarifications.

Specialists are entitled, by authority of the court, to access the case materials, to participate in court sessions, to file motions for the presentation of additional materials.

Specialists are entitled to refuse to provide consultations in matters, exceeding the limits of their knowledge, and if the materials presented to them are insufficient to provide consultations.

In order to clarify the matters, arising in the course of the consideration of the case and requiring special knowledge, the court appoints a court expertise upon the motion of a person participating in the case or by consent of persons participating in the case.

The court may appoint a court expertise on its own initiative if this appointment is provided by law or stipulated in an agreement, or is necessary to verify an application concerning the falsification of presented evidence, or if it is necessary to conduct an additional or a repeated court expertise.

The court determines the range and contents of matters, in respect of which a court expertise is to be conducted. Persons participating in the case are entitled to present to the court the matters, which are to be clarified in the course of the court expertise. The court is obliged to substantiate the rejection of the matters, presented by persons participating in the case.

Persons participating in the case have the rights: to apply for the summoning of persons, indicated by them as experts, or for the conduction of a court expertise at a specific expert institution; to recuse experts; to apply for additional questions to the expert to be added into the ruling on the appointment of a court expertise; to give explanations to the expert; to access the expert opinion or the report on the impossibility to state an opinion; to apply for the conduction of an additional or a repeated court expertise.

The court issues a ruling on the appointment of a court expertise or on the rejection of a motion for the appointment of a court expertise.

The ruling on the appointment of a court expertise specifies the reasons for the appointment; the family name, first name and patronymic of the expert or the name of the expert institution, at which the court expertise is to be conducted; questions, posed to the expert; materials and documents placed at the expert's disposal; the term, during which the court expertise is to be conducted and an expert opinion is to be submitted to the court.

A ruling must likewise contain an indication of the warning about the criminal liability for stating a deliberately false opinion, given to the expert.

A court expertise is conducted by state court experts by order of the head of a state court expert institution or by other experts from among the persons having special knowledge in compliance with the federal law.

Several experts may be entrusted with conducting a court expertise.

Persons participating in the case may be present during the conduction of a court expertise (except for cases, where such presence could impede the normal work of the experts), but they may not interfere in the examination.

The presence of the participants of commercial proceedings is not allowed during the drawing-up of the expert opinion by an expert, as well as during the experts' consultations and the formulation of conclusions, if the court expertise is conducted by a commission of experts.

An examination by a commission of experts is conducted by at least two experts of the same specialty. The court specifies that the examination is to be carried out by a commission of experts. If the opinions of experts coincide, based on the results of conducted examinations, they draw up a single expert opinion. If there are differences of opinions, each expert, participating in the court expertise, gives a separate opinion regarding the matters causing the differences. A complex court expertise is conducted by at least two experts of different specialties.

The experts' opinion includes the type and volume of examinations, conducted by each expert, the facts established and the conclusions made by each expert. Each expert, participating in the complex court expertise, signs the part of the expert opinion, containing the description of the examinations, made by this expert, and is liable for it.

A general conclusion is drawn by experts, competent to evaluate the gained results and to formulate the given conclusion. Where there are differences between experts, the results of expertise are formalised in compliance with this Code.

On the basis of conducted examinations and subject to their results, the expert in their own name or an expert commission states a written opinion and signs it.

The expert opinion or the opinion of an expert commission must include the following:

- 1) the time and place of conduction of the court expertise;
- 2) the reasons for conducting the court expertise;
- 3) data on the state court expert institution, and on the expert (surname, first name, patronymic, speciality, working record, scientific degree and academic status, current position), entrusted with the conduct of the court expertise;
- 4) records in respect of the warning, given to the expert in compliance with the laws of the Russian Federation, concerning the criminal liability for stating a deliberately false opinion;
- 5) questions posed to the expert or the expert commission;
- 6) objects of examination and case materials, presented to the expert for conducting the court expertise;
- 7) contents and results of the examination with an indication of methods applied;
- 8) an evaluation of the results of the examination, conclusions regarding the posed questions and their substantiation;
- 9) other data in compliance with federal laws.

Materials and documents, illustrating the opinion of the expert or of the expert commission, are attached to the expert opinion and are an integral part of the opinion. If in the course of a court expertise an expert establishes circumstances, which are significant to the case, and in respect of which questions have not been posed, the expert may include conclusions, regarding such circumstances, into the opinion. The expert opinion is announced in court session and is examined together with the other evidence in the case.

An expert may be summoned before the court upon the motion of a person participating in the case or on the initiative of the court. After the announcement of the opinion, the expert may give the necessary explanations in respect of it and is obliged to answer additional questions, posed by persons participating in the case and by the court. The expert's answers to additional questions are entered into the minutes of the court session.

If an expert opinion is not sufficiently clear and full, as well as if questions arise in respect of the circumstances examined beforehand, an additional court expertise may be appointed with the same or another expert entrusted with conducting it. If doubts arise in respect of the substantiation of the expert opinion or if there are contradictions in the conclusions of an expert or of an expert commission, a repeated court expertise may be appointed with regard to the same questions, and another expert or another expert commission is entrusted with conducting it.

In order to receive clarifications, consultations and to learn the professional opinions of persons having theoretical and practical knowledge in the matter of the dispute before the court, the court may summon a specialist. Counsels of staff of a specialised court, appropriately qualified to the specialisation of the court, may be summoned in the capacity of specialists.

Specialists provide consultations impartially and in good faith, based on their professional knowledge and according to their inner conviction. A consultation is provided in the oral form, without conducting any special research, appointed on the basis of a ruling of the court. In order to get clarifications and additions regarding the consultation provided, the court and the persons participating in the case may pose questions to the specialist.

Experts and specialists are compensated for the expenses, incurred by them, due to their appearance before the court, including travel expenses, expenses for the rental of housing accommodation and additional expenses, related to habitation away from the place of permanent residence (daily allowance). Experts receive a reward for the work, carried out by them, by order of the court, if such work does not belong to their official duties as employees of state court expert institutions. Specialists receive a reward for the work, carried out by them by request of the court, unless they are counsels of staff of a specialised court.

The amount of an expert's reward is determined by the court by agreement with the persons participating in the case and by agreement with the expert. The sums of money, payable to experts are deposited to the court's bank account by the person that files the corresponding motion within the term, fixed by the court. If motions are filed by both parties, the required sums are deposited to the court's bank account in equal amounts.

If the sums of money, payable to experts, are not deposited to the court's bank account within the time fixed by the court, it may reject a motion to appoint a court expertise, if the case can be considered and a decision can be delivered on the basis of other evidence presented by the parties.

The sums of money due to experts and specialists are paid upon the discharge of their duties.

The sums of money due to experts and witnesses are paid from the depository bank account of the court.

The services of a specialist drawn to the participation in court proceedings by the court, specialist's daily allowance and the compensation for the expenses incurred by him due to the appearance before the court, as well as the sums of money, payable to experts, should the court on its own initiative appoint a court expertise, are paid at the expense of the federal budget.

The Use of Experts in England and other Common Law countries

Michael Cohen QDR FAE
Chairman Emeritus, The Academy of Experts

Before looking at the detail it is important to understand the broad concept. In over-simplified terms the legal system in a jurisdiction effectively dictates how Experts are used. Within the Civil Law jurisdictions the Expert is basically the responsibility of the court. It is they who appoint the Expert and it is they who instruct the Expert (*le mission*). This leads to the courts accrediting Experts by putting them on their (the court) lists. The Expert is a tool of the judge some might say is actually his personification. This is because the Civil Law system is inquisitorial with the judge actively seeking the truth.

Contrast this with the Common Law position which is an adversarial system with the parties metaphorically 'fighting it out' in court. The Claimant is required to prove his claim on what is known as the balance of probabilities. This he does by the evidence he produces. The barrister (counsel or advocate) elicits this from the witnesses. In the case of Experts they rarely present their opinion orally. They will have prepared an Expert Report in writing. This will have been given to the other side so both they and their Expert will know exactly what it is. This Report will then be 'adopted' as his evidence by the Expert whilst he is in the witness box. As soon as the Expert 'adopts' the Report it becomes his sworn testimony rendering him liable to charges of perjury if he has not told the truth in his report.

It is after the Report has been adopted that the Common Law System's major weapon is brought into use. This is called Cross Examination. Cross examination is conducted by the advocate for the opposing side. It consists of questioning the witness in open court. The theoretical objective of cross examination is to test the veracity of the witness' testimony. In practice it is far more than that.

It does indeed test the veracity and also the accuracy of the testimony but it does far more. It can be used to test the skill and knowledge of the Expert. It will help to discover whether the Report has been properly researched and any affiliations that the Expert might have which might affect his independence. Even more importantly it might shed a new light on his credibility.

Credibility is very important because if you cannot rely on the person his opinion (and therefore his Report) becomes degraded. Thus what might look like a very strong and supportive Report may be discounted because the author is suspect. I say 'suspect' because credibility can suffer in a number of ways.

Is the Expert truly independent or is he partisan?

Has the Expert complied with his duty to the court?

Is the Expert sufficiently qualified?

Does the Expert have sufficient appropriate experience on the issues of the case in hand?

Is there a problem with his standing? If, for example, he had been disciplined by his professional body, suffered judicial criticism or had been convicted of fraud would his credibility be sufficiently good?

None of these examples would necessarily preclude the person being able to give Expert evidence. In the Common Law system there are two distinct tests. The first is whether the evidence is admissible into the proceedings. If it is the second test comes into focus. This is the 'weight' that should be attached to the evidence. Put simply, evidence given by a well qualified Expert of good standing is likely to be given far more weight than evidence by an Expert whose integrity has been doubted and whose qualifications were suspect. We recently had an Expert giving evidence in a case. It was shown that one of the academic qualifications he claimed was false. The judicial criticism that he received should mean that he will no longer practice as an expert witness.

I turn now to how the Expert is typically used in England. In our sense the word 'Expert' is used as an abbreviation for 'expert witness'. We are not talking about somebody who works for example, as a valuer or assessor for an insurance company. We are talking about an individual who uses his expertise in the legal area ultimately giving evidence in court. We do not have a system where Experts are given accreditation by the courts. To take as an example, in France an expert will be placed on the List of a Court which means that he or she can be regarded as accredited by that particular court. This listing is normally for a five year period at the end of which the expert can either be retained on the List for a further period or if he is not, he will cease to be an accredited expert.

Because most Common Law countries lack this basic court system of accreditation alternative ways have been found for accreditation.

The Academy of Experts was established twenty five years ago partly to fill this 'accreditation gap'. Now a quarter of a century later The Academy is seen as an independent accrediting organisation having accredited thousands of Experts in both the United Kingdom and other jurisdictions around the world.

Because the court rarely appoints its own Expert (Court Appointed Expert) it falls to the parties to appoint their own Experts if it is desired to have expert testimony considered by the judge. This is where the problems, real or perceived, start.

Firstly the party or more usually its lawyers, have to find the appropriate expert. Not just somebody with the necessary knowledge and experience but a person who knows how to use that knowledge and experience in the legal arena. One who will understand the legal procedures and comply with them. Having found the person it will be necessary to agree their Terms of Appointment which includes their fees. In England experts' fees are not regulated and except for publically funded work there is no tariff which means the fee rates and possibly the maximum number of hours to be spent on the assignment have to be negotiated and agreed.

Problem number 1 has been solved. The right expert has been identified.

Problem number 2 has now been solved as the expert's fees and other terms will have been agreed.

Problem number 3: Under the Civil Procedure Rules (CPR) no person can be called to give expert evidence without the permission of the court. This is not a formality. The court has to be persuaded that expert testimony is required in order for the matter to be tried fairly and decided by the judge. Assuming the court agrees to this it will normally give permission for a named individual to give expert evidence on matters it defines.

In the Common Law system the expert is not what the Americans call the 'finder of facts'. This is the role of the judge. The Expert may however contribute to the judge's quest by the facts that he 'discovers' either physically or intellectually. Essentially the Expert receives his Instructions from the lawyers of the party who has appointed him. These Instructions define the work that the Expert has to undertake and set out the timescale and other matters. They are extremely important and often cause difficulties either because they are incomplete or because they do not address the real issues. The matter is further complicated because although the party:

- selects the Expert
- instructs the Expert
- receives his Report
- calls the Expert to give evidence to the court
- and pays the Expert

The Expert only has a very limited duty to the party. The Civil Procedure Rules make it totally clear that the Expert has an overriding duty to the court and not to the party instructing or paying him. It is this overriding duty to the court which is the foundation for the relationship that the Expert has with his instructing party. It is intended to ensure that the Expert will remain fully independent and will not be an advocate for the party. He is not, what is referred to as, a 'hired gun' who says what he is paid to say.

Problem number 4 is independence. Despite the existence of the Expert's **OVERRIDING** duty to the court and the Code of Practice for Experts which essentially reinforces the 3I's (Independence, Impartiality, Integrity) there is still the perception, especially in non Common Law countries, that an Expert who is appointed, instructed and paid by a party will have a commercial and financial interest in helping that party to win. I admit that there are some who break the rules. Unfortunately these people exist in all countries of the world. However I believe that the high professional standards and the integrity of most Experts means that they do comply with their overriding duty to the court. Unfortunately it is the exceptions who receive the publicity and this can and does give a wrong impression.

Problem number 5 is linked to the preceding one. It is when those instructing the Expert try to persuade him to modify parts of his Report. This in reality is not a major problem because the real Expert would deal with these requests as a challenge to his opinion and then to reconsider it. If his opinion has changed he would modify his Report, if not he would decline to make any changes. Apart from his integrity the Expert will always have at the back of his mind that he will be challenged in public when he is cross examined. This is an excellent inducement to do the correct thing.

Problem number 6 is the perception that the Expert will not be as truthful as he should be when giving his evidence and especially whilst he is being cross examined. If you believe that people who swear to tell the truth still do not do so, all systems fall to pieces be they Common Law or Civil Law. Undoubtedly some people do lie. However I believe that the vast majority of Experts are honest professionals who do conduct themselves with integrity.

The Common Law system allows great flexibility in the use of Experts and enables the parties to retain control of their case and how they best wish to pursue or defend it. I have not dealt with the many other ways that experts are used. They can be expert advisers assisting the party to prepare its case, they can be Expert Determiners or Mediators or Assessors appointed by the judge to assist them. The use of Assessors is closer to the Civil Law system but not the same, they are also rarely used.

Expert Concepts: Expert Determination

Wolfgang Jacobs, Chief Executive, BVS Germany

Introduction

The activities of Experts are most varied, ranging from the provision of specialised advice and valuation, inspection and monitoring through to the preparation of expert opinions. The pre-court and out-of-court activities of Experts are gaining increasing importance, whereby services to avoid and resolve disputes and prevent damage take the fore. This includes in particular the Expert Determination which is commissioned by two contracting parties and has binding effect.

Thought is increasingly being given as to how pressure can be taken from the state courts. Arbitration points are placed upstream of the court proceedings and private arbitration intensified. The benefit of private arbitration activities is moving more and more into the focus of deliberations because they also contribute to amicably settling disputes outside state court jurisdiction – which is usually faster and less expensive.

What is Expert Determination?

Expert Determination is a dispute resolution process in which an independent expert in the subject matter of the dispute is appointed by the parties to resolve the matter. The foundation is provided by a contract between the parties which contains a corresponding Expert Determination agreement or to which a separately agreed Expert Determination agreement refers. It is stipulated in this Expert Determination agreement that disputes between the parties of the basic contract about the content, adjustment and interpretation of the contract are to be clarified in a binding manner by an Expert Determiner. The Determiner is not involved in this agreement and is not therefore directly obligated by them.

The expert's decision is - by prior agreement of the parties - legally binding on the parties. This is intended to avoid recourse to the courts, although this does remain possible under certain conditions. Like all ADR processes, it is entirely confidential.

When should I use Expert Determination?

Expert Determination is ideally suited to disputes and matters of valuation and/or which are primarily dependent on technical issues e.g. does the computer match the specification, is the malfunction due to a design or a manufacturing fault, valuations of shares, rent reviews and contract performance matters. It can also easily be used in many other areas such as insurance wording disputes, sale of goods disputes, fitness for purpose and boundary disputes. Although Expert Determination is an Alternative Dispute Resolution process, it can also be used when there is no dispute, but a difference which needs to be resolved for example the valuation of a private business. Because of its flexibility, Expert Determination is ideally suited to multi-party disputes.

What if I do not agree with the Expert Determiner?

The Expert Determiner's decision is legally binding. There is only a very limited basis to challenge the Determination. If the Expert Determination contains rectifiable errors, the clients can request that the expert eliminate them. A liability of the Determiner towards his clients only exists if the errors lead to the Expert Determination appearing evidently unfair or evidently incorrect and the Determiner has acted with wilful intent or gross negligence contrary to his duties. The Expert Determination will

be evidently unfair or evidently incorrect if the error is obvious to a knowledgeable and unbiased observer – even if this may be after detailed inspection.

It is therefore important that the parties select an Expert with both relevant expertise and experience in addition to knowledge of the Determination process. Neither party need accept a Determiner who is not competent in the specialisation or who is biased. Each party has a right of refusal even if any such right is not explicitly stated in the Expert Determination agreement.

Sometimes the Expert's decision is not binding, but advisory. This is known as Expert Evaluation. Although not binding the evaluation often forms the basis of a settlement.

How do I find an Expert Determiner?

Experts are selected in accordance with corresponding provisions in the Expert Determination agreement between the parties. If, for example, a tax adviser is named as Expert Determiner, then in the case of a dispute it will not be possible to appoint any other tax advisor. The parties to the basic agreement may also agree that they both select and commission the Expert who comes into question by mutual consent or that it is left to only one party – with the authorisation of the other party on the basis of a corresponding provision in the Expert Determination agreement - to select and appoint the Determiner. It is also possible for the parties to the basic agreement to agree that a third party (e.g. an organisation of experts, a chamber or a court president) selects and appoints the Expert. The appointment by a third party only has binding effect on the parties to the basic agreement if this is explicitly provided for in the Expert Determination agreement. If any such provision is missing in this agreement, either of the parties may reject the Expert Determiner named by the third party if there is a good reason to do so. A reason of this nature may exist, for example, if justified doubt is expressed as to the impartiality or specialised competence of the expert.

The parties to the basic agreement also have the possibility to consult several Expert Determiners to clarify differences in opinion. This will usually take the form of an individual party naming an Expert Determiner of his choice and a third party determining an ombudsman with binding force who organises the course of the procedure. All Expert Determiners decide together. This procedure is found particularly in the insurance industry.

The agreement of the parties to the basic agreement on a specific Expert Determiner or the naming of the Expert Determiner by a third party does not yet mean that the expert has been appointed with all the resultant contractual duties. The agreement with the Expert Determiner first comes about once the parties to the basic agreement appoint the Expert with the preparation of the Expert Determination and the Expert accepts this appointment.

What happens next?

Each Expert Determiner will have his own approach unless the parties have prescribed certain procedures here or agree the applicability of an Expert Determination procedure (for example the "Rules for Expert Determination" of the Academy of Experts). But in general: The parties must agree the exact wording of the question(s) to be determined by the Expert. They then provide such evidence as they think necessary. The Expert may ask for any further evidence that he considers appropriate. He will decide whether or not to deal with the matter on a documents only basis or if it is necessary to hold a hearing and/or a technical examination. Sometimes the Expert may choose to hold a preliminary procedural meeting to deal with some of these questions.

The Expert should always be aware during all phases of the procedure that he has two clients with different and usually contrary interests. He must therefore exercise strict neutrality and always clarify contentious issues with both parties. When preparing the Expert Determination, the Expert may have recourse to the cooperation of both parties to the basic agreement who have undertaken in the Expert Determination instructions to promote the work of the Expert and to refrain from doing anything which makes the preparation of the Expert Determination difficult or impairs it. They are therefore obliged to cooperate with the Expert Determiner. Once the Determination is completed the Expert will issue his decision (the Determination) in writing in accordance with the agreed procedures.

Will it work?

Yes – Expert Determination has been in use for many years in a large number of technical arenas and has a proven track record.

What will it cost?

Costs will vary depending on the complexities of the matter, but are directly related to the decisions of the parties. The calculation and the amount of the fee are agreed by the parties with the Expert when he accepts the work. Both an hourly rate and a flat fee can be agreed. This also includes an agreement on any reimbursement of expenses (auxiliary staff, typing costs, travel expenses, overnight accommodation etc.) and the payment of an advance. The agreement will usually also contain a provision as to who of the two clients owes the fee. However, the fee agreement can also determine that both parties are to each bear half of the fee or that the fee is paid to the Expert by the party concerned in the ratio of winning to losing.

How long will it take?

It will take much less time than that for arbitration or litigation. The time varies with the number of parties involved and the complexity of the dispute.

Expert Concepts: 'Hot tubbing'

Charles Gardner, Secretary, The Academy of Experts

'Hot tubbing' is legal slang for the presentation of the oral evidence of experts at trial simultaneously in place of the more usual procedure of calling expert witnesses sequentially. This procedure which may more prosaically termed 'concurrent evidence' has its origins in Australia where I believe it was first used in valuation cases but where it has since become common practice in a wide variety of civil cases. Hot tubbing is now being considered for use in England whereas in Canada the court rules for civil cases have already been changed to permit the courts to make orders for hot tubbing.

What does hot tubbing mean in practice? Sadly, it has nothing to do with having a good soak in a Jacuzzi. It involves the expert witnesses from any similar discipline being on a panel in court in order that they may give their evidence together as advisers to the court. By this means it is argued, they will be able to inform the judge more efficiently about their respective views upon the technical or scientific issues that arise. It is an advance upon the control of expert evidence which started many years ago with the disclosure of all relevant material before trial and led on to the disclosure of experts' reports and further to the narrowing of issues between experts as a result of experts' meetings. As a further refinement, the process of hot tubbing has now been developed with three main objectives. These are:

- identifying the remaining true issues between the parties;
- eliminating unnecessary issues and
- emphasising the (narrowness of) the differences between the parties so as to enhance the prospects of settlement.

The actual process is entirely flexible and can be varied to suit the particular requirements of each case but the basic format envisages that it will be set against the background of the standard English procedure for giving expert evidence in court. The expert is required to prepare a written report for exchange with the other party. A meeting with the other expert then takes place at which the exchanged reports are discussed (the parties and their representatives would of course be absent from such a meeting). The result of the experts' meeting is then recorded in a joint statement setting out in detail those matters upon which the experts are agreed and also those matters upon which they are unable to agree. Most importantly this joint statement must also set out the reasons why, in respect of each issue, they are unable to reach agreement. This joint statement then provides the basis for the 'hot tub' session. The parties will produce an agreed agenda based upon the points of disagreement disclosed by the experts' joint statement listing in a numbered sequence and in some detail the matters upon which the experts are unable to agree. The agenda is then submitted to the trial judge well in advance of the hearing so that he has adequate time to give full consideration to the experts' reports and to all the issues that arise from the agenda.

At the hearing of the case, the experts are sworn in at the same time and take their place together to give evidence: probably they would sit at a table rather than be in a witness box. The judge then acts as a chairman of a discussion of the matters on which the experts disagree. In this way each expert is obliged to explain and defend his or her point of view in the face of the views being given directly by the other expert. The experts are also encouraged both to ask and to answer each other's questions. The representatives of the parties should also be allowed to ask questions of the experts so as to ensure that all aspects of the experts' views are fully explained

to the court and no relevant areas are overlooked or distorted in any way by the manner in which their oral evidence is given to the judge. Finally, when the court is satisfied that all the points of view have been fully and properly explored, the judge should ask an open question of each expert as a means of providing an opportunity for each of them to confirm that their respective evidence and explanations to the court has been full and complete.

It is intended that using concurrent evidence should also result in a saving of judicial time and legal costs. As many of you will know, over the past decade in England, as in other countries, there has been a major drive towards simplifying court procedures in order to reduce both the costs and the delays that are inherent in litigation. The English court rules were completely rewritten in 1998 but despite this the costs of litigation have continued to rise and the length of some complex trials have not become any shorter. Following a major review of the costs of litigation undertaken by a senior English judge, Lord Justice Jackson¹ the recommendations contained in his report are now being implemented. As usual in England, we proceed with all such recommendations or new initiatives somewhat cautiously.

Before adopting hot tubbing as a standard practice in all courts as recommended by Sir Rupert Jackson, a pilot study has been undertaken in the Manchester Technology and Construction Court and the Manchester Mercantile Court. This started in June 2010 with the judges identifying suitable cases for hot tubbing and then inviting the parties to adopt the procedure at trial. An interim report on this pilot study was published in January of this year based on 3 cases that went to trial using the hot tubbing process together with 15 others where the giving of concurrent evidence was considered but where the cases have subsequently settled or were, at the date of the interim report, yet to be tried. The data available was however so small that the compilers of the interim report were unable to conclude whether the procedure really was effective at achieving its stated aims of saving the parties costs, saving judicial resources or even providing any useful data that could be applied towards creating rules for a more general use of the process. It is nevertheless possible that by April 2013 changes to the court rules will be made so as to allow judges to make directions for concurrent evidence to be taken at trial in all cases where the parties agree to that procedure being used.

The advantages and disadvantages of the use of hot tubbing are somewhat anecdotal. Jackson LJ of the English Court of Appeal said in a speech given last year that he had found from his discussions with Australian judges that:

- “(i) The procedure is quicker and more focused than the traditional sequential format.
- (ii) Experts find this procedure easier; they give evidence better and sometimes more impartially than under the traditional sequential format.
- (iii) Judges find it easier to understand complex technical evidence when it is given in this way.
- (iv) The procedure achieves a significant saving of both trial time and cost.”²

Those who are sceptical of the value of the process say that surrendering one's expert to the process is giving a hostage to fortune. Undoubtedly, the legal representatives to some extent do lose control of the presentation of the expert evidence, one might almost say of 'their' expert evidence. It is not unreasonable to have some sympathy for this point of view. It is certainly true that whilst expert evidence is only

¹ *Review of Civil Litigation Costs: Final Report*, December 2009

² *Focusing Expert Evidence and Controlling Costs*, a speech given by Jackson LJ on 11 November 2011

one part of a case to be put before the court for a party's lawyer it is only one part, albeit a critical part of the weapons at his disposal and in advising his client upon the appropriate litigation strategy overall. Adopting the concurrent evidence procedure may be seen as adding an unnecessary risk to the litigation. Using this interactive process is likely to be somewhat unnerving for the litigant and his adviser. There will always be the fear that the expert may make admissions or concessions by an unguarded comment that perhaps he would have more easily avoided in the course of a formal cross-examination by opposing counsel. When engaged in the more informal and relaxed atmosphere of a discussion with the judge or when challenged directly by the views, perhaps vigorously expressed, of a more senior and more forceful member of his own profession, the expert and his client may find that such concessions are fatal to the arguments that he had originally formed in his report.

The concerns of the parties over the way that the expert will react in the hot tub session are only one aspect of the problems posed by a hot tub session: another is the attitude of the judge. As I noted earlier, one of the prerequisites of the hot tub session is that the judge must have thoroughly acquainted himself with the experts' reports and the issues that arise from the agenda for the session that will have been agreed between the parties³. If the judge has misunderstood either the reports or the agreed issues and needs to be re-educated by the experts, at best much time will be wasted in re-educating him; at worst confusion may follow. In this regard the parties' counsel must be allowed to interpose questions with the object of eliciting fully the arguments being put forward by the respective experts. Equally, each expert needs not only to fully grasp the detail of his opponent's report and the theories and facts on which it is based but he must also be able to articulate clearly the reasons for his own conclusions so as to enable the judge to acquire a clear understanding of his particular viewpoint on each of the issues.

For his part, the judge has to remember that when taking part in a hot tub session with experts he should regard himself as a pupil being educated by them and he is not taking an equal part. As the chairman or referee of the discussion he may not enter the arena as though he is an expert in his own right and must not be tempted to offer or appear to offer an expert opinion himself. This may be quite hard to achieve in the crucible of a discussion that may become a lively discussion over the conflicting views posed. The judge must retain his independence of thought and rely on testing the experts' views against each other so as to arrive at a full understanding of their respective positions before he can make any attempt at arriving at his own conclusions. This is no easy task, indeed it has been said that: "The search for truth may conflict with the timely resolution of disputes."⁴

In particularly difficult areas where the problems involved are at the very cutting edge of the science of human understanding (this situation seems to occur in pharmaceutical patent cases or where the analysis of complex medical conditions is concerned) hot tubbing may prove to be a particularly difficult route by which to arrive at the truth of the matter. The hot tub process assumes that the best expert evidence is being given to the court on the issue but this might not necessarily be the case. If a weak or inarticulate expert is used, the judge may easily conclude that he prefers the evi-

³ "...the procedure should not be undertaken unless the judge has time to master the expert reports thoroughly." *Per Jackson LJ ibid.*

⁴ *Per The Hon Justice Peter McClellan, Chief Judge at Common Law, Supreme Court of New South Wales in a speech, 25 October 2008.*

dence of a more articulate expert from the other side⁵. If both experts are fairly inferior then the judge may have to reject all the expert evidence and reach his judgement on the other evidence available to him.

The education of the judge on the remaining expert issues is not the only duty of the experts in a hot tub session. The experts must also be properly prepared to meet the arguments of their peers, particularly those arguments that may carry equal merit to their own. The expert must steer a course between avoiding being an advocate for his client (the 'hired gun' approach) whilst at the same time adhering to the opinions he has formed provided that they are justifiable and honest – this despite any extremes of 'heat' that the hot tubbing process may generate. The good expert will of course be articulate and not passive and will avoid any sign of nervousness. Perhaps especially in a contest of apparently equally valid opinions where the judge is clearly going to have to make a difficult choice as to whose opinion he may prefer, any signs of reticence or nervousness may be taken as an indication of a lack of confidence in the answers being given by the expert. Above all the expert witness must avoid being unnecessarily conciliatory. The expert is not deciding the case and by making unnecessary concessions on aspects of his opinion in the more casual atmosphere of a hot tub session he may later find that he has caused critical damage to the weight that the judge may place on the whole of his evidence.

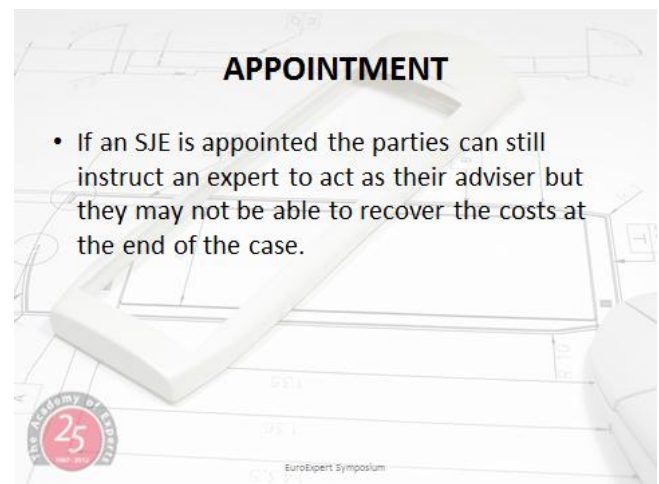
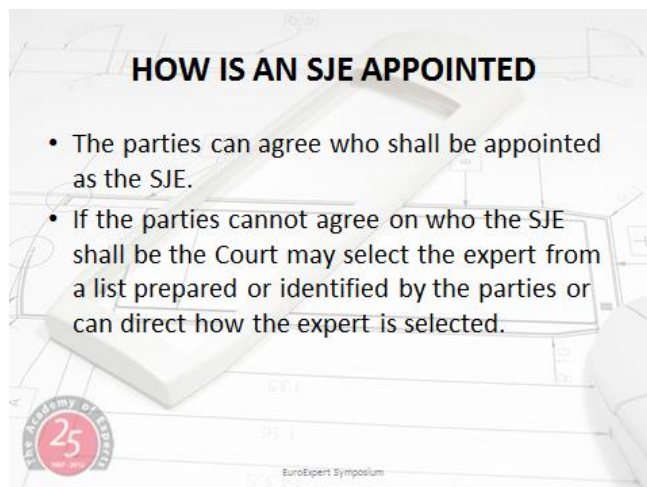
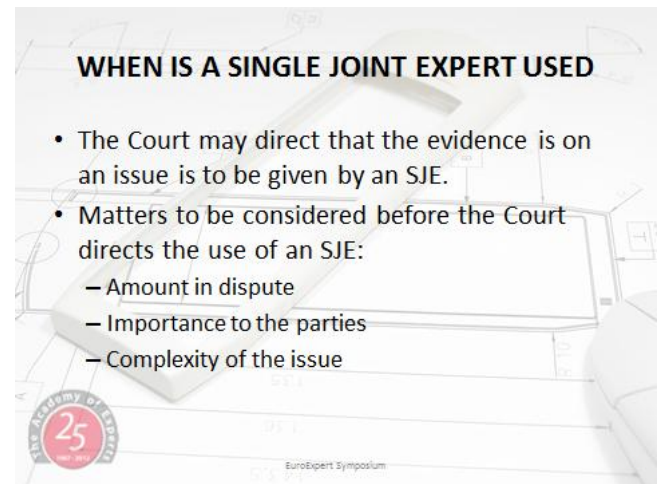
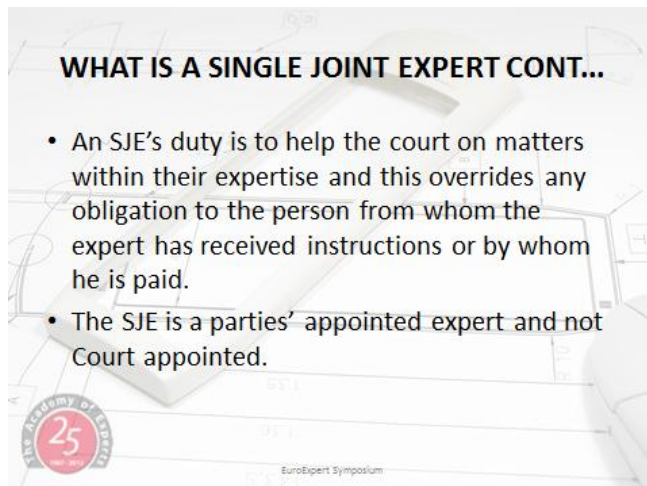
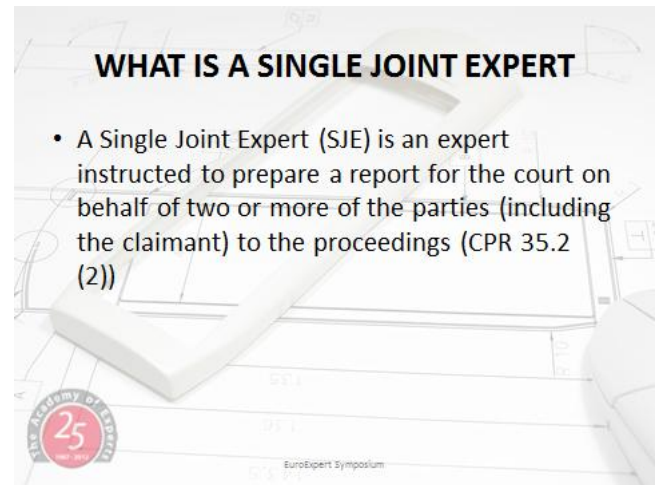
There are differing views as to the type of case that will be suitable for hot tubbing. The number, nature and complexity of the issues will be factors as will the importance of the expert issues but there is no presumption that it is only appropriate where the expert issues are complex or important.

In conclusion, hot tubbing puts experts firmly into the role of being of objective and independent assistants to the court on any difficult technical questions that arise rather than simply presenting their evidence in support of their clients' cases and defending their opinions under cross examination. There will inevitably be a loss of control for the lawyers and their clients over those aspects of the expert evidence that are presented in this way but against this there is potentially a great saving both in judicial time and in cost for the parties. As you will probably be aware, Apple and Samsung are currently engaged in litigation in several countries over alleged infringements of the patents to Apple's new iPhone; in Australia the experts for each side have been using the hot tub process. We shall see whether the use of hot tubbing in this high profile case will provide an example for other countries to follow.

⁵ If there is any serious issue as to whether an expert is properly credible or independent the concurrent evidence procedure "is unlikely to be suitable." (from the Guidelines for the Manchester Courts Pilot Scheme.)

Court Appointed Expert versus Single Joint Expert

A panel including The President EuroExpert and other Symposium Speakers



TERMS OF APPOINTMENT

- All instructing parties are jointly and severally liable to pay the experts' fees.
- All the SJE's invoices should be sent simultaneously to all instructing parties.
- The Court may limit the amount of experts fees and expenses (CPR 35.8 (4) (a)) and this should be included in any terms of appointment.



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INSTRUCTIONS

- Parties should ideally agree joint instructions for the SJE. If this is not possible then all parties may give instructions.
- Where separate instructions are given the parties should try to agree where the areas of disagreement are. All instructions must be copied to the other parties.



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SJE CONDUCT

- They should maintain independence, impartiality and transparency at all times.
- The experts report should be served simultaneously on all instructing parties.
- An SJE may be
- required to make different assumptions of facts and the report may therefore need to have more than one set of opinions on any issue.
- The SJE does NOT determine the facts this is the role of the Court.
- An SJE would not normally give oral evidence at a trial but if they do all parties may cross-examine them.



EuroExpert Symposium

The Academy of Experts

www.academyofexperts.org



EuroExpert Symposium

The Use of Experts in Arbitration

Dr. Zsolt Turán, President of the Budapest Chamber of Experts

Ladies and Gentlemen,

on behalf of the Hungarian Chamber of Expert Witnesses, I'd like to present to you the compliments of the hungarian colleauges.

My own professional field in expertise is the construction, the construction costs and prices, and the evaluation of real estates.

There are many disputes at law on these areas, in connection with

- the completion of technical requirements of the constructed buildings and structures,
- the completion of time, the deadlines,
- the prices and the accounting of additional works, supplementary works,
- the accounting of additional costs, etc.

The usual court proceedings need experts in all such cases. Usually, the expert must make a large discovering work – let say, a technical and financial investigation – in order to see clear, what was the intention, the real idea of the parties when they formulated and signed the construction contract, what was the real content of the system of contract conditions, what happened really in the construction process, and what is the result.

While the main role is the role of the expert, it is more and more usual that the parties agree in their contract, that in case of dispute, they ask expert(s) to decide the dispute.

In the last years, I was several times member of such arbitration committees. The range of these construction investments was between 30 – 100 million Euro, the completion time 2-3 years. The subject of the dispute, usually the price extension was in the range from about one to ten millions.

The work of such a committee needs 2 - 4 months, depending on the number of disputed claims and on the quality of the documents prepared. The honorar can be calculated on the basis of expert days, that was in these cases about 15-30 days pro committee member. (The processing time is not equal to the pure honorar-basis time). The required time and also the honorar is higher if the dispute and the connecting documents are not well prepared, if they are incomplete, and a lot of supplementary data and document is needed.

All these are much more favourable for the parties, for the Client and Contractor, – sure quicker and usually also cheaper – than the ordinary court way, which needs sometimes years.

The basis of arbitration is the agreement of the parties already in the contract, that they choose this way in case of dispute and they ask one or more expert to fulfil such an arbiter role. The parties may ask one person in full mutual understanding, but usually they select three persons: one from side A, another from side B, and a third one mutually.

Also in Hungary, the law allows and supports the operation such arbitrational solutions. The main solutions are the followings:

mediation, (this is not arbitration), - its rules are fixed in the law, a mediator can be anybody who the parties accept, if he or she is registered at the Ministry of Justice, as mediator, (any kind of university diploma plus a short trainig is the requirement, legal diploma or expert's position is not required). Expert beside a mediator can be anybody also without any diploma, or registration, if the parties accept him or her as an expert,

- the *Arbitration Court of the Hungarian Chamber of Industry and Commerce*, here the judges are elected by the parties, they are legal professionals, - lawyers, retired judges, they work in three-member boards, this is a highly respected organisation,
- the *Arbitration Committees*, containing experts, elected by the parties, according to FIDIC rules, the reputation of these committees is rapidly growing.

In each case, there are certain possibilities to go to state court if there was violation of law in the work of the arbiters.

FIDIC is the Federation Internationale des Ingenieurs-Conceils, an international federation of national ingenieur organisations. It published the customs of construction contracts in the so-called Red Book, Yellow Book, Silver Book, - these are the collections of usual detail rules of managing of works, of mutual cooperation of the parties, of rules of price calculation and accounting, and so on. These rules are much more detailed than the law, and the rules correspond to the construction practice. The Yellow Book concerns the turnkey projects, the Red Book concerns the construction projects accounted by detailed items, and so on. However, it is not yet investigated, do they correspond 100 %-ly to the national law also.

The application of this system of rules is advantageous for very complicated big projects where the connections between the Client, the Main Contractor(s), subcontractors, suppliers etc. is difficult to manage. A part of the named Books deals with the operation of the Arbitration Committees.

This way, if the contract of the parties refers to any FIDIC book, the rules to be applied can be studied there in the named Book.

If the arbitration is based on FIDIC, the members of the Arbitration Committee must know the rule books deeply and they have to analyse and judge the claims from the point of view of the rules.

If a committee member is not a practising expert witness, he or she is not well and up-to-date informed about the ordinary court practice so is not able to mix and use all these knowledges.

My position is a little bit more difficult, because I feel myself engaged, to recognise and prevent the problems, which can appear if the matter can not be closed on the arbitration level and goes later further to ordinary court. If there remain contradictions between the FIDIC based results and the governing law, these cause difficulties at the court. Because of that, I always try to take in consideration these expectable collisions between law and FIDIC, if they exist, and I try to form the result without collision.

The claims originate usually from modifications of the Clients's demands, of technical designs, from unknown situation discovered under the soil surface, sometimes from lack of the best proper material, from flood and very sever weather conditions, etc.

The Contractor has to formulate, to document and to support every claim.

The Committee has to examine every claim step-by-step. There are questions to be decided only by „yes” or „no”, and questions which need calculations, technical ones and price/cost estimations too.

Here you can see my practical summary sheet prepared for this process:

The translation of the Hungarian text of the sheet:

Name of the committee (project name, date)	
--	--

Summary sheet of the examination of a modification proposal	
date of the proposal	
No.	
Designation	
Place (building name, etc.)	
Summary of the explanation	
Claim of the Contractor: money (without VAT)	
deadline modification	days

Acceptance by the Client: - legal ground: - if exists, technical content (list of items): - quantities: - price:	
--	--

- Supporting (existing or not):	
- order from the Client:	
- order from an authority:	
- order from The Designer:	
- is the work technically necessary:	
- is the work carried out, (proved:...):	
- modification of designs, if it was necessary:	
- calculation of quantities:	
- cost forecast of differences:	
- unit prices (tender prices, price analyse):	
- cost documents, if required:	
- is the work on the critical path:	

Opinions of each arbitrator with explanation	
Arbitrator 1.	
2.	
3.	
Qualification of the work (it was in the cost forecast, additional, supplementary, not foreseen)	
legal ground	
sum (without VAT)	
influence on deadline	

Opinion of the Arbitrator Committee	
legal ground	
sum	
deadline modification	
signatures	

As the number of claims can be more hundred or even in the range of thousand, each claim has to have a separate documentation in a separate cover - the quantity of documents can reach the load of a small lorry.

Finally the Arbitration Committee gives a report of the examination and a summarized result.

This is obligatory for the Parties depending on their contract. Usually the result serves as the basis of an agreement, however, any of the parties is able to find another, more acceptable result.

EuroExpert - the way ahead

Nicola Cohen, President Euro Expert
Bernhard Floter, Secretary General EuroExpert

EuroExpert Core Curriculum for the Training of Experts

EuroExpert in its aims includes the development, promotion and convergence of and education in common ethical and professional standards for experts within the European Union, based upon the principles of high qualification. As part of this aim it has agreed a core curriculum for the training of expert witnesses. Experts are required to be "fit and proper" persons and both having and maintaining a high standard of technical knowledge and practical experience in their professional field. The curriculum is designed to enhance this.

- **Codes of Practice:**

National/Regional Code of Practice for Experts (this includes the principles of the EuroExpert Code of Practice)

- **Justice System:**

Overview of National Justice Systems including differences between the inquisitorial and adversarial system
Basic Law to include contract, tort, fees, advertising and liability

- **Procedure Rules applicable to experts:**

Criminal
Civil
Others, where applicable

- **Role & Responsibilities of The Expert:**

Appointment procedures
Terms of engagement
Conflicts of interest
Giving evidence including requirements for reports

- **Alternatives to the Court Process:**

ADR including methods such as mediation and expert determination
The role of expert in different processes

Language concerning the Use of Experts

Expert

A person having professional qualification(s) with special skills, technical knowledge and practical experience in one or more discipline(s).

1) The Expert in Court

Expert witness

An expert whose opinion on any matter within his expertise is used for giving evidence.

Court appointed Expert (CAE)

An expert witness appointed and instructed by the Court. The overriding or paramount duty is to assist the Court on the matters within his expertise.

Party Appointed Expert (PAE)

An expert witness appointed and instructed by one of the parties in a dispute. The overriding or paramount duty is to assist the Court on the matters within his expertise and this duty overrides any obligation to the party from whom he has received instructions or by whom he is paid.

Single Joint Expert (SJE)

As with the PAE except that the SJE is appointed and instructed by two or more parties involved in the dispute. The overriding or paramount duty is to assist the Court on the matters within his expertise and this duty overrides any obligation to the parties from whom he has received instructions or by whom he is paid.

Expert Adviser

The Expert is appointed by one of the parties as their consultant in the dispute.

Professional witness

A professional person, for example a doctor of medicine, who because of his professional knowledge is called as a witness of fact.

Expert evidence

Any evidence given by an expert in his capacity as an expert witness.

Litigation

The taking of legal action in court.

Dispute

Disagreement leading to legal action.

2) The Use of Experts out of court

Adjudication

Exercise of a power delegated by contract or statute to a third party to resolve disputes on an interim or final basis as they arise without recourse to formal arbitration or litigation.

Expert Determination

The use of an independent Expert to investigate the referred matters and to give his determination which becomes binding on the parties.

(Early) Expert Evaluation

The use of an independent Expert to investigate and give his Expert opinion on any matter referred to him jointly by the parties. Normally this process will be used by the parties to assist them in reaching a settlement or narrowing the issues.

Arbitration

The private judicial resolution of a dispute in a final and legally binding manner, by a neutral or independent person, other than a judge in court, who is usually selected by or for the parties on the basis of his expertise and reputation in the field of activity from the which the dispute stems. Arbitration is governed by statute in most jurisdictions.

3) Competence of Experts

Certified, accredited, recognized, registered, listed

The method by which an Expert can demonstrate his competence varies with different countries. In some countries experts do this by an application procedure by a private association. In other countries experts are registered by the courts having satisfied them of that they are competent and have the appropriate qualifications. In some countries third party certification by private or public authorities is the method used.

The experts are then termed recognized, accredited, certified or registered. In some countries these Experts are listed as qualified experts by courts, private and public authorities.

Practise of Experts

It is recognized that there are different systems of law and many jurisdictions in the world, any of which may impose duties and responsibilities which must be complied with by Experts (e. g. Code of practice, Code of Ethics, General Professional Principles).

The value of an Expert Service depends essentially on a variety of criteria. The most important principles include the:

- : independence
 - : impartiality
 - : objectivity and
 - : integrity
- of an Expert.

4) Expertise Services

Appointment

The Expert having been selected by the court, a public authority, lawyer or a party (private client) to do expert work is formally appointed and has the duties and responsibilities of the appointment.

Assignment

The project or work that involves the expert.

Instruction

Having been selected and appointed for a particular case the expert is instructed by the court or the public or private client, as appropriate. The appointer gives the details of the mission and sets out in the expert's instructions the questions the expert has to answer.

To give an opinion

To evaluate and draw a conclusion.

Expert Report

Opinion formally expressed after evaluation. A Report is a document that records (i) the instructions in respect of the assignment, (ii) the basis and purpose of the report, and (iii) the analysis and reasoning that have led to (iv) the opinion and conclusion arrived at by the expert. The type, content and length of a report will vary according to the intended user, legal requirements and the nature and complexity of the assignment.

First opinion

Giving a first or preliminary statement to a question stipulated.

Inspection

Evaluation by observation, measurement, testing or gauging to determine the extent which inspection criteria are fulfilled.

Test

Evaluation to determine the extent to which test criteria are fulfilled (e. g. variance comparison) or the results of the tests.

Audit

Evaluation to determine the extent to which audit criteria are fulfilled.

Loss adjusting

Investigating insurance claims or claims for damages and recommending how much money should be paid out.

Valuation

Estimation of worth.

Verification

Evaluation and confirmation to ensure the accuracy, correctness, or truth of information and/or data.

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The Speakers



Peter Laverick Taylor
Solicitor, Consultant to Hogan Lovells

Peter Taylor read Law at Cambridge University, and was called to the Bar of England and Wales in 1979. Upon qualification, he worked in-house for a marine insurer, the West of England P&I Club, dealing with charter party and contract disputes, both in litigation and arbitration, in a multitude of jurisdictions. He returned to private practice with Holman Fenwick & Willan in their Paris Office, where, as an employed barrister, he conducted litigation and arbitration in France, the UK, USA and francophone Africa in the fields of marine and reinsurance law.

After his return to London in 1987 and re-qualification as a solicitor, he joined Lovell White Durrant in 1993 as a Partner, and continued with both contentious and transactional work in the field of reinsurance in the UK, USA and numerous Continental European jurisdictions until his retirement from partnership in 2010.

In the course of his career, he has worked with experts of many countries, in both civil and common law systems, and has practical experience of the key differences in regulation and approach of these systems to the role of the expert in court and arbitration proceedings.

He is recognised by Chambers, the Legal 500, and Who's Who Legal as a leader in his field.

He now lives in the North of Scotland and consults part time for his former firm, now known as Hogan Lovells International LLP.

He also chairs the Disciplinary Committee of the Chartered Insurance Institute in London and has just retired from Vice Chair of the Insurance Committee of the International Bar Association.



Dr. Sergey Zakharov
President of the Russian Chamber
of construction expert witnesses



Michael Cohen
Chairman Emeritus
of The Academy of Experts

Michael Cohen is Chairman Emeritus of The Academy of Experts. He is an Expert, Registered Mediator, Chartered Arbitrator. He has a wide experience in expert matters and ADR in many jurisdictions and a regular course director and tutor.



Wolfgang Jacobs
Chief Executive
Bundesverband öffentlich bestellter
und vereidigter sowie
qualifizierter Sachverständiger e. V.



Charles Gardner
Secretary of The Academy of Experts

Charles Gardner is Secretary of The Academy of Experts and has served it in several capacities - as a member of Council, as chairman of the Members Vetting Committee and for a previous term as Secretary. Although not an expert, in his previous life as a solicitor he worked with experts from many different disciplines and can claim a good understanding of their role in the process of dispute resolution.

Dr. Zsolt Turán
President of the Budapest Chamber of Experts



Nicola Cohen
President EuroExpert

Nicola Cohen is Chief Executive of The Academy of Experts and President of Euro-Expert. She is the driving force underlying The Academy and its Chief Administrator. She has special responsibility for experts' and mediators' standards and selection, as well as providing day-to-day practical advice to a wide range of experts, lawyers and mediators.



Bernhard Floter
EuroExpert, Secretary General

Bernhard Floter graduated in business management at the University of corporate education, Ravensburg, Germany and the Ecole Supérieure de Commerce, Dijon, France in 1991. He worked as business consultant for the Association of German Chambers of Industry and Commerce in Bonn, Brussels and Tokio from 1992 to 1993.

Since 1994 he has worked as Chief Executive for the Institut für Sachverständigenwesen e. V., IfS, (Institute for expert affairs) which is primarily responsible for the training of experts in Germany. In co-operation with its 180 member-organisations the IfS has developed standards for the qualification of experts as well as requirements for experts' practises since 1974. These Standards are the basis for the public certification of experts by the state-appointed certification bodies in Germany (the chambers of architects, the chambers of crafts, the chambers of industry and commerce, the chambers of engineers, the chambers of agriculture).

In 1999 he was appointed Secretary General of EuroExpert. EuroExpert was formed as a not for profit organization in 1998 by The Academy of Experts (TAE), United Kingdom, The Fédération Nationale des Compagnies d'Experts Judiciaires (FNCEJ), France, and the Bundesverband öffentlich bestellter und vereidigter sowie qualifizierter Sachverständiger e. V. (BVS), Germany, as the founders. One field of activity of EuroExpert is the development, promotion and convergence of and education in common ethical and professional standards for experts within European Union, based upon the principles of high qualification; personal integrity; independence; impartiality; objectivity and respect for confidentiality.

Attachments



The Academy of Experts - Rules for Expert Determination

Part I: General Rules & Principles

Rule 1: Interpretation

1. “The Academy” refers to The Academy of Experts, 3 Gray's Inn Square, London, WC1R 5AH
2. References to the ‘Procedure’ are references to an expert determination conducted in accordance with the rules in Parts I & II.
3. The “Expert” is defined in Part I, Rule 4.
4. Words used in the singular include the plural and vice versa as the context may require. The masculine is taken to include the feminine.

Rule 2: Scope

Where an expert determination agreement provides for expert determination under The Academy's Rules, the Rules in force at the time the agreement is entered into shall be deemed to form part of that Expert Determination agreement.

Rule 3: Services of Notices, Communication and time calculation

1. Unless the parties have agreed otherwise, any notice or other communication that may be or is required to be given under these Rules shall be (a) in writing and delivered by first class post or transmitted by fax or email and (b) copied to the other party and the Expert.
2. For the purpose of calculating a period of time under these Rules, in the case of delivery by first class post, such period shall begin to run from 48 hours after the notice or communication is sent; in the case of a fax or an email sent before 4pm, such period shall begin to run from the following day.
3. Any reference to “days” in this agreement means working days and does not include weekends or public holidays.

Rule 4: Appointment of the Expert

The parties shall agree to the appointment of an expert (the “Expert”). If the parties are unable to agree on an Expert, The Academy will nominate 3 experts and the parties shall endeavour to choose the Expert from the 3 nominations within 14 days. If the parties are unable to agree on the identity of an Expert after 14 days, The Academy shall nominate the Expert. Either party may object to The Academy's first nomination by sending the reasons for his objection to The Academy in writing within 7 days of receipt of the notice of nomination. The Academy shall consider the reasons for the objection and may in its absolute discretion nominate another Expert. The parties shall accept the second nomination of The Academy or The Academy's decision not to nominate a further Expert as final.

Rule 5: The Expert

1. **Function:** the Expert shall act as an expert and shall determine the dispute before him. The Expert shall not act as an arbitrator or adjudicator, nor as an expert witness. The parties agree that the expert determination process is not an arbitration or adjudication within the meaning of any statute.
2. **Role:** the Expert shall adopt procedures suitable to the circumstances of the particular case so as to provide an expeditious, cost-effective and fair means of determining the dispute between the parties.

3. **Neutrality:** the Expert must act with impartiality, must have no vested interest in the outcome of the dispute and must not be biased in any way towards or against either party. If the Expert becomes aware of any circumstance which might reasonably be considered to affect his ability to act impartially and disinterestedly, he must inform the parties and The Academy immediately. The parties must then inform the Expert and The Academy within 10 days whether or not they agree that the Expert should continue the determination. If either party considers that the Expert should withdraw, The Academy will decide whether the Expert is to withdraw. The Academy's decision will be binding. A new expert will be appointed under Rule 4 of Part I.
4. **Evidence:** the Expert is not bound by the rules of evidence and may at his discretion receive and take into consideration any information submitted to him by either party in such manner as he thinks fit and may give such weight to the same as he considers appropriate.
5. **Final and binding:** the Expert's determination shall be final and binding on the parties. It shall be made in writing.
6. **Interest:** the Expert has discretion to award simple interest at such a rate and for such period as he thinks fit on any amount in dispute or any part of it and he may also award interest for late payment of the award.
7. **Payment:** unless otherwise expressly agreed in writing by the parties any amount payable under the determination shall be paid within fourteen days of the determination
8. **Liability:** the Expert shall not be liable for any act or omission arising from the Expert determination under these Rules unless such act or omission is shown to have been fraudulent or deceitful. The Academy and any officer, or employee or agent or authorised representative of the Academy shall not be liable for any such act or omission of the Expert unless it is shown that it was a party to fraudulent or deceitful conduct by the Expert.
9. **Indemnity:** the Expert shall not voluntarily (a) provide oral evidence or (b) divulge, produce or disseminate or provide details (in whole or in part) of any documents or information arising from the Expert determination to any person or body other than the parties. The Expert will only be released from the requirements of this sub-Rule where he is under a legal obligation to provide oral evidence or other details, including where he has been ordered to do so by a Court of competent jurisdiction.
10. **Incapacity, inactivity, resignation or death:** if the Expert is unable to reach a determination in accordance with a timetable acceptable to the parties or otherwise set out in Rule 1 of Part II, due to sickness, other incapacity or a conflict of interest arising after his appointment, the Expert shall withdraw from the determination, retain any interim payments that have been made in the course of the Procedure, forego the rest of his fee and arrange for the documents to be returned to the parties. The Academy will then appoint another Expert, if the parties wish. If the Expert is unwilling to reach a determination he shall withdraw from the determination, forego his fee and repay any interim payments already made in the course of the Procedure and arrange for the documents to be returned to the parties. The Academy will then appoint another Expert, if the parties wish. If the Expert dies during the course of the determination, the Academy will use its best endeavours to ensure that the parties' documents are returned and will appoint another Expert if the parties wish.
11. **Discretion:** at the request in writing of either party, and either with the agreement of all other parties or of his own motion, the Expert shall have discretion (a) to amend the time limits set out in Parts I and II of these Rules and/or (b) to

amend any of the Procedural Rules in Part II of these Rules. The Expert's decision as to his exercise of this discretion shall be final.

12. **Consultation:** unless otherwise determined by the Expert and agreed with the parties, no one party or anyone acting on one party's behalf shall communicate with the Expert in the absence of the other party. The Expert must not consult with a party other than in the presence of the other party except where a party, having received a notice under Rule 6(1) of Part II, has failed to make a written submission or appear at a meeting.
13. **Disclosure:** except as provided in Rule 5 of Part II, the Expert must disclose all information and documents received from any party to all other parties.

Rule 6: The Determination

1. **Law:** English law applies to the determination.
2. **Language:** the determination shall be conducted in the English language and the parties will provide to the Expert, at their own expense, translations into English of any documents and communications in a foreign language, if requested by the Expert.
3. **Confidentiality:** each person involved in the expert determination shall maintain the confidentiality of the expert determination and may not use or disclose to any party the determination or any information concerning, or obtained exclusively in the course of, the expert determination except to the extent that: (a) the parties have agreed otherwise in writing (b) the information is already in the public domain (c) disclosure is necessary in connection with legal proceedings relating to the expert determination or (d) disclosure is otherwise required by law.
4. **Slip rule:** where the Expert's determination contains a clerical mistake, an error arising from an accidental slip or omission, a miscalculation of figures or a mistake in the description of any person, thing or matter, or a defect of form the Expert may correct the determination.
5. **Costs:** unless otherwise agreed between the parties, each party shall pay its own costs of or incidental to the Procedure. Unless otherwise agreed in writing between the parties, the parties shall be jointly and severally liable for the costs of the Procedure, and shall pay those costs in equal shares.

Rule 7: Procedure

1. The Procedure will be as specified with the Rules listed in Part II.
2. The Rules set out in Part II may only be varied by the written agreement of (1) all the parties to the dispute and (2) the Expert as provided for in Rule 5 (11) of Part I.
3. A party who becomes aware of any non-compliance with the Rules in Part I or II must object in writing within 14 days of the time at which he became aware or should have been aware of the non compliance, or he will be deemed to have waived his right to object.

Part II: Procedural Rules & Requirements

Rule 1: Timetable

1. The following timetable is subject to Rule 5(11) of Part I: the timetable shall be variable at the discretion of the Expert.
2. Within 14 days of the date on which the Expert accepts appointment, the claimant shall provide the following to any other party and the Expert: (a) a written document setting out the nature of the dispute, the legal and factual issues involved, his submissions in relation to those issues and the quantum of his claim; and (b) all documents and other evidentiary material on which he relies ("the Claim").
3. Within 14 days after receipt of the Claim, all other parties shall provide any other party and the Expert with: (a) a written document indicating whether or not he agrees with the claimant's description of the dispute and, if not, his statement of the nature of the dispute (including any cross claim), the legal and factual issues involved in the Claim and any cross claim, his submissions in relation to those issues, and the quantum of any cross claim and (b) all documents and other evidentiary material on which he relies ("the Response").
4. Within 7 days after receipt of the Response, any party may provide to the Expert and the other party: (a) a written document indicating whether he agrees with the Response and if not why he disagrees; and (b) any documents or other evidentiary material in reply to the Response and/or the cross claim ("the Reply").
5. If a cross claim is made under Rule 1.3 of Part II then the cross claimant may serve a reply to the written material served in response to such a cross claim under Rule 1.3. Such reply shall be served within 7 days of receipt of the Response under Rule 1.4.

Rule 2: Meetings/hearings

1. If he considers it necessary, the Expert may at any stage hold a meeting or teleconference/web conference with the parties to clarify the issues in dispute and make such orders as he considers necessary for the fair and expeditious determination of the dispute.
2. All parties will be given at least 7 days notice that such a meeting/teleconference/web conference is to be held.
3. At least 3 days before such a meeting or teleconference/web conference the Expert must inform the parties in writing of any specific matters to be addressed at the meeting.
4. The Expert may also hold a substantive hearing if he considers it necessary to determine the dispute.
5. All parties will be given at least 10 days notice that such a substantive hearing is to be held.
6. At least 5 days before such a substantive hearing the Expert must inform the parties in writing of any specific matters to be addressed at the hearing.

Rule 3: Expert evidence

1. Where a party or both parties has considered it desirable to engage an expert, the Expert may, if he considers it appropriate, direct that the party's or parties' expert(s) attend a meeting with him so as to narrow the issues in dispute. The

Expert shall have total discretion over the procedure adopted and the recording of any decisions made at such a meeting.

Rule 4: Powers of the Expert to seek further evidence

1. The Expert may at any time, on his own motion or at the request of a party, allow or require further evidence, including the submission of documents or other information in a party's possession or control.
2. The Expert may, on his own motion or at the request of a party, require statements or appearances by witnesses for either party.
3. The Expert may, on his own motion or at the request of a party, inspect or require the inspection of any site, property, product or process as he deems appropriate.
4. The Expert may, on his own motion or at the request of a party, carry out such non-destructive tests as he deems appropriate.

Rule 5: Withholding information by reason of confidentiality.

1. A party may invoke the confidentiality of information it wishes or is required to submit for expert determination. The party shall submit the information to the Expert stating the reasons for which it considers the information to be confidential. If the Expert determines that the information is to be classified as confidential, he shall decide under which conditions and to whom the confidential information should be disclosed.

Rule 6: Power to impose sanctions

1. Where a party has failed to provide the Expert with information which he has requested or has failed to attend a meeting, the Expert may serve on the party a notice stating that unless the information is served within 7 days or the party attends a meeting on a set date he will proceed to determine the matter in the absence of the information/ the meeting.
2. The Expert is entitled to draw adverse inferences, where appropriate, from the non-production of information or non-attendance at a meeting.
3. The Expert shall determine the dispute on the basis of information that is before him.

Rule 7: The Determination

1. As soon as reasonably practicable after receiving the submissions and evidentiary material from the parties under Rule 1 of Part II, the Expert shall determine the dispute between the parties and notify such determination in writing to the parties.
2. Unless otherwise agreed by the parties and communicated to the Expert in writing at the time of his appointment, the Expert will not give reasons for his determination.
3. The determination shall be delivered to the parties upon payment in full of the Expert's outstanding fees and expenses. If one party pays the Expert's fees and expenses when the other party should have paid all or part of that sum, then such amount shall be recoverable forthwith by the paying party from the other party, unless otherwise agreed in writing by all the parties.

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