COURT EXPERTS’ CONTRIBUTION TO AN EFFICIENT DISPUTE RESOLUTION

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Court experts advise judges in technical issues and thus support them in finding a fair verdict. That makes them a key pillar of the legal systems of many European countries. The appointing system varies in the respective EU Member States. Additionally, the appointed experts from the traditional national systems, the number of experts appointed according to EN ISO/IEC_17024 increases. Currently, some courts and law firms evaluate the opportunity to create a unified expert register for some kinds of disputes. Italy and Germany both have a national system in appointing experts for technical advice in court cases which differs in some points, but request, among others, a high level of knowledge and personal integrity. The authors compare the national expert systems and analyze the relevance of the new European expert appointment according to EN ISO/IEC_17024. They consider the pros and cons and discuss the creation of a unified expert register for construction disputes. Furthermore, the authors analyze some educational programs able to ensure a body of professionals of excellence for the best resolution of technical disputes. As a conclusion the authors propose standards for a unified expert register following the EN ISO/IEC_17024 accreditation criteria, in order to guarantee a high level of knowledge, personal integrity and professional behavior.

Keywords: Litigation, Engineering knowledge, Unified expert register, EN ISO/IEC_17024.

1 INTRODUCTION

Finding a fair verdict in a litigation, especially in construction law, requires a variety of skill. First of all, courts need legal knowledge to decide in a conflict. Judges are the courts’ law experts to fulfill this requirement. But, in a dispute where technical examinations are relevant to settle the conflict and the parties provide a large number of technical documents to the court, judges need guidance of engineering experts. That means, often in construction disputes, the judge is not able to render a fair verdict without the expertise of specialized engineer (Speight 2008).

In several European countries, court experts are a significant factor for the functionality of the legal system (Quapp and Holschemacher 2023). To ensure that the best engineers support judges in legal disputes, the courts select experts by their excellence, personal integrity, and perfect professional behavior. A successful guiding principle for selecting court experts in the last years was to require the proof of passing the appointment procedure of the respective country. Nevertheless, construction projects and resulting disputes become more and more international. That may require court experts from other countries. The question is how to secure their quality in the interest of the functionality of the legal system.
Additionally, to the appointed experts from the traditional national systems, the number of experts appointed according to EN ISO/IEC 17024 increases. In compliance with European Law, these experts shall be treated legally equal with experts appointed according to the national systems of the European Member States. Nevertheless, there are doubts whether experts appointed in other countries or from private accreditation agencies may are able to fulfil the requirements of high quality and personal integrity.

To ensure the high quality of court experts in future, courts and law firms currently evaluate the opportunity to create a unified expert register for some kinds of disputes. The authors discuss, if a unified expert register will support the legal system in the European Member States. But first, the paper shortly explains the different systems of appointing court experts.

2 SYSTEM OF APPOINTING COURT EXPERTS

In Europe, each country uses its own system in appointing court experts. In the following, the authors present two national system and the European system.

2.1 The Italian System

In Italy, the regulation of the Judge expert is contained in the Code of Civil Procedure (Articles 61-64 c.p.c.; Articles 191-201 c.p.c.; Articles 13-23) and in Article 14 of Decree Law No. 83 of 2015 (Italian Parliament 2023).

Article 13 of Implementing Provisions of the Code of Civil Procedure (Provisions for the Implementation of the Italian Code of Civil Procedure 2022) stipulates that a roll of technical consultants shall be established at each court. The roll is divided into categories, by discipline or group of disciplines.

By Article 14, of Decree Law No. 83 of June 27, 2015, converted by Law No. 132 of August 6, 2015, applications for inclusion in the roll of court-appointed technical consultants, in civil litigation, and in the roll of court-appointed experts (in penal litigation) are inserted by telematic means, and the same rolls, in each judicial office, are maintained exclusively by telematic services.

Every year, engineering consultants, regularly subscribed in the corresponding Order (equivalent to the Chambers in Germany), or scientific experts, can apply for their nomination to the official roll of experts in the court of their residential province. A specific commission selects the subscribing candidates, examining curricula, publications, technical experiences, and continuum education courses in forensic engineering with a minimum of 30 hours (CNI Training Regulations 2013).

To be appointed in the courts’ official roll and to remain registered, the applicant must also prove that he/she is provided with the objective requirement of "special competence", which means technical experience - above average - in the professional sector for which registration is requested. For registration, the additional subjective requirement of "mirrored moral conduct" is necessary (Provisions for the Implementation of the Italian Code of Civil Procedure 2022).

In Italy, judges usually appointed their expert from an official roll of expert consultants specific to each court. Until last year, each court had its own roll, and judges could appoint experts only from the roll of their own court, except in some cases where, by decree of the President of the Court, an expert from another roll could be appointed for specific expertise or to ensure independence of professionalism with respect to their own territory.

In turn, Legislative Decree No. 149 of October 10, 2022, provided for the establishment at the Ministry of Justice of a national list of court-appointed technical consultants, divided into categories and containing the indication of the areas of specialization of each category. This
national list automatically includes records of appointment orders; this list is, moreover, accessible to the public through the telematic services portal. Finally, Decree No. 109 of the Minister of Justice of August 4, 2023, approved the regulations on the identification of the requirements for registration on the register of technical office consultants, as well as rules for the formation, maintenance and updating of the national list of technical office consultants (Italian Parliament 2023). On December 5, 2023, provisions on the computerized maintenance of the CTU and expert witness rolls were published, which are effective as of January 4, 2024. In order to ensure the implementation of the provisions on the CTU roll, appraiser roll and national list, the ministry has created a single portal called the "CTU Roll, Appraiser Roll and National List Portal," through which it will be possible for professionals to submit applications for registration in each district roll and on which all useful queries can be made to obtain data on technical consultants registered in the individual district rolls. Access to the portal will be made available starting next January 4, 2024 (Italian Parliament 2023).

2.2 The German System

At German courts, expert lists exist, for which each expert is allowed to apply. Nevertheless, the judge hearing the case is free in selecting an expert to be involved, section 404 (1) German Code of Civil Procedure (German Parliament 2005). The judge is not obliged to select an expert from the list. A good guiding principle for judges in selecting an expert is to require the proof of being publicly appointed and sworn. Publicly appointed and sworn experts shall be the first choice, unless particular circumstances require selecting another person, section 404 (3) German Code of Civil Procedure (German Parliament 2005). If experts have been publicly appointed for certain types of reports, other persons shall be selected only if particular circumstances so require, section 404 (3) German Code of Civil Procedure (German Parliament 2005). The professional quality of the publicly appointed and sworn experts has been secured by public law bodies (such as engineering chambers, chambers of commerce and industry, or chambers of crafts) which promotes public trust in the expert’s services (Quapp and Holschemacher 2023).

Engineers may apply for the title “publicly appointed and sworn expert” by an authorized body (for example by an engineer’s chamber, a chamber of commerce and industry, or a chamber of crafts). These public law bodies regularly control the experts’ knowledge and professional experience in the required field. Additionally, the applicants are tested for personal suitability. Publicly appointed and sworn experts have to perform their expert duties independently, free from directives, in person, impartially and conscientiously.

2.3 The European System

Since the introduction of EN ISO/IEC_17024 as a European standard in 2003, new certification agencies have been introduced in order to guarantee a professional accreditation. The certification criteria suggested by EN ISO/IEC 17024 currently are applied by several certification bodies in Europe. In Italy, since 2015, the National Council of Engineers (CNI) support the establishment of a competence certification body and created the Certing Agency, a certification body accredited according to UNI CEI EN ISO/IEC 17024 by Accredia, which issues the certification of experts covering 21 engineering fields. At the same time, since the immediate post-war years, the CNI has historically been involved, in collaboration with its European counterparts, in the action of mutual recognition of competencies and the free movement of engineers on the European continent.

Around fifteen years ago, EN ISO/IEC_17024 was implemented as the German standard DIN EN ISO/IEC 17024 (2012). From that year on, the public law bodies lost the monopoly to control
the quality of expert services in Germany. As the result, publicly appointed and sworn experts as well as certified experts by ISO/IEC 17024 are already considered equal by the authorities.

On 15 July 2022, the Enginet project, the alliance of European agencies for the certification of engineers' competencies was developed. The project suggests overseeing all certification schemes for engineers which, in many European countries, represent the real gateway to the profession. The European agencies that built up Enginet are Engineering Council (Great Britain), Kivi (Holland), Ipfe (France), Aipe and Aqpe (Spain), Ordem dos Engenheiros (Portugal), and Certing (Italy). Enginet’s aim is a mutual recognition and development of engineers' mobility in Europe. The French administration has completed the complex bureaucratic process for the recognition of this new entity, which will be based in Toulouse/France. After becoming a legal person, Enginet now can begin to operate, in particular by overseeing all certification schemes for engineers which, in many European countries, represent a gateway to the profession.

Enginet aims to recognize and enhance the skills of engineers in the international scenario, overcoming the limitations imposed by the specific regulations of each country, working on a common platform to recognize the skills of professionals working in the field of engineering and operating in the European market. In the following, the authors explain at an example, in which cases a unified expert register may be beneficial.

3 THE UNIFIED PATENT COURT (UPC)

Patent issues often affect several countries and require a unified European Court. Since around ten years, the Unified Patent Court (UPC) exists which is a new European court set up to decide on the infringement and validity of Unitary Patents and "conventional" European patents under the Agreement on a Unified Patent Court (UPC Agreement) of 19 February 2013 (UPC 2013). Normally, national courts and authorities decide on the infringement and validity of European patents. In practice, this can lead to difficulties when a patent proprietor wishes to enforce a European patent in several countries or when a third party seeks the revocation of a European patent. Parallel litigation in different countries is expensive and there is a risk of diverging decisions and a lack of legal certainty. The UPC Agreement (UPC 2013) addresses these shortcomings by creating a specialized patent court with exclusive jurisdiction for litigation relating to Unitary Patents and European patents and harmonizing the scope and limitations of the rights conferred by a patent, and remedies available beyond EU Directive 2004/48/EC (Enforcement Directive) (European Parliament 2004). The UPC is an international court common to currently seventeen EU Member States, in which the Agreement on a Unified Patent Court (UPCA) (UPC 2013) is in force (see Fig. 1). The UPCA can be ratified by any of the other seven EU Member States, which have signed it at any time. Furthermore, any of the remaining EU Member States could still accede to it anytime. The Court comprises a court of first instance, a court of appeal, and a registry. In addition, a Patent Mediation and Arbitration Centre is foreseen to foster amicable settlements. The court is composed of judges from all over Europe. The panels comprise both legally and technically qualified judges with great expertise in patent litigation.

During a UPC proceeding, a party may provide written expert opinions in the proceedings which is the majority of evidence. But it may also request that an expert shall be heard in person. In order to do so, the party must apply for the hearing of an expert in person, with the particular reasons why the expert should be heard in person, including the facts which the party expects the expert to confirm pursuant to Rule 176 of the Rules of Procedure of the Unified Patent Court (UPC 2022) (also applicable to the parties’ experts according to Rule 181).
The expert may also be heard in person if the court orders it of its own motion, or where a written statement is challenged by the other party pursuant to Rules 177 and 181 of the Rules of Procedure of the Unified Patent Court (UPC 2022). The questioning of experts is under the control of the court and is limited to what is necessary in accordance with Article 53 of the UPCA. The court provides an indicative list of court experts. One can rightly assume that this additional means of evidence, which the court can implement itself, is more likely to be used when no technically qualified judge is on the panel. UPC experts must be in the official register of experts in the court of their residential province. An EN ISO/IEC 17024 accreditation is not mandatory.

4 UNIFIED EXPERT REGISTER

In international construction disputes, trust in the experts’ quality may be reduced. That is why the implementation of a unified expert register may help judges in selecting a highly qualified and reliable technical court expert.

To fulfill the quality requirements, it is necessary to create an accreditation system which compares the experts’ professional competences, for example by passing an examination. Furthermore, the system has to evaluate if the expert can proof a longstanding professional experience, a liability insurance, financial autonomy and impeccable professional conduct. It is absolutely necessary that the accrediting body acts free from economic interests to build up trust in its accreditation decisions and in the quality of the accredited experts. It would be helpful and
could support the trust in the accrediting institution if they are under supervision of state authorities.

5 CONCLUSIONS

Court experts are an important factor for the functionality of the legal system of many European countries. To guarantee a fair verdict, judges have to rely on the support of the best engineers with excellent knowledge, personal integrity and impeccable professional behavior. Currently, court experts mostly will be appointed in national procedures that ensure their quality. In a globalizing world, international trust in expert appointing systems become more and more important. A unified expert register with comparable accreditation criteria, free from economic interests, and supervised by European Member State authorities, may support the development of trust and acceptance of court experts’ opinions and, by this, the whole European legal system.

References


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