The Palais de Justice located in the Île de la Cité in central Paris

The critical role of judicial experts in construction litigation and arbitration in France

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To a greater extent than is typical in the common law system, judicial experts play an important role in deciding construction disputes in civil law countries such as France. Where the dispute is to be resolved in the courts of such countries or by arbitrators trained in the civil law tradition, the role of the judicial expert merits the attention of dispute resolution counsel in order to avoid unpleasant surprises and unexpected costs.

In order to understand the major role played by a special body of 'judicial experts' in litigation and, to a certain extent, in arbitration in France and several civil law countries having the same judicial tradition, it is first important to outline four key features of the judiciary.

First, most judges in France and the civil law systems influenced by France typically have no particular expertise in construction

matters. They are professional judges whose professional career often begins at the age of 25 as court assistants. They are highly qualified in general law and procedure and, with few exceptions, they are appointed after extensive training from one very selective and highly regarded school only: the National School of Magistrature in Bordeaux. Nonetheless, they are not specialists in construction law. Indeed, only a few leading courts in France have a special department for construction matters.

Since there is little training at the judiciary school in construction matters and since, with few exceptions, those professional judges do not stay more than three or five years in a specialised department, the vast majority of the judges are ignorant of the technical and engineering aspects of the construction cases that come before them.

Secondly, it is exceptional for hearings in even the most complex cases to last more than a few hours. This is due, inter alia, to a substantial difference with the common law world in producing evidence, and a full chapter of the French Civil Procedure Code regulates the process of producing judicial evidence.[1] Even where the Code of Civil Procedure permits witness evidence, it is highly exceptional to see witnesses in the court room and the inquisitorial procedures of witness examination and cross examination in the common law sense are not permitted.

Thirdly, common law discovery procedures are not allowed. The rules of evidence are organised in a very precise manner. Although it may be possible to obtain an order from the court directing a party to produce a particular document, sometimes under the penalty of a daily fine, after a certain period of time the fine is no longer due. If the document is not produced, the court will simply take this lack of evidence into account in its final judgment.

Fourthly, in this framework and in the interest of good justice, it is essential for judges both to have the benefit of external expertise and to ensure that their reliance upon this expertise is the result of a process that is fair to the parties involved. Although nothing prevents a party from being assisted by its own technical expert, the judges generally do not rely on party-appointed experts since there is a specific institution dedicated to identifying highly qualified professionals: the judicial expert system.

The judicial expert must be a highly experienced and well-recognised professional who, after many years of practice, may apply for the status of judicial expert. This status is very strictly regulated at various levels, in order to ensure professionalism, objectivity and fairness in the judicial process.

Those regulations[2] deal with professional qualifications, conditions of certification and professional independence.[3] In addition, the judicial expert is required to be neutral and impartial.[4] The expert may not receive compensation directly from a party,[5] must observe the adversarial nature of proceedings,[6] and must comply with a duty of care relating to potential conflicts of interest. The expert must be sworn in[7] and once this has taken place, he or she becomes an authentic auxiliary court officer. In addition, their terms of reference are defined by the tribunal, often based on standard terms[8] (this does not prevent the parties from requesting, through interim orders, amendments to the terms of reference taking into account the particular circumstances of their case).

The net effect of these four features of the judicial system is that the judicial expert plays a leading role in court decisions in the vast majority of construction disputes in France.

As a practical matter, the judicial expert organises meetings with the parties as well as site and other visits, requests documents from the parties, and drafts a detailed report for the tribunal, including exhibits. This process may last for several months (and sometimes more depending on the complexity of the case).

Although the judicial expert has no authority to advise the judge as to the ultimate outcome of the case, his or her influence on the decision is critical since, at the request of the judge, he or she will have identified all the relevant facts and given his or her technical opinion; this is usually the basis for assessing both liability and quantum.

When the judge receives the judicial expert's report, he or she cannot amend it, and the expert is very rarely examined during the hearing. However, this does not prevent a party from interpreting the expert's report or challenging facts contained within it, but it is for the party's lawyer to make all the arguments during the hearing.

That judges largely defer to the expert is confirmed by the fact that, in most cases, the judge will simply confirm the conclusion of the expert's report,[9] even though the report is not, strictly speaking, binding upon the judge.[10]

Nonetheless, the judge is not powerless if he or she has doubts regarding the performance of the judicial expert, and in some cases the judge participates in the expert's investigation. For instance, the judge may attend meetings organised by the expert and request explanations.[11] In addition, the judge may, if he or she considers it useful, hear evidence from a witness upon the request of the judicial expert or any party.[12] The expert may also request a hearing by the judge.[13] Lastly, the judge may always request that the expert complete, clarify or explain the content of his or her report and its conclusions in writing or at the hearing.[14] If the judge believes that the report lacks clarity, he or she may hear the expert, the parties being present or summoned.[15]

Since judicial experts are usually highly qualified regarding technical matters, with a very strict and regulated status, including some procedural and judicial training in order to be an 'auxiliary of justice', the system of judicial experts is generally considered by the parties as a fair and efficient system to resolve disputes at minimal cost.

However, the system of judicial experts is not without its critics, especially regarding the method for producing evidence and avoidance of conflicts of interest. In this respect, the French system could learn from the common law world. For instance, the following improvements are often advocated:

- a party should be authorised to request the hearing of a witness to facilitate the judge's understanding of important technical aspects in complex cases. There is no doubt that in several situations, well-organised debates with the judicial expert at an appropriate time would be in the interest of good justice;
- the judicial expert should transmit his or her draft report to the judge and the parties for comments, and in time for the parties to review the report in preparation for the hearing; and
- a party-appointed expert should be permitted to comment in writing on the final report of the judicial expert before the hearing.

In conclusion, in the French legal system, which has influenced several other civil law countries, the judicial expert often plays a leading role in the judge's decision. While not without its critics, the system is one that lawyers from other jurisdictions – particularly common law countries – need to understand when advising clients with disputes pending in civil law countries or before arbitrators with civil law backgrounds.

Notes

1 Code of Civil Procedure, title VII: the judicial administration of evidence, chapter V: measures of investigation performed by a technician (Arts 232 to 284–1).
2 Law No 71–498 of 29 June 1971 and Decree No 2004–1463 of 23 December 2004 relating to judicial experts.
3 Art 2 of Decree No 2004–1463 of 23 December 2004 relating to judicial experts.
4 Art 237 of the Code of Civil Procedure.
5 Art 248 of the Code of Civil Procedure.
6 Enforcement of Art 16 of the Code of Civil Procedure, for instance, cassation court 2nd civ, 20 December 2007, No 06–14439 relating to the respect of adversarial principle when all the parties have been convened to the expertise meetings; cass. 2nd civ, 8 April 2008, No 02–11619, Bull civ II, No 147 relating to the respect of the adversarial principle by transmission of the statements and documents to the parties.
7 Art 6, Law No 71–498 of 29 June 1971 relating to judicial experts.
8 Arts 273 to 281 of the Code of Civil Procedure
9 Cass 1st civ, 12 November 1985, No 83–17061, Bull civ I, No 299: 'considering, by second and third part, that if the judge is not bound by the conclusions of the technician, he is free to agree with them and to appreciate in its sovereign capacity their objectivity, their value and their scope.'
10 Art 246 of the Code of Civil Procedure.
11 Art 241 of the Code of Civil Procedure.
12 *Ibid.*
13 Art 245 of the Code of Civil Procedure.
14 *Ibid.*
15 Art 283 of the Code of Civil Procedure.

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