The Corpus Iuris Civilis as a common root of European legal systems

Reminiscence of the
EUROEXPERT- Symposium 2005 in Vienna – An Austrian view

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To begin with I like to confirm that this meeting showed to what an extent the similarities of European national rules concerning the legal position of expert-witnesses or judicial experts prevail the differences. Reminding the very useful talks during this conference I also realised some difference between the point of view of the representatives of the Academy of Experts, London, and the opinion of some representatives of continental expert associations. Therefore it might be helpful to give a short reference to the common root of our legal systems.

The reports of the representatives of the national associations on the EUROEXPERT-conference 2000 in the Spanish capital allow to derive an almost unanimous definition of the expert in judicial proceedings. Namely as a person who is qualified in a special field and competent

to discover and distract factual information,
to analyse and consider the facts according to his professional knowledge and experience and , finally, to offer an impartial opinion to the court.

The reason for this correspondence of the basically equal position of experts in court are the common historical roots of our legal systems. The most important basis of the European legal systems is the ROMAN LAW, as compiled in the **Corpus juris civilis** in the years 530 to 534 during the reign of emperor Justinianus. This comprehensive Corpus of rules and commentaries was out of conscience and practise during the turbulent years of the migration of peoples in Europe. But from the end of the 11th century onwards the universities of BOLOGNA, PARIS, OXFORD and CAMBRIDGE and others began to teach Roman law and thus the Corpus Juris Civilis came again into force as jus commune besides and subsidiarily to the local laws. European legal scholars being trained in Roman law used, adapted and developed it especially on the continent. And at the end of the 18th century the many and partly inconsistent doctrines of Roman law were brought into a unified and classified framework.

The time for packaging the rules of private law as well as those of the procedural law exhaustively into codes had come. But the period of enlightenment was a climax of nationalism and therefore the codes were national codes. Quite important were the French codes, namely le CODE CIVIL from 1804 better known as Code Napoleon and le Code de Procedure Civil from 1806, because they began to influence other continental codifications because of their concise systems and libertarian principles.

Integrated in these codes were Teutonic elements on one hand and Slavonic elements on the other hand. The mentioned evident common understanding of the expert’s task in court and the mentioned Roman Law as an important root of our legal systems shall allow us to find the way to the convergence of the legal position of sworn-in experts in European civil proceedings.

I admit respectfully that the Anglo-Saxon procedural system spread to North America as well as to the Commonwealth of Australia and other countries whereas the Spanish system was transferred to South America. The Austrian procedural rules yet never emigrated the boundaries but had been codified for several European territories of different languages and cultures (Teutonic, Slavonic and Romance). Therefore I suppose that a short survey of the legal background and the cornerstones of our system may be helpful in our discussion.

The legal rules concerning the sworn in judicial expert and the evidence given by him are

- the paragraphs 351 – 367 of the Austrian Civil Procedure Code from 1895, which has been amended several times in the meanwhile
- the Court-Certified Experts' and Interpreters' Act from 1975
- and last but not least the Witnesses' 'Experts and Interpreters' Compensation Act of the same year.

These rules can be downloaded from "bka.gv.at" link Rechtsinformationssystem Bundesrecht.

The essentials of it are:
Under Austrian procedural law it is the competence of the judge to appoint one or several experts in criminal cases as well as in civil cases. For the same materia there is usually only one expert called in. If several experts are appointed and each of them for a different field, the judge may direct them to cooperate under the coordination of one of them. He may also instruct them to do their work sequentially.

The appointed expert is bound to the so-called judicial order of evidence and to the detailed instructions given by the tribunal. If there are any doubts about the task the expert must ask for judicial advice.

The appointment entitles the expert to receive his fee from the state, that is to say in Austria from the Republic. The fee is assessed by the court according to the rules of the before mentioned Compensation Act. From the parties' point of view these costs are part of the proceeding's expenditures.

The appointment by the tribunal is a public-law assignment. But neither the generally sworn-in nor the occasionally sworn-in expert becomes a tribunal assessor. He is just an auxiliary body of the court. And he must strictly restrain from appreciating the truthfulness of different evidence. The expert-opinion is an autonomous means of testimony besides witnesses, interrogation of the parties, documents and prima facie evidence in loco.

The expert-opinion is freely considered by the Court which may adopt or abandon it. In any case the issued judgement comprises a detailed consideration of evidence.

Experience shows that expert opinions are seldom rejected and if they are then only because of

- incomplete findings of the facts
- wrong or insufficient analysis
- lack of experience or
- illogical conclusions.

The last three decisions are to be based on a superior-level opinion commissioned by the court.

The parties may challenge the expert himself and also his opinion. The expert-witness can be replaced for the same reasons for which a judge can be replaced. Advocates who are not fond of the opinion scarcely miss the slightest opportunity to object to the expert's impartiality.

The expert opinion can be charged by the parties in the hearings, or the parties may present a privately commissioned expert-opinion as a documentary means of proof, which the court has to consider.

Under Austrian civil law the liability for an incorrect expert-opinion in Court does not differ from the common liability of counsels and experts in general: that is for any degree of carelessness. A suit for indemnification may be commenced by the parties against the expert-witness, but not against the state.

According to a EU-guideline generally sworn-in and court-certified experts in Austria are obliged by national law to take out and to maintain an insurance to cover a damage of at least 400.000 Euros.

Finally I would like to affirm that we appreciate the before mentioned Compensation Act. It provides the expert in general a fee equal to his income in his normal profession. There are of course some exceptions in regard to social aspects which reduce the expert's normal fee to about 80 or 75%. On the contrary the judiciary may augment the normal fee for example: if the task needs a very high level of knowledge or a very intensive strain.

The price of a privately commissioned expert opinion is subject to an arrangement. According to our code of conduct the privately arranged fee should to some extent correspond with the rules of the before mentioned Compensation Act.

At the end of an expertise we have to sum up and to confirm our conviction. I am aware that there are two symbols of law and Justice in Europe:
If we walk up the large staircase of the Royal Courts of Justice in London we can see a mosaic: King Solomon sitting on a chair and a man on his side holding up a baby on one leg and the head down-under. In front of the king two women, one kneeling with clasped hands in front of the king and the other standing upright, stiff and pale. Everybody knows what this mosaic means. On the continent law and justice is mostly symbolized by the Roman Justita: A lady mostly sitting on a chair, scales in her left and a sword in her right hand and her eyes covered with a blindfold.
Two symbolic aspects of the same ideal: **Law and justice** which the legendary Roman legal consultant Ulpianus defined in an outstanding precise and concise manner:
Summum jus est: honeste vivere, neminem laedere ac suum cuique tribuere
Which means as you know: the maxim of law and justice is: To live honestly, to injure no one and to give every man his due.

Our task is to help the judiciary bring truth to light and by doing so assist the courts in their difficult task to apply the law in justice. I am convinced, that our task is a very noble one. And this conviction makes me - as I mentioned above - sure that we shall find a common legal status of the expert and the expertise in the European Union.