

First EuroExpert e-bulletin

I am delighted to welcome you to the first EuroExpert e-bulletin.

The bulletin will be published periodically and will, we hope, provide an insight into areas of common interest both for those acting as experts and their users alike. This edition sees articles from Hungary, Austria and the United Kingdom on subjects including electronic submission of expert opinions and Mediation. Mediation is particularly apposite at the moment with the EU Directive on Mediation coming into force this year and is also the focus of our upcoming symposium in Berlin where opportunities for experts will be considered.

EuroExpert promotes and has established high standards for experts and the active exchange of information between experts. At our autumn symposium in Vienna we discussed, amongst many subjects,

the remuneration of experts. As part of the discussion we launched the results of our latest study and these can be downloaded from our website: http://cms.euroexpert.org/cms/upload/pdf/Remuneration_022011.pdf

On our website you can also find information about other studies that we have undertaken which we believe provides useful information on expert practices in the EU.

We warmly welcome active participation in all our work including articles for publication on Expert and Dispute Resolution Matters.



Nicola Cohen
President
March 2011

EuroExpert

The Organisation

EuroExpert (EE) is a membership organisation whose members are representing substantial bodies of Experts in their own country. Each organisation must demonstrate to EE that they have appropriate standards for Experts.

Philosophy

EuroExpert's philosophy is self-regulation by Experts and the establishment of agreed common professional standards is in the best interests of society.

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News from Hungary

Hungary will fulfil the tasks of the rotating presidency of the Council of the European Union from 1 January 2011. The next Council Meeting of the Justice and Home Affairs of the European Union will be held at the end of January 2011 in the Royal Palace of Gödöllő (30 km from Budapest). Dr Tibor Navracsics, Hungarian Minister of Public Administration and Justice will be the President of the Justice section of the Justice and Home Affairs Council from 1 January 2011 for the forthcoming 6 months. The newly elected judicial authorities in Hungary intend to modify legal norms concerning the rules of expert activities and professional areas of competence integrating the regularly professional education rules of experts.

The Hungarian Presidency is the last member of the Spanish-Belgian-Hungarian trio. Therefore its programme fits into the trio programme and the priorities are built on the results delivered by the Spanish and Belgian Presidencies. 2011 will be the year of action: the implementation of the decisions taken in 2010 will start and use the opportunities offered by the new policies introduced by the Lisbon Treaty. Besides measures with a long term perspective, the Hungarian Presidency will do its utmost to ensure the adoption of the 2011 budget in the shortest time possible.



German Experts Day

EuroExpert Symposium Berlin 2011

The Berlin Symposium is the latest in the European Symposia that EuroExpert has run over a number of years. Previous locations have included Leipzig, Lisbon, London, Prague and Vienna. A EuroExpert Symposium is less formal and more interactive than a Conference, which have been held in Paris and Madrid, and has the combined objective of bringing knowledge and higher standards to European Experts whilst giving them the opportunity to network with other European Experts.

Each Symposium has a theme and for Berlin it is Alternative Dispute Resolution (ADR) concentrating on Mediation. With the European Directive on Mediation and the cost saving moves in the judicial systems, mediation is likely to have an increasing use across Europe and the rest of the world. This will change the present opportunities for Experts. Those who adapt to the changing environment should prosper.

The Berlin Symposium will examine mediation and demonstrate its uses as well as highlighting new opportunities for Experts.

The Berlin Symposium is being held alongside German Experts Day. Bundesverband öffentlich bestellter und vereidigter sowie qualifizierter Sachverständiger e.V. (BVS) have extended an invitation to those attending the Symposium to participate for €150 inv VAT which includes coffee, tea, lunch etc. There is also an evening reception which costs €35.



Berlin in Spring is a fascinating and enchanting city. Why not take advantage of the special rates at the Symposium hotel, obtain further professional development (CPD) and enjoy a weekend away?

Programme

Friday 18th March

- What is ADR
A general world review with the emphasis on Europe
- ADR (Alternative Dispute Resolution), The German perspective
- ADR - New opportunities for Experts
- Don't talk mediation - Mediate Workshop - Familiarisation training for prospective users of mediation and prospective mediators
- EuroExpert Report on European ADR and Expert topics

Accommodation

You can book rooms directly at the venue hotel.

Please use booking code "DST 2011":

Hotel Hilton Berlin
Mohrenstr. 30
10117
Berlin

Tel: +49 30 2023-4201

The rates are:

Single – 199 € per night
Double – 219 € per night
Including breakfast and VAT

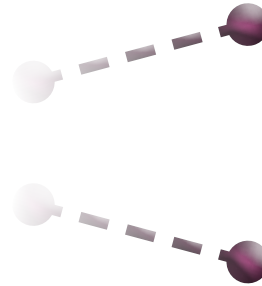
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The Presidency will work on bringing Europe closer to its citizens. Tangible results have to be achieved in the field of freedom, security and justice, which influence the everyday life of the citizens. Public security, the enforcement of legal rights and legal certainty are key areas for action. In accordance with the principles and objectives laid down in the Stockholm Programme, work will continue to deliver concrete results of cooperation in the field of justice and home affairs.

The protection of citizen's right is a priority. Therefore, discussions on the compensation of the victims of crimes will continue. Increasing the efficiency of the fight against organised crime and cybercrime is also a key issue. In the field of personal relations between citizens the protection of personal data, the cross border inheritance cases and the matrimonial property regimes are in the focus of the Hungarian Presidency.

The renewal of the EU's neighbourhood policy is of utmost importance. Based on its geographical location, the Hungarian Presidency can bring added value to the EU's policy towards its Eastern neighbours. Budapest will host the second Eastern Partnership Summit in May 2011 with a view to strengthening the relations between the Union and the six Eastern Partners.

Eszter Erős was writing on behalf of Magyar Igazságügyi Szakértői Kamara



New Form of Communication with Courts in Austria

Electronic Submission of Expert Opinions

According to Austrian procedural laws it is a matter of principle that experts must submit their written expert opinions in printed form on paper to a court or a public prosecution office, signed by their own hand. In addition, a round seal must be affixed which bears the name of the expert and the designation "allgemein beeideter und gerichtlich zertifizierter Sachverständiger" (generally sworn and court-certified expert).



Dr Schmidt speaking at the EuroExpert Symposium, Vienna

Under the Austrian judicial system it is also possible to submit certain documents in electronic form to courts or public prosecution offices. However, sending merely an e-mail is not sufficient for this purpose. It is admissible to submit a document by fax. In most cases, though, conventional mail channels must be also be used in such cases. Facsimile transmission is thus used primarily to meet tight deadlines.

For several years now "Elektronischer Rechtsverkehr" (Electronic Judicial Communication - ERV) has been available for the electronic submission of documents. This is a structured form of communication between courts and parties involved in litigation. Persons wishing to avail themselves of this system must link up to a communication point or forward documents directly to the Federal IT Center. This ensures compliance with

the prescribed structures in technical terms. Documents may either be submitted in text format or as PDF attachments. Attorneys and notaries are obliged to use this type of communication. Other persons – including experts – can do so on a voluntary basis. When submitting expert opinions in electronic form, it suffices to use an appropriate certificate, as a substitute for affixing the expert's seal.

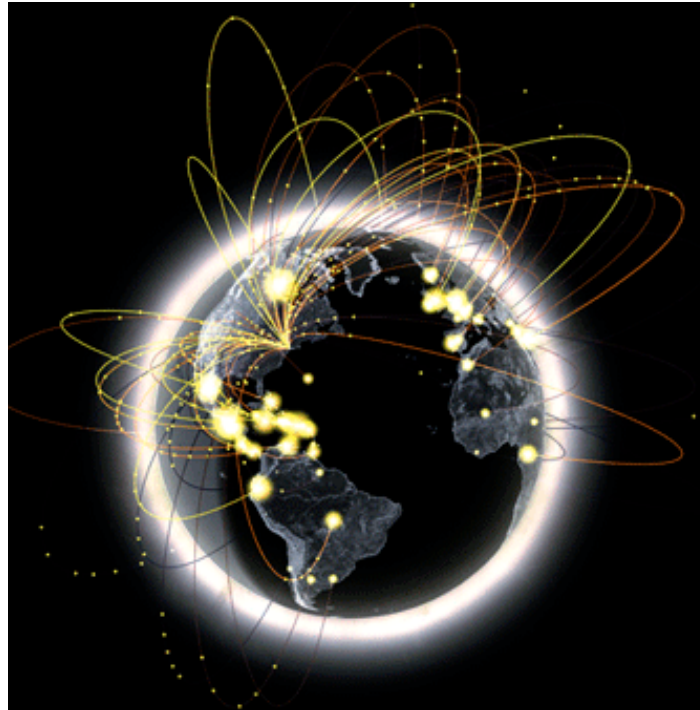
In spite of the large-scale use of Electronic Judicial Communication by the legal professions (more than three million submissions and four million services of documents per year), this type of communication has not proved to be suitable for experts, as the cost of the necessary hardware and software and the service is enormous and only pays off in economic terms if there is sufficiently intensive daily communication with the courts or public prosecution

offices. Normally, this is not the case for experts who, as a rule, exercise an occupation or profession that is distinct from their work as experts.

A new type of electronic communication has been available since 2002 for one of the areas in which experts work, i.e. the valuation of real-estate property in foreclosure sale proceedings. In these cases, experts must provide the court with the valuation opinion, as well as a short summary of the opinion also in electronic form. This type of communication is handled via accessing a separate page on the experts' website (<http://sv.justiz.gv.at>), using a certificate. After logging in, experts can see the cases to which they have been assigned and are able to upload their data. The result of their work can then be seen on the Internet in the data base for the official publication of insolvency data (<http://edikte.justiz.gv.at/>), where all court auctions of real-estate property, owner-occupied apartments, building rights and supra-structures are published with legally binding effect. In addition to these official notices the data base also contains the summary expert opinions drawn up by experts, as well as photographs, site plans and ground plans.

As this system has proved to be highly successful, the Austrian Federal Ministry of Justice, in cooperation with the Austrian Federal Association of Generally Sworn and Court Certified Experts (Hauptverband der allgemein beeideten und gerichtlich zertifizierten Sachverständigen Österreichs) has produced an application available to all experts, i.e. DES – Dokumenteneinbringungsservice (Document Delivery Service). It can be used for communicating expert opinions to the justice sector in electronic form.

This application for the submission of expert opinions to the judicial authorities has been available since 1 October 2010. It is much simpler than submissions via ERV (Electronic Judicial



Communication). In addition to a computer with Internet access all that is needed for logging in to the system is a card reader and an expert's identity card with a valid certificate. This has already been issued to all experts. Users log in to the DES website (<http://des.justiz.gv.at>). Detailed information can be found there, as well as a test area for trying out the system without actually communicating any data.

When wishing to submit an expert opinion in electronic form, users log in and enter their confidential four-digit pin. Then the delivery to a court or a public prosecution office can be prepared and processed. To this end the court, the court file number and a key word, possibly also some accompanying text is entered. Then the documents in question (expert opinion, statement of fees, possibly attachments) are uploaded. Only signed documents in PDF format can be communicated. At present, the total volume of one delivery amounts to 10 MB. Larger data volumes can be forwarded in several transmissions.

Upon entering the court file number, a check is made as to whether a valid number has been entered and whether the required file format has been used and the data volume is of adequate size. After successfully entering the "send"

command, a transmission protocol is delivered. In a next step the judicial authority automatically confirms receipt of the communication.

All deliveries made are shown in a table which can be used to easily find and check all submissions. These entries are archived after one year.

This new mode of submission is not compulsory. However, it offers considerable advantages to the judicial authorities, especially as they can serve expert opinions on the parties' representatives in electronic form using ERV (Electronic Judicial Communication). It also offers benefits to experts, who largely use IT support to draw up their expert opinions,

as there is no further need to print out documents and to resort to paper and mail handling.

This new form of transmission replaces the sending of expert opinions in paper form. The required seal is replaced by an electronic signature.

The presentations made to date by the staff of the Federal IT Center, in cooperation with the association of court experts, have met with great interest among experts. It can therefore be expected that this future-oriented form of communication will make work easier, both for many experts and the judicial authorities.

Dr Alexander Schmidt was writing on behalf of Hauptverband der allgemein beeideten und gerichtlich zertifizierten Sachverständigen Österreichs based upon a paper ('European Justice - Challenges & Opportunities for Experts') that he presented at the EuroExpert Symposium in Vienna, October 2010.

Rt Hon Lord Neuberger
Gordon Slynn Memorial
Lecture, London



Has Mediation had Its Day?

News from the United Kingdom

The Experts' world in the UK continues to be busy with changes to the Civil Procedure Rules as well as forthcoming changes to the Family Proceedings Rules. However for this edition we focus on ADR.

Lord Neuberger, The Master of the Rolls is the Head of Civil Litigation in England and Wales. He is the second most senior judge in the country.

The Academy of Experts was honoured at the end of last year when he delivered to The Academy the first Gordon Slynn Memorial Lecture about ADR (Alternative Dispute Resolution). Lord Slynn, a former President of The Academy, was the Advocate General at the European Court of Justice.

Some extracts from the Lecture are given below. The full

Lecture can be viewed from www.academy-experts.org.

// It is a great honour to be giving this, the first Gordon Slynn Memorial lecture, and I thought I would start with a quotation, which, perhaps appropriately for a lecture in memory of one of the foremost post-war European Jurists, comes from Anatole France's *Le Lys rouge* – the Red Lily. The quotation (translated of course, as I am not going to subject you to my French accent, which would have my Parisian grandmother rolling in her grave) is this,

'The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread.'

That remark expresses a view about what could be called the substantive justice of law: about the fairness of general laws. Should they treat all alike, all equally, when individuals are not socially or economically equal? The answer which Monsieur France looked for was that they should not. For him, law should not dispassionately treat all alike. Its majestic equality did not, he thought, affect all equally and this could not be countenanced. Others took a different view; as is the way of political thought; and that debate continues.

What though does this remark have to do with mediation or with the question, which you perhaps think is rhetorical, of whether mediation has had its day? Like a bad witness, I will

answer that straightforward question in a thoroughly roundabout way.

... It is therefore appropriate to emphasise that I am a supporter, indeed a keen supporter, who has been vocal, in court and out of court, in favour of mediation and ADR. It is an important adjunct to, with a potentially strongly beneficial effect, on our civil justice system and can be highly effective in securing a relatively cheap and expeditious, and often imaginative, resolution of civil disputes. The question isn't whether mediation and ADR have such a role. The real question is: how significant that role can properly be? Can there be too much of a good thing? And here I return to Anatole France.

The law's majestic equality is for civil justice of fundamental importance. Notwithstanding the views of Anatole France to the contrary, equal access to justice for all underpins our commitment to the rule of law. It ensures that we live not under what Friedrich Meinecke characterised as a 'government of will [but under] a government of law.' It ensures that any one individual citizen can come before the courts and stand before the seat of justice as an equal to his or her opponent - whether that opponent is another such individual, a powerful corporation or the state itself. We should not, in light of this, be too surprised to note that equality before the law, *isonomia*, – of which equal access to the courts is one aspect – was for the citizens of Athens two and a half thousand years ago, the basis out of which democracy arose.

As von Hayek put it, for the Greeks, 'equal participation for all in the government' was one of the consequences of a belief in equality under the law (provided, it must be added -in case we get too starry eyed about the classical Athenians - they were not women, servants or foreigners, or indeed ostracised). It is interesting to think that equality before the law, and access to courts able to dispense justice without fear or favour, as the judicial oath puts it, predates the development of democracy. Without equal access to the courts, without equality before the law, the conclusion to draw is that democracy would not long survive.

...

On 16 May 1997, Sir Richard Scott VC and first Head of Civil Justice, now of course Lord Scott of Foscote, said this while discussing the decision to render the civil justice system self-financing,

'A policy which treats the civil justice system merely as a service to be offered at cost in the market place, and to be paid for by those who choose to use it, profoundly and dangerously mistakes the nature of the system and its constitutional function.'

Such a policy, and the mistaken premise upon which it is based, is now too deeply embedded to be undone, at least at the current time when the Government's finances plainly do not permit us to draw back from it. In this age of austerity, it is not realistic for me to press the argument that the civil justice system cease to be self-financing, although it is only right to point out that it is certainly not self-financing, or intended to be so, in Australia. The recognition of that fact should not blind us however to the principle which Lord Scott was defending. To conceive of the civil justice system, any more than the family and criminal justice systems, merely as a self-financing service which the state offers, indeed which the state almost happens to offer by historical accident, is to make a profound and dangerous constitutional mistake.

...

The acceptance over the last two decades that the civil justice system should be self-financing can however mislead us to think that it is simply a service provider in the everyday sense.



It can mislead us into thinking that it is not part of government and is not, as it is, a part of the constitutional framework of our society. And that is a framework without which none of us could safely and securely take advantage of all the myriad services available in towns and cities throughout England and Wales. Without a secure framework of general laws, provided by Parliament, and enforced by the judiciary, in this case the civil judiciary, we would have no such services.

...

The point of principle which Lord Scott highlighted in the context of the decision to render the civil justice system self-financing is equally important here. Mediation and other forms of ADR are services provided to those who are in dispute. They are often excellent means by which such disputes can be satisfactorily resolved. There is no doubt about that. But they are no more than services provided to disputants. Mediation and other forms of ADR are not part of the framework of government. They are not, nor can they be, an aspect of the state in the same way that the civil, family and criminal justice systems form part of the state. To imagine that they can be is to make the same profound and dangerous mistake regarding the nature of the justice system and its constitutional function of which Lord Scott warned us in 1997. Mediation and ADR are services provided as alternatives to formal adjudication. They gain their value because of, and only because of,

the existence of formal adjudication and the branch of the state which delivers it. Without the civil and family justice systems there would be no mediation or ADR.

To confuse the civil justice system with the provision of mediation and ADR is not just to repeat that mistake however. It is to go beyond it and take a step towards unravelling our commitment to equality before the law. Our constitutional settlement is based on the idea, the Ancient Greek idea, of equal participation in government. Our elections are free and fair and based on universal suffrage of all adults of 18 and over. We have long been committed to freedom of association. And we have for many long years now been committed to the principle that everyone has equal access to the courts. Of course, that principle has not always been easy to put into practice; as Sir James Mathew's famous 19th Century complaint had it, 'In England, justice is open to all - like the Ritz Hotel!'

...

Requiring all individuals to mediate before gaining access to the court door will necessarily have a greater impact on some classes of litigants than others. Some litigants will have the resources to afford both mediation and litigation. Others will not. Those who do not will then be faced with a choice. Accept a mediated solution, which may well not reflect their legal rights, because they cannot afford to first mediate and then litigate, or accept no solution at

all. Financial pressure on some litigants may well mean that a mediated solution becomes a substitute for justice because the requirement to mediate is a fetter on access to justice. Such financially based fetters run the risk of depriving some citizens of their right of access to justice; they run the risk of depriving all citizens of an equal right of participation in government. We must be careful to ensure that this does not occur.

The points of principle which it seems to me should limit the expansion of our commitment to mediation are therefore twofold. First, that the justice system is part of our constitutional framework; it is part of government. The delivery of justice is not a service. On the other hand, the provision of mediation and other forms of ADR is a service. To conflate or confuse the two is to make a profound constitutional mistake. Secondly, our constitutional settlement is predicted on equal participation in government, which includes equal participation in justice, in other words it includes access to justice. Mediation should support that noble aim by helping to ensure that those disputes that can and should properly result in a mediated settlement do so. Insofar as it places a fetter on equal participation it cannot properly be supported. Our support for mediation and the benefits

it can and does bring to many cannot be allowed to blind us to possibility that too great a faith in its benefits may result in the creation of a partial system of justice. If that occurs we undermine our constitutional framework and our constitutional settlement.

... Furthermore, education of the legal profession and judiciary has to continue. Experienced mediators need to become ever more involved in the provision of training to those in the profession and judiciary ... the time is perhaps ripe to revisit the way in which we train lawyers. It is perhaps time to look at legal education in our universities. It remains the case that, apart from a few exceptions, civil justice, in particular civil procedure, remains a Cinderella subject. It is the opposite in the United States, where courses in civil justice and procedure form an essential aspect of law degrees. It seems to me that it is time for those who accredit law degrees to consider whether there should be a requirement for such courses, and for courses in ADR to become compulsory elements in any qualifying law degree. If we want to develop a truly effective litigation and mediation culture for the future, that development should start sooner rather than later and it should start at the outset of any lawyer's legal

career.

... Increasing the use of mediation, it seems to me, is very much an issue of education of the public and the legal profession. Education will not just draw the public's attention to mediation and its benefits. One of the things Professor Genn's Twisting arms study demonstrated was the general lack of awareness of mediation. That cannot continue to be the case. Public legal education, including mediation education, is of fundamental importance. More needs to be done in that direction. Professional education also needs to develop, as I have said, starting in our universities.

... Mediation has certainly not had its day. It will undoubtedly go from strength to strength. It can however only grow properly and consistently with our commitment to equal access to justice for all. Mediation is a complement to justice. It cannot ever be a substitute for justice.



Michael Cohen was writing on behalf of The Academy of Experts.

Members of EuroExpert



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Hauptverband der allgemein beeideten und gerichtlich zertifizierten Sachverständigen Österreichs

Czech Republic

Komora soudních znalců ČR, o.s.

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Conseil National des Compagnies d'Experts de Justice

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