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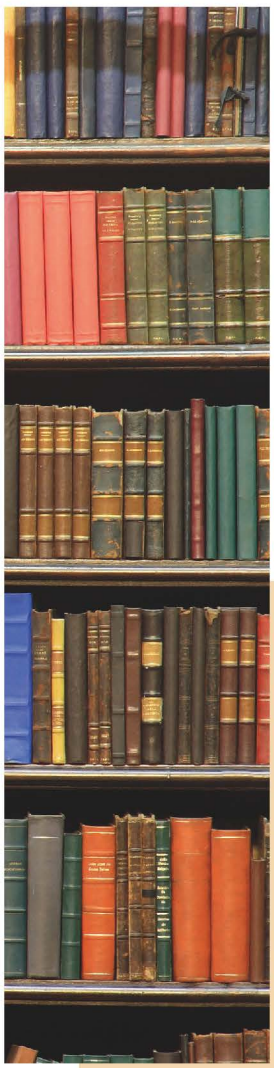

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Civil-law expert reports in cross-border litigation in the European Union: a comparative analysis of the situation in France and Germany

In-depth analysis for the JURI Committee

EN FR

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DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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LEGAL AFFAIRS

Civil-law expert reports in cross-border litigation in the European Union: a comparative analysis of the situation in France and Germany

IN-DEPTH ANALYSIS

Abstract

Upon request by the JURI Committee, this in-depth analysis highlights the difficulties that parties may encounter in relation to an expert report ordered in civil litigation, and the urgent need to harmonise practices and procedures existing in the different Member States of the EU.

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AUTHOR

Beatrice Deshayes, Rechtsanwältin and avocate, Hertslet Wolfer & Heintz (hw&h) Avocats & Rechtsanwälte, 39 rue Pergolèse, F — 75116 Paris

ADMINISTRATOR RESPONSIBLE

Roberta Panizza
Policy Department C: Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: poldep-citizens@ep.europa.eu

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CONTENTS

LIST OF ABBREVIATIONS

Bull.civ.	Bulletin civil de la Cour de cassation (Official Journal of the Court of Cassation)
BVerfG	Bundesverfassungsgericht (German Federal Constitutional Court)
Cass. Civ.	Chambre civile de la Cour de cassation française (Civil Division of the French Court of Cassation)
ECHR	European Court of Human Rights
ECJ	Court of Justice of the European Union
CPC	Code de procédure civile (Code of Civil Procedure)
DIHK	Deutscher Industrie- und Handelskammertag (Association of German Chambers of Commerce and Industry)
GewO	Gewerbeordnung (German Trade Regulation Act)
HwO	Handwerksordnung (German Crafts Code)
JVEG	Justizvergütungs- und Entschädigungsgesetz (German Law on Judicial Remuneration and Compensation)
MSVO	Mustersachverständigenordnung (Model Regulation for Experts)
OLG	Oberlandesgericht (German Court of Appeal)
EU	European Union
ZPO	Zivilprozessordnung (German Code of Civil Procedure)
ZRHO	Rechtshilfeordnung für Zivilsachen

EXECUTIVE SUMMARY

This in-depth analysis seeks to explain how civil-law expert reports work in France and in Germany, to highlight the differences in approach and to illustrate the practical difficulties which may arise in cross-border litigation.

Any expert report is ordered according to the internal procedural rules of the tribunal which is seised of the case. Rules of procedure are not harmonised across the European Union. Thus, fundamental differences exist in the texts and can also be felt quite strongly in practice. By way of illustration, specific cases from France and Germany will be analysed.

These two countries have similar legislation on some aspects, which provides solid guarantees on essential issues such as the competence and independence of the expert: the systems of enrolment on a list and appointment of a judicial expert are similar. Furthermore, both in France and in Germany, the opinion of a judicial expert may either be sought before any proceedings, to preserve evidence or identify the cause of damage, or as part of the investigation in ongoing legal proceedings, to clarify the matter for the judge. Finally, judges and parties in France, much like their German counterparts, demand that the appointed expert be impartial and possess sufficient technical know-how to shed light on specific points that will allow the judge to resolve the dispute.

However, the difficulties are evident because other elements come into play:

- An expert report is prepared in very different ways on the two sides of the border, which gives rise to practical difficulties during the preparation of an expert report and when expert reports are actually used.
- The expert's task is not described in the same manner in France and in Germany: in France, the expert is given rather broad instructions, whereas in Germany, he is asked to address very specific questions.
- Accordingly, a German expert's report provides answers to detailed questions, whereas a French expert presents more generally the opinion he has formed while preparing the expert report. Therefore, the structure and wording of expert reports is very different in the two countries.
- Finally, the parties do not participate in the same manner in the preparation of an expert report. In France, the adversarial principle is fundamental at any moment during the litigation; for that reason, the parties are in direct contact with the expert and may ask him questions, demand that he respond to their comments and that these comments be reflected in the report. This is not the case in Germany, which makes it difficult, in practice, for the French side to accept an expert report prepared in Germany.
- In German civil procedure, if the parties so request or where the judge orders it at his own initiative, the expert is questioned at a special hearing during which he explains and if necessary completes the report. In France, even though the possibility to convene a hearing may exist theoretically, it almost never takes place in practice. The use made of an expert report and the follow-up it is given are therefore very different.

Using cases from my professional practice as a lawyer and member of the bars of Paris and Cologne, I will show how the lack of harmonisation of expert report procedures in EU Member States may create obstacles to the proper conduct of cross-border litigation involving citizens or businesses, since the conditions for mutual trust do not exist.

These practical examples will demonstrate that it is not always easy to admit a German expert report to a French procedure, to involve a French expert in German proceedings, etc. As a result, the court proceedings themselves are sometimes artificially extended and their costs increased, which does not contribute to the proper administration of justice.

1. INTRODUCTION

In civil proceedings, an expert report often strongly influences a judge's decision. The increasing technical complexity of litigation means that judges increasingly use experts to resolve questions of fact.

Moreover, the multiplication of cross-border commercial exchanges, especially inside the European Union, brings with it a significant increase in litigation involving one or more foreign elements: foreign parties, manufacture of components in one country, delivery in a second country and installation in a third, industrial sites spread over several countries.

The first difficulty parties face when they decide to go to court is often that of determining the court of competent jurisdiction. Within the European Union, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012[1], which since 10 January 2015 replaces the Brussels I Regulation[2], allows the parties to find out which court they ought to address — sometimes with some difficulties, which should be resolved thanks to the mounting case-law of the Court of Justice of the European Union.

Secondly, before examining the grounds for the application, the judge must decide on the applicable law. Several EU regulations, including in particular the Rome I[3] and Rome II[4] Regulations, constitute genuine tools of European private international law which are quite well suited to solving issues which occur frequently in these proceedings.

The judge applies the law thus determined and, where appropriate, commences with the appraisal of the evidence in compliance with the national rules of procedure.

It is at that moment that the expert report comes into play.

As shown above, in many cases, the facts cannot be established without the help of a technical expert. This may be an expert in mechanical engineering, construction, informatics, a doctor, architect, geologist, etc. Specialisations are varied and numerous, going hand in hand with the complexity of today’s world. The judge is then simply unable, technically, to answer the questions put to him and a technical appraisal of the facts is needed before a reply can be given to the questions of law before him. For that reason, the judge needs the help of a third party to resolve the dispute.

That third party must be independent and impartial, much like the judge, even though he is obviously not asked to resolve the dispute on behalf of the judge. In many countries, the parties can actually object to an expert on the same grounds they can object to a judge. Furthermore, to be able to explain complex facts to the judge and respond to the questions that have been raised, an expert must have technical competences in the field concerned. Only the expert's answers will allow the judge to settle the dispute, by applying the rule of law to the facts at issue.

[1] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).
[2] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[3] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.
[4] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

In most EU Member States, the judge is not bound by the expert report. Nevertheless, it must be noted that, in practice, in 95% of cases, the judge takes his decision on the basis of the report.

It is with good reason that the European Court of Human Rights (ECHR) has pointed out several times that the fair trial rules apply to expert reports, as they do to any procedure, in particular as regards compliance with the adversarial principle. Thus, the parties to proceedings must be given the opportunity to inspect all documents or observations that an expert presents to the judge and to discuss these, with a view to influencing his decision[5].

The above shows that often a very large — and very often decisive — part of the dispute depends on the words of someone other than the judge.

For the parties, their lawyers and judges, this raises the question of whether they can trust this third party. In this area, there is no harmonisation. The conditions of "mutual trust", which the Commission considers to be so important, are not fulfilled. What conditions would have to exist for parties to accept the authority of that third party, what rules would make litigants support the method being followed, which measures would assure parties that their rights of defence have been respected, and which presuppositions are required to ensure that the conclusions reflect the true facts and that justice is properly administered?

In most European countries, there are procedural rules which provide such guarantees. But — as shown by the Eurexpertise project in 2012[6] — they are often very different.

In France, the rules of the Code of Civil Procedure (*Code de procédure civile - CPC*) have for a long time seemed sufficient to ensure this trust. However, in recent years, a consensus conference was necessary to identify good practices and ensure a wider support of litigants for the methodology used[7].

The situation may appear similar in Germany: the expert report (*Beweis durch Sachverständige*) is governed by paragraphs 402 to 414 of the German Code of Civil Procedure (*Zivilprozessordnung* — ZPO). The Association of German Chambers of Industry and Commerce (*Deutscher Industrie- und Handelskammertag* — DIHK) has published a model regulation concerning the appointment of experts and the qualifications needed to become a judicial expert. This model regulation is accompanied by guidelines[8].

Thus, the procedural rules governing the use of expert reports differ from one country to the next. The parties and judges hearing a case in a given country do not know the rules which apply in the other countries of the European Union. Therefore, it is very difficult for them to determine whether the conditions (both legal and practical) that prevail in these countries allow them to use a foreign expert report in the same way as a report prepared by a national expert.

Even though mutual recognition of judicial decisions is today the cornerstone of judicial cooperation within the European Union, there is currently no principle of mutual recognition of expert reports among the different Member States of the European Union. This is mainly due to the following two reasons: such recognition presupposes that the various countries give the same judicial force to expert reports, and, second, that they trust the rules

[5] ECHR, 18 March 1997, no. 21497/93, Mantovanelli v. France: Rec ECHR 1997, p. 424; ECHR, 18 February 2010, Baccichetti v. France, Case no. 22584/06, point 35.

[6] http://www.experts-institute.eu/-EUREXPERTISE,86-.html

[7] The proceedings of the conference can be found on the website of the Court of Cassation: http://www.courdecassation.fr/colloques_activites_formation_4/2007_2254/recommandations_bonnes_pratiques_juridictionnelles_11103.html

[8] *Mustersachverständigenordnung* (MSVO), and *Richtlinien zur DIHK-Mustersachverständigenordnung*

governing expert report in the other countries of the European Union. Currently, the conditions for such trust do not exist.

To highlight the difficulties that may arise when one has to deal with a foreign expert report or when, as a litigant, one has to participate in expert report proceedings initiated in another Member State I will compare, initially, the workings of the French expert report procedure with that of France's closest economic and cultural partner, Germany.

Different practical examples will subsequently be used to illustrate the difficulties encountered in the context of cross-border litigation or claims and, consequently, the need to harmonise the rules on expert reports in Europe.

2. EXPERT REPORTS IN GERMANY AND THE FUNDAMENTAL DIFFERENCES WITH THE FRENCH SYSTEM

2.1 Status of judicial experts

2.1.1 Expert lists

A judicial expert has significant power to assess the facts that are submitted to the judge; to ensure that he has the right skills and technical competences, a system of control must be put in place. In France, just like in Germany, experts a judge can appoint are normally enrolled on lists and thereby authorised.

On the other side of the Rhine, lists of authorised experts are drawn up by chambers of industry and commerce[9] or craft chambers[10,] depending on the sector.

Any professional (natural person) who wants to be enrolled on such a list must furnish proof of his technical knowledge before a commission established by the regulation of the regional chamber concerned. There is at least one chamber of commerce and industry per *Bundesland*; at the moment there are 80 chambers of commerce and industry in Germany. To standardise these local regulations, the model regulation of the DIHK (Association of German Chambers of Commerce and Industry) deals with the enrolment of experts on the lists[11.]

Depending on the chamber and the applicable regulation, admission commissions comprise a representative of the local chamber of commerce and industry and at least two experts who have the same specialisation as the applicant, which allows them to effectively assess the technical competence of the candidate. In the context of the examination before the commission, a future expert (*"Sachverständiger"*) must also demonstrate his ability to describe complex facts, both orally and in writing. Moreover, an expert must have a minimum knowledge of law (including civil procedure and liability law).

Once it has been established that an expert has the technical competence for the field in question and is able to elaborate an expert report both orally and in writing, the commission adds his name to the list.

The procedure is closed by the expert taking an oath[12]. He vows in particular to be impartial and to draft his reports conscientiously. The future expert also undertakes to comply with the duties imposed by the regulation to which he is subject. The model regulation of the DIHK, which is used as a reference throughout Germany, comprises essentially these notions of independence and impartiality, and of work that is neutral and objective and carried out conscientiously; these notions are defined with precision in every local regulation.

In principle, an expert is enrolled on the list for a period of five years[13] and this gives him the right to use the title of "publicly appointed and sworn" expert. At the end of this five-year period, an expert may request the renewal of his registration, which will be valid for a further period of five years renewable, following a simplified examination of his application.

[9] *Industrie- und Handelskammer* (IHK), para. 36 of the German Trade Regulation Act (*Gewerbeordnung* - GewO).
[10] *Handwerkskammer*, para. 91 art. 1 no. 8 of the Crafts Code (*Handwerksordnung - HwO*).
[11] *Mustersachverständigenordnung* (MSVO).
[12] A general oath — rather than a specific oath for each expertise — is provided for in para. 410 art. 2 ZPO, German Code of Civil Procedure.
[13] MSVO (version of 20 July 2012), paragraph 2(4).

This simplified examination includes the examination of at least one expert report and one amicable expert report, as well as the list of expert reports prepared by the candidate.

According to the model regulation of the DIHK, an expert is not restricted in his activity to the territory of the chamber of commerce that has enrolled his name on its list; on the contrary, an expert is authorised to prepare an expert report anywhere in Germany and even abroad.

The rules governing enrolment on the lists of experts are quite different from those prevailing in France.

Since the Law of 29 June 1971, lists are drawn up for court experts in criminal matters as well as in civil matters[14]. Decree No 2004-1463 of 23 December 2004 stipulates that a national list and a list for each court of appeal are established each year[15].

Article 2 of the 2004 Decree lists the conditions that apply to enrolment on a list. A candidate must not be subject to criminal, disciplinary or commercial sanctions and must demonstrate that he has sufficient technical qualifications in his area of specialisation. He must also demonstrate that he is independent and impartial.

One condition only exists in France: a candidate can as a rule only be enrolled on a French list if he is under 70. Such an age requirement is contrary to the case-law of the highest German administrative court (*Bundesverwaltungsgericht*), which has indeed made clear by a recent decision that enrolment on a list may not depend on a minimum or maximum age of the applicant[16].

The French rules also differ from the German rules in that, in France, a candidate may be a natural or a legal person. In Germany, only natural persons can as a rule be appointed as judicial experts[17].

The enrolment procedure, which is different depending on whether it concerns enrolment on the national list or on the list of a court of appeal, does not take place before a chamber of commerce and industry, but directly before the courts. Enrolment on the national list is only possible if an expert has been enrolled for at least five consecutive years on the list maintained by a court of appeal[18]; for that reason, the procedure for enrolment on such a "regional" list is decisive[19]. An applicant has to lodge his application with the prosecutor of the Republic at the regional court (Tribunal de Grande Instance) that has jurisdiction over the area in which the applicant exercises his professional activity. The prosecutor forwards the application to the Prosecutor General, from where it is sent to the first President of the Court of Appeal, so that it may be examined by the General Assembly (Assemblée Générale des magistrats du siège) of the Court of Appeal[20]. The general assembly draws up the entire list each year during the first half of November.

[14] Law no. 71-498 of 29 June 1971 on judicial experts, OJ 30 June 1971, as amended by Law no. 2004-130 of 11 February 2004 reforming the statute of some judiciary and legal professions, judicial experts, industrial property attorneys and experts in public auctions.
[15] Decree no. 2004-1463 of 23 December 2004 on judicial experts, art. 1.
[16] Bundesverwaltungsgericht, Decision of 1 February 2012, OJ C 8, 24/11.
[17] Art. 3 of Decree no. 2004-1463 of 23 December 2004 concerning judicial experts; nevertheless, this is very rare in practice.
[18] Law no. 71-498 of 29 June 1971 on judicial experts, art. 2 III.
[19] It is also acknowledged that enrolment in the national register of court experts is not covered by Directive 2005/36/EC on the recognition of professional qualifications, Cass. Civ. 2nd, 29.09.2011, Bull.civ. II no. 177); since 2012, following the ruling in *Penarroja* (ECJ 17.03.2011, Joined Cases C-372/09 and C-373/09), the law provides that the skills acquired by a judicial expert over a period of at least five years, which are recognised as such by the other EU Member States, may as a rule also be taken into account.
[20] Decree no. 2004-1463 of 23 December 2004 on judicial experts, arts. 6 and 7.

If the application is approved, the applicant will be enrolled initially for a probationary period of three years in a register of authorised experts. If he submits a new application, the judicial expert may be re-enrolled for a period of five years. This new application has to be submitted to a commission comprising representatives of the courts and experts. Subsequent re-enrolments, for five years, are handled in the same way[21].

Even though the rules for enrolment in the lists are different in France and in Germany, they are nevertheless similar in spirit and as a rule guarantee the competence, independence and impartiality of the persons called upon to act as judicial experts. When judges, lawyers and parties have to deal with judicial experts, they can make enquiries about the expert by means of these lists, which is a first step towards establishing trust in the expert.

2.1.2 Liability and insurance of judicial experts

In France and Germany, even though parties may propose an expert and request that he be appointed by the court, there is no contractual relationship involving the expert, the parties and the court[22]. Therefore, any possible liability may arise only on the basis of the provisions relating to tort or negligence.

Pursuant to paragraph 839a of the German Civil Code (*Bürgerliches Gesetzbuch* - BGB), an expert is liable for any damage suffered by a party to the proceedings as a result of inaccuracies in his report, which were either introduced intentionally or due to gross negligence. Legal action against an expert can only be brought on grounds of liability, but his liability is mandatory: an expert cannot be exempted from it and cannot limit it.

Furthermore, any expert enrolled on the above-mentioned lists must take out civil-liability insurance[23].

In France, a judicial expert may be liable under civil or criminal law; in civil law matters, the general law on liability applies (art. 1382 of the civil code). An expert is judged against the standard of a conscientious and prudent expert. He can accordingly be found liable for all faults, errors or negligence that a conscientious and prudent expert would not have committed. Moreover, it is not necessary to provide evidence of malicious behaviour or intentional dereliction of duty. At the same time, an expert is not liable for slight errors that a judge could have detected himself or for the opinions he proffers, since these opinions bind neither the judge nor the parties, who may criticise or challenge them[24]. If the misconduct has caused damage, the judge can order the expert to pay damages and interest or reduce his fees.

A French judicial expert is not obliged to take out civil liability insurance. Being a "judicial expert" is not an independent profession[25]; nevertheless, experts are generally covered by the insurance policy relating to their principal profession. In addition, the National Council of Judicial Expert Companies (Conseil national des compagnies d'experts de justice, CNCEJ) has negotiated a standard contract for professional liability insurance for judicial experts, thus making it easier for judicial expert to obtain cover by insurance companies.

[21] Law no. 71-498 of 29 June 1971 on judicial experts, art. 2 II.
[22] Cf. Münchener Kommentar/Wagner, commentary BGB, para. 839a BGB no. 2; Redon, M., Investigative measures entrusted to a technical expert, Dalloz, no. 632 s.
[23] MSVO, paragraph 14(2)
[24] Lamy Assurances 2015, no. 5040: Liability of judicial experts.
[25] A judicial expert carries out a mandate given to him by the judge but does not, in doing so, exercise a profession, Cass. Civ. 2nd, 04.07.2007, no. 07-12078.

2.2 Preparing an expert report

2.2.1 Procedures involving an expert report

In German civil procedure, an expert may be appointed in two ways:

- At the request of a party, prior to any proceedings, in the context of "independent proceedings for the taking of evidence"[26] (para. 485 ZPO), where the party has an interest in preserving evidence that may otherwise be lost, or in describing the nature of a certain thing or object, the cause of damage or a defect, or the amount of the costs necessary for the restoration of such damage.

- In the context of ongoing proceedings, at the request of one or several parties, or even automatically, to prove a fact which the court considers to be crucial to the outcome of the dispute. An expert report is considered to be one of the five legal means of evidence[27].

The French Code of Civil Procedure provides for two similar methods of appointment:

- Outside of any proceedings, a party may request the appointment of an expert by filing a petition or an application for interim measures, if it proves a legitimate interest in preserving or establishing proof of facts on which the resolution of a dispute might depend. This is called an expert report "in futurum" (art. 145 CPC).
- Next, as with any investigative measure, a judge can order an expert report at any time during ongoing proceedings, when he needs clarification in order to rule on a dispute (art. 144 CPC) and the findings or consultations do not seem to provide sufficient explanation (art. 263 CPC).

The Court of Appeal (*Oberlandesgericht*) of Munich held, by a decision of 19 February 2014, that an expert report "in futurum" provided for in the French Code of Civil Procedure is the "functional equivalent" of the independent proceedings for the taking of evidence, since it is a judicial procedure that is preparatory to the main proceedings[28].

However, according to the leading case-law in Germany, it appears that an expert report prepared in France can only be used as "free evidence". For that reason, a court would not grant it the same value as a report by a German expert[29]. There is a reason for this: unlike in Germany, the French expert report cannot be questioned and is in practice never the subject of a hearing at which the expert may be interviewed by the judge and the parties.

By the same token, the report of a German expert would likely not be used by a French court, because there is no compliance with the adversarial principle as laid down in the French Code of Civil Procedure when an expert carries out his task in Germany.
We will come back to this point below.

[26] *"Independent proceedings for the taking of evidence"(selbständiges Beweisverfahren).*
[27] In addition to the visual examination of the object of the dispute (*Augenschein*, paras. 371 ff. ZPO), written documents (*Urkunden*, paras. 415 ff. ZPO) witnesses (*Zeugen*, paras. 373 ff. ZPO) and interrogation of the parties (*Parteivernehmung*, paras. 445 ff.ZPO).
[28] OLG München, decision of 19 February 2014, 15 W 912/13.
[29] OLG Köln 05.01.1983, NJW 1983, 2779.

2.2.2 Appointment of a judicial expert

In accordance with paragraph 404 of the German Code of Civil Procedure, German court normally chooses the expert. He must — unless there are special circumstances — be chosen from an existing list.

The same principle applies in France: the judge appoints the expert. However, the judge can appoint an expert who is not enrolled on any list, as confirmed by Article 232 of the French Code of Civil Procedure: "*The judge may appoint any person of his choice to clarify for him a matter of fact that requires elucidation by a technical expert, whether this be through observations, a consultation or an expert report*." Priority is nevertheless given by the legislator to technical experts enrolled on a list, which makes it easier for a party or a foreign judge to check the judicial expert and enhances his credibility.

In France and Germany, a judicial expert may be challenged by the parties in the same way as a judge, in particular if there are fears that he may not be impartial[30].

Two differences, however, may come as a surprise to French and German parties.

First, in Germany, the court may ask the parties to indicate one or several suitable experts. If the parties agree on an expert of their choice, the court is bound by this proposal[31]. The French Code of Civil Procedure does not provide for a similar rule.

Second, the German Code of Civil Procedure provides that a judge may appoint more than one judicial expert, but may also limit himself to a single one. On the other hand, the French Code of Civil Procedure requires the judge to expressly justify the appointment of several experts[32]. In doing so, the French legislator wished to give priority to the appointment of a single judicial expert. In practice, the instructions to the expert generally state that he may be assisted by a technical specialist, whom he can choose freely, if he considers that he needs the help of another specialist to fulfil his mission.

2.3 The task, the report and the remuneration of a judicial expert

2.3.1 Defining the task of a judicial expert

In the two cases where a judicial expert is appointed — before or during any proceedings — a German judge only puts to the expert questions of evidence that he considers necessary for the resolution of the litigation (current or future), since the purpose of any investigative measure is precisely to provide the evidence necessary for the judge to rule on the case. For that reason, he will, to the extent possible, draw up precise questions so that the answer that the expert provides - depending on whether it is positive or negative - allows him to state whether the party concerned has in fact provided evidence to support its claim.

For that reason, before German courts, the expert's task is most often set out in the form of very precise and "closed" questions, for example:

[30] paras. 406 and 42 ZPO; art. 234 CPC.
[31] para. 404 art. 4 ZPO.
[32] para. 404 art. 1 ZPO; art. 264 CPC.

- "The claimant maintains that the pieces that were delivered were defective: did the goods delivered by the defendant correspond to the specifications as agreed in the contract / to their intended use / to the state of the art / to state-of-the-art technology?"
- "The defendant maintains that the purchaser should have noticed the defects when he received the goods: did the purchaser inspect the goods upon reception? If yes, should the inspection have allowed him to discover the disputed defect? Does the inspection that the purchaser carried out correspond to international requirements in this respect?"
- "Were the injectors that the defendant manufactured upon an order placed by the claimant not watertight in the steel section of the injector, between the hot and cold water parts of the water cooling system?"

In this respect, the mission of a German expert is very different from that of a French expert. Even though a French judge cannot, as a matter of course, delegate the power to investigate the cases before him, the tasks of an expert are often expressed much more broadly. For example, a judge may ask the expert to carry out the usual investigations, in accordance with a "standard assignment" drafted *in abstracto* by a panel of magistrates[33]. He could also give the expert the following tasks:

- to look for evidence of commercial and non-material damage[34];
- to give his opinion regarding the actual existence of the damage and defects alleged by the parties;
- to give his opinion on the causes and origins of an incident.

Thus, a French expert is not asked to respond to questions, but rather to provide his opinion. His instructions also often include guidance on how to carry out work on the expert report. Thus, it could be stated that the expert may:

- ask to receive all documents and evidence which he considers relevant to his task;
- interview any "person possessing information" ("sachant")[35] he thinks might be useful;
- visit and inspect the premises, if he considers it useful;
- provide any element from his particular area of competence, to enlighten the court on the origins and technical causes of the alleged facts at issue in the proceedings and the harmful consequences pleaded by the parties.

The wording of the latter in particular may surprise a German party, since it describes the initial and principal objective of an expert report, without asking for further details.

This difference in the definition of an expert's task is very important in practice. It implies not only a different approach to the drafting of an expert report (see above), but also that a German expert is much more bound by specific questions than a French expert. Thus, a French party participating in a meeting on a German expert report (provided such a meeting is organised, see below) may be surprised to find that the German expert strictly follows the agenda, which is drawn up on the basis of the questions that were put to him, and does not allow for an open debate on his observations and findings.

[33] PINCHON, François, Judiciary expertise in Europe, Editions d'Organisations, 2002, no. 616.
[34] Court of Cassation, 1st Civil Division, 13 January 1982, No 80-16.461, Bull.civ. I, no. 23.
[35] A "person possessing information" is a "person who has not been implicated by the expertise, has not volunteered information, is not a technical expert and not a witness, but who may hold information that may be useful to the judge and that ought to be collected", Jacques Mallaval; Revue Experts, no. 60, 2003.

Following his appointment, a German expert is in principle legally required to produce his report[36]. He does, however, have the right to refuse his appointment for personal or material reasons, for example if he is a spouse or a direct relative of one of the parties[37]. Conversely, the expert appointed by a French judge is only legally required to produce his expert report once he has accepted the task. Thus, the French Code of Civil Procedure allows for greater freedom to accept or refuse the task ordered by a judge[38].

In both countries, an expert has to continue to follow the instructions of the court throughout his assignment[39]. Any instructions given to an expert must be shared with the parties, who have the right to be present if a hearing is held in order to present to the expert the facts of the case.

However, in practice, in Germany the judge remains largely in control of the preparation of the expert report — while in France, with the exception of requests for the extension of the deadline (which are made very frequently and which national courts grant in 95% of cases) and the possibility to bring the matter before the judge with responsibility for reviewing expert reports in cases of particular difficulty, an expert has sole responsibility for the preparation of his report and carries out his task with complete autonomy.

This is also linked to the fact that in France, where the expert report, as is often the case, is ordered before the opening of proceedings, the judge hearing the application for interim measures is no longer in charge of the file once the order has been made. This is not the case in Germany, where the judge who has ordered the expert report, even if he did so "before the proceedings", remains in charge of the file until the report has been submitted, the parties have had the opportunity to raise additional questions, a supplementary report has been submitted where necessary, a hearing has been held with the expert and the costs have been fixed.

2.3.2 The expert report

In the context of the main proceedings, German law as a rule foresees an oral report[40]. In this case, the expert has to respond to questions raised during a special hearing, by drawing on the results of his investigation. By contrast, a written report is required in most "independent proceedings for the taking of evidence", where an expert report is prepared before any proceedings are launched. It is clear that, in practice, a written report is almost systematically prepared in all cases. If a written expert report is ordered (mostly by an "order for evidence"[41]), the court sets a time limit for the expert's investigations and the submission of his report. In the event of delay, the court may impose an administrative fine[42].

In France, it is theoretically possible to have an oral report which is only recorded in the minutes of the hearing (art. 282 para. 1 CPC). However, in practice, an expert report is always presented in form of a written report. An expert report must be submitted by a fixed deadline, initially laid down by the judge. Where that deadline is not respected, an expert can as a rule be replaced[43], removed from the list of authorised experts or incur liability towards a party which considers it has suffered harm as a result of the failure to comply

[36] para. 407 ZPO.
[37] paras. 408, 383 and 389 ZPO.
[38] art. 267 para. 2 CPC.
[39] para. 404(a) ZPO; for example, arts. 153, 236 and 241 and 273 CPC.
[40] cf. para. 411, ZPO.
[41] *Beweisbeschluss*, para. 358 ZPO
[42] paras. 409 art. 1, 411 art. 2 ZPO.
[43] Art. 235 CPC.

with the deadline[44]. A report may also become null and void if the deadline is not respected. In practice, unfortunately, there is systematic disregard for the deadline (which is often not realistic); even where the deadline has been extended several times, even beyond what can reasonably be expected, the non-respect of the deadline (sometimes by as much as several months or even years in some cases) is not sanctioned.

The report submitted by a German expert often looks very much like the one a French expert would have written: it recalls the assignment, describes the working method (by annexing the results of any investigations or tests, or information provided by third parties), and then records the facts of the problem. The report subsequently responds in a structured manner to the different questions raised, while avoiding taking a position on legal aspects, and ends with brief conclusions, addressed to the parties' court[45]. However, in the final summary, a German expert only addresses the questions put to him as part of his assignment.

In both countries, following the submission of the report, the court may summon the expert to a hearing to clarify certain points in the report or to ask additional questions[46]. The German rules expressly provide that a judge may order the summons not only on his own initiative, but also at the request of the parties[47]. In France, these provisions are never used; possibly due to a lack of resources, judges almost never ask an expert to come and explain his report at a hearing and the parties do not have the right to request such a hearing.

The European Court of Human Rights explained, in the context of a decision on the excessive length of the main proceedings in a case — it had lasted more than 10 years — that the courts should use all means at their disposal to shorten the procedure, for the benefit of the claimant, in particular the early summoning of the expert to a hearing[48]. Unfortunately, that case-law has not been followed.

A German court is not bound by the conclusions of an expert[49]. However, in practice, if the investigations have been properly conducted and the report is coherent, its conclusions are very frequently adopted by the courts. By contrast, if the court considers that the report is "insufficient", it may order an additional expert report or a second opinion[50]. This is in fact required if the report presents obvious defects, e.g. gaps or contradictions, or if the report is incomprehensible[51].

As in German law, a French judge is not bound by the findings or conclusions of a judicial expert[52]. Even though a judge may order a new expert report if the information is insufficient (which is extremely rare), he must as a rule first seek to obtain the necessary explanations from the expert, so as not to prolong the procedure unnecessarily (Article 245 para. 3 CPC).

[44] Court of Appeal of Colmar, 27 November 1997, Gaz. Pal. 1998 2 Somm. 448.
[45] An example of the recommendations can be found at: http://www.muenchen.ihk.de/de/recht/Anhaenge/empfehlung-fuer-den-aufbau-eines-schriftlichen-sv-gutachtens.pdf.
[46] Articles 245 et 283 CPC.
[47] para. 411 subparagraph 4 ZPO.
[48] ECHR 21.10.2010 - 43155/08 (Grumann v. Germany), NJW 2011, 1055.
[49] The principle of the free assessment of evidence under paragraph 286 ZPO applies to the five recognised legal means of evidence in civil proceedings.
[50] para. 412 ZPO.
[51] Commentary ZPO, Zöller para. 412 no. 2.
[52] Article 246 CPC.

2.3.3 Paying for an expert report

According to paragraph 413 of the German Code of Civil Procedure, the remuneration of an expert is laid down in the law on judicial remuneration and compensation[53]. The fees are set according to the amount of time spent on the file and range from EUR 65 to 125 per hour. However, provided the parties agree, an expert may ask for a different hourly rate. In the order appointing an expert, the court orders the party who has the burden of proof to pay a deposit intended to cover the expert's fees[54]. In practice, if both parties raised questions falling within the expert's remit, they must both advance part of the costs of the expert report. At the end of a dispute, the unsuccessful party must pay the costs, which include the costs of any expert report.

In France, when a judge appoints a judicial expert, he also fixes an advance on his remuneration, which must be paid by one or both parties, according to the decision of the judge[55]. Thus, it is not necessarily the party who has the burden of proof that has to pay this advance. In practice, it is almost always the claimant who pays the advance "on behalf of the party ordered to pay the final costs".

When an expert submits his written report, the judge sets the remuneration depending in particular on the work performed, respect for deadlines and the quality of the work that has been submitted[56]. The expert may receive only the advance deposited at the beginning, or (this is what normally happens) the advance plus an additional amount.

2.4 The adversarial principle in expert report procedures

There is no doubt that, in the context of a German expert report, the role of the parties is important in certain respects. We saw above that the parties have the right to jointly agree on an expert and that this choice binds the court; also, if one party demands a hearing with the expert, the court must convene such a hearing. But in general, parties do not get involved in the preparation of the expert report itself, in the way they do in France.

The German Code of Civil Procedure provides that it is for the judge to determine the extent to which an expert may contact the parties (e.g. to ask them questions on the facts, if these have not been sufficiently established) and when he must allow them to participate in the expert's investigations[57]. Thus, whether in the context of "independent proceedings for the taking of evidence" or during the main proceedings, the judge remains in control of the procedure. It is the judge who communicates with the expert, who forwards any letters written by the parties, ask any additional questions, etc.

Accordingly, the parties do not, in principle, have the opportunity to discuss technical issues with the expert or to present to him their positions and comments, until the report has been finalised and submitted. In practice, exchanges between the parties and the expert are actually very limited. Consequently, it quickly raises suspicion when a party contacts the expert without having been asked to do so. It is no exaggeration to say that a French party involved in a German expert report procedure may be baffled by this approach.

[53] German Law on Judicial Remuneration and Compensation (Justizvergütungs- und Entschädigungsgesetz - JVEG).
[54] paras. 402, 379, ZPO.
[55] Article 269 CPC.
[56] Article 284 CPC.
[57] para. 404 art. 3 ZPO.

In France, the "adversarial principle" must be complied with in the context of any measure of inquiry (art. 160 CPC). For that reason, an expert must summon the parties and submit any document or information to the parties before submitting it to the court. This allows the parties to exchange arguments. On this subject, the Court of Cassation, following the case-law of the European Court of Human Rights[58], has stated that compliance with the adversarial principle requires an expert to submit to the parties any document he intends to annex to his report and to allow the parties to discuss the document in his presence in a manner that complies with the adversarial principle, before the report is submitted[59].

The comments of the parties have to be attached to the expert's report, if they ask for this[60]. An expert may contact the parties directly to request information orally or to ask for documents[61].

Moreover, it is increasingly common in France for the judge to ask the expert to give the parties a preliminary report before the report is officially submitted to the court. This allows the parties both to discuss and comment on the documents and information available to the expert, and to discuss his report as a whole.

Such a preliminary report is not provided for under German law, and is not a customary part of procedures in Germany. One might ask whether this procedure fully respects the adversarial principle as interpreted by the case-law of the European Court of Human Rights on expert reports, according to which all the parties are informed of the content of the report at the moment it is submitted and may subsequently comment on it.

The judges in Strasbourg pay special attention to respect for the adversarial principle within the framework of expert report proceedings. In particular, the judges were asked to find, in a procedure initiated against France, that the principle had not been respected, because one of the parties had not been given "the opportunity to comment effectively" on the expert report. To a German lawyer, this may seem all the more surprising since, in the case at issue, the party had read the preliminary report before it was officially submitted. The European Court of Human Rights found that this was not sufficient and held that the party should have been involved in all steps undertaken by the expert[62].

In fact, in Germany, compliance with the adversarial principle is guaranteed in other ways: as soon as the report is submitted — and only then — the parties may inform the court that they wish to put additional questions to the expert, and/or ask to be heard at a hearing. In the context of such a hearing, the parties have the right to question the expert on all points in his report which they consider objectionable, and ask him to back up his opinion with additional explanations. These hearings often produce additional explanations which are sometimes as effective as the exchange of views that takes place during the preparation of a French expert report.

Accordingly, the case-law of the German Constitutional Court on compliance with the adversarial principle[63] concerns mostly the parties' right to interrogate the expert. The Constitutional Court held that the Federal Court of Justice had not protected the parties' right to be heard when it found a patent to be invalid, by adopting a position that was

[58] ECHR, 18 February 2010, No 22584/06, *Baccichetti v. France*
[59] Cass. 1st Civ., 1 Feb. 2012, no. 10-18.853.
[60] art. 276 para. 1 CPC.
[61] arts. 242 and 243 CPC.
[62] ECHR, 18 March 1997, No. 21497/93, Mantovanelli v. France: Rec. ECHR 1997, p. 424, points 33 ff.
[63] The German term "Anspruch auf rechtliches Gehör" (literally, the right to be heard) is not really the same as the term "principe du contradictoire" (adversarial principle) in French. In general, to translate the "principe du contradictoire", the term "Prinzip des kontradiktorischen Verfahrens" is used; however, this term does not exist, as such, in the Code of Civil Procedure or in the Basic Law.

contrary to the expert's report, without allowing the parties to question the expert during the hearing[64].

Clearly, there are significant potential difficulties as regards the "recognition" of a expert reportexpert reportexpert report by a foreign court.

[64] BVerfG, Decision of 14 May 2007, 1 BvR 2485/06.

3. THE PRACTICAL DIFFICULTIES OF CROSS-BORDER EXPERT REPORTS: THE EXAMPLE OF FRANCE AND GERMANY

3.1 Cross-border expert reports: difficulties linked to the international character of proceedings

In the context of cross-border litigation or claims, two kinds of problems may arise:

- Parties can never be certain that a report prepared by an expert appointed by a court in one Member State will be "recognised" as usable by a court in another Member State.
- Parallel expert reports, sometimes with conflicting results, may be ordered in two different countries.

A few examples help to illustrate these difficulties.

(i) "International" derailment

A train carrying vehicles owned by a French company from Romania to France is derailed in Austria. The vehicles are destroyed and the derailment has caused widespread damage to railway infrastructure in Austria.
The owner of the cars introduces a claim for contractual liability against his French forwarding agent before a French court. The owner of the Austrian company that owns the railway infrastructure brings an action in tortious liability against the French owner of the railway carriages before the Austrian courts.

None of the two courts wishes to stay proceedings, considering that is has full jurisdiction. The Austrian court initiates the procedure for an expert report. Is it possible for the French court to use the Austrian expert report, even though that report does not comply with the French principles governing expert reports, particularly as regards the adversarial principle? Or, conversely, should it order a second expert report covering the same issues?
What would a second expert report add? If the second expert report confirms the findings of the Austrian expert report, the procedure would have been drawn out unnecessarily. If, on the other hand, the French expert arrives at different conclusions than the Austrian expert, the court would find itself in the difficult situation of having to decide which expert report carries greater weight.

(ii) Industrial accident

A German seller sells to its French distributor steel pipes made by a Czech manufacturer. The French distributor sells them on to a French industrialist for use in his factory. Following the installation of the pipes on the French industrial site, explosions occur, causing major damage. The French industrialist files a suit against the French distributor before a French court. The French distributor commences third-party proceedings against the German seller, who in turn commences third-party proceedings against the Czech manufacturer. In parallel, but after the first suit has been brought in France, the German seller asks a German court to order an expert report concerning his Czech manufacturer, without informing the other parties. This expert report is limited to examining the pipes at issue. A year later, the French court also orders an expert report, which has a much wider remit. The German expert submits his report before the French expert does.

To what extent is the French expert bound by the findings of the German expert? How should he assess the relevance of these findings? Is the German report enforceable against the parties to the French proceedings, even though the adversarial nature of the German expert report is contested, and even though the parties in the French proceedings were not parties to the German proceedings?

(iii) Traffic accident

A road accident occurs in France, the victim is German, the driver who caused the accident is Spanish. The procedure for compensation of the victim by his German insurer takes place in Germany, but involves investigations in France, where the accident took place. Given that the victim is German, a German expert is appointed. Some of the investigations take place in France. The Spanish driver who caused the accident and his insurer are not party to the proceedings but were merely "served with notice of the proceedings" (*Streitverkündung*) according to German procedural rules. It is difficult for them to understand the procedure governing the expert report, since Spanish experts are appointed by the parties, and never by the court.

The German expert finally submits his report, and the German insurer compensates the victim.

The appeal of the German insurer against the Spanish driver and his insurer takes place before the Spanish courts. Can the Spanish court use the German expert's report, even though it has been drawn up according to very different rules and practices than the ones prevailing in Spain?

(iv) Medical liability

An expert report has to be ordered in France for the purposes of a high-profile case involving medical liability. The experts that could be appointed by the French judge are all more or less closely related to the laboratory that has been incriminated. Their independence is not guaranteed; for that reason, the court wishes to use a foreign expert. But the lack of harmonisation in the area of expert reports in Europe may cause problems. First, the French judge does not know how to choose the expert: do other countries have registers of authorised judicial experts? If so, are the criteria and conditions for enrolment in the register similar to those in France? Is the foreign judicial expert sworn in? It his competence guaranteed? For his part, the foreign expert will receive his instructions in a manner that is unfamiliar and possibly in another language. How should he address the issue of compliance with the adversarial principle, and how should he structure his report?

(v) Construction

Building material made in Germany that has been used on a house built in France turns out to be defective. The owner starts proceedings for an expert report in France, before any suit against the French builder, who in turn addresses himself to his supplier, a French retailer. The French retailer implicates the German manufacturer of the materials, but only for the purposes of the expert report. Following the submission of the expert report, the owner of the house initiates the main proceedings before the French courts against the builder, who commences third-party proceedings against the seller of the tiles. The latter can only file a suit against the German manufacturer before German courts, which have exclusive jurisdiction due to a jurisdiction clause.

Before the German judge, the French retailer relies on the French expert report which found the product to be faulty. The manufacturer requests that the expert report be declared inadmissible, on the grounds that it did not comply with the adversarial principle. Indeed, although it had been expressly provided for in the order appointing the expert, the

expert did not submit a preliminary report and did not give the parties the opportunity to respond to it. Can the German court, which has to adjudicate on the action for indemnity, rule on the validity of the procedure governing the French expert report? Can a German party rely on a French procedural rule to invalidate a French report abroad? If the German court decides that the report may not be used, may it nevertheless call the expert as a witness?

These few examples, which are merely an illustration of the very numerous cases of cross-border expert reports, show that in the absence of harmonisation of the rules and practices governing expert reports within the European Union, investigations and procedures are likely to increase.

There is indeed a real legal void in the matter. The provisions of EC Regulation No 1206/2001[65] — which are moreover hardly known and very little used — unfortunately do not allow for expert reports to be shared among the courts of different EU countries. The same applies to the recast Brussels I Regulation applicable since 10 January 2015, which only provides for the recognition of judgments and not of forms of evidence. The courts of the Member States therefore have great difficulty in using expert reports produced in other Member States.

3.2 Using a foreign expert report

It has been accepted that a German court can use a report drawn up by a French expert. The scope of such a report is however still much debated. Most often it is only admitted as "free" evidence (para. 493 ZPO), of lesser value than the means of proof accepted by the Code of Civil Procedure (ZPO). Sometimes it is only one of several written document (para. 286 ZPO)[66].

In France, there is no doubt that a judge may use elements of a foreign expert report simply as information. Thus, in the context of two parallel expert report procedures, the French expert could be led to find that the evidence produced by the German expert merely constitutes material supplied by one of the parties which does not have more probative value than any other document in the file. Nevertheless, he ought to discuss the findings of the German expert report[67], which both allows and forces him to assess the relevance of the facts established by the foreign expert, so as to be able to provide an objective opinion on these findings.

A French court could theoretically, on the form, go further and admit the report of a German expert as being similar to what it already knows. Indeed, the party which relies on the report could, without any great difficulty, show that the German judicial expert fulfils all the requirements of technical competence, independence and impartiality necessary to ensure fair proceedings. As we have seen above, the procedures for the appointment and enrolment of experts on the lists are similar in spirit.

This cannot be said as regards compliance with the adversarial principle: as previously mentioned, the French procedure allows parties to address an expert directly. Further, according to Article 276 of the French Code of Civil Procedure, he must not only take the comments into account but also attach them to the report and respond to them. What answer could a judge give to a party claiming that the German expert report fails to comply with the adversarial principle, which is deemed essential by French provisions and practice?

[65] Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.
[66] OLG München, decision of 19 February 2014, 15 W 912/13.
[67] Court of Cassation, Commercial division, 5 May 1971, no. 69-14.567, Bull.civ. IV, no. 123.

Even if the parties to German proceedings may participate in the procedure through other means, the adversarial principle is not as explicitly anchored anywhere in the German Code of Civil Procedure as it is in French procedural law.

Thus, a French judge could take the view that a German report does not comply with the adversarial principle within the meaning of French law and that it cannot, for that reason, be invoked against the parties.

This provides perfect delaying tactics for the party wishing to prevent the procedure from progressing smoothly!

The question could go up all the way to the European Court of Human Rights, to establish whether or not there has been a "fair hearing" as required by Article 6 of the European Convention on Human Rights, in particular whether the rights of the defence have been respected and whether the decision has been reached within a reasonable time.

The least one can say is that this is not desirable.

In any event, making use of a foreign expert report can be difficult and time consuming, since in most cases the report has to be translated. Thus, it can happen in the context of two parallel procedures that a German expert report can only be used effectively by a French legal expert eight months after it was first submitted - and that only on condition that one of the parties introduces the foreign expert report to the proceedings. Again, such a delay in the proceedings is not desirable in the light of the principles of prompt dispensation of justice and respect for the reasonable duration of proceedings that apply to any procedure.

3.3 The appointment and status of a foreign judicial expert

If a German court wants to appoint a French expert to prepare an expert report, it has to plead special circumstances to allow it to appoint an expert that is not on a German list, even if the French expert is enrolled on a French list. Such special circumstances may for example be accepted in an international dispute in which only the French expert can provide the expert report or, even better, because he has already been appointed by a French court in the same case. But in any case, a court can only appoint an expert with sufficient knowledge of the German language to answer the questions of the court without the help of a translator, which would add the risk of inaccuracies... which considerably reduces the range of possibilities.

The practice in France is broadly similar, even though the Decree of 23 December 2004 no longer requires French nationality as a condition for the appointment of a judicial expert and for enrolment on a national list or the register of a court of appeal. Thus, the French judge may appoint a foreign expert for an expert report to be prepared in France, if that is necessary. This is notably the case in matters concerning translation. But that is very rare.

If a German judicial expert wants to participate in the preparation of an expert report in France, he does not need any authorisation from the French or German government. This is also not needed where a German judge participates in the preparation of a expert report in France[68].

To allow a French judicial expert who has prepared an expert report in France to appear before a German judge, a German provision adopted on the basis of Regulation (EC)

[68] para. 61 art. 2 ZRHO.

1206/2001 provides for the possibility of requesting the "presence" of a foreign judicial expert for a national expert report[69].

In the event of expert report proceedings taking place in parallel, this allows the German judge to authorise the French judicial expert to attend a meeting organised by the German expert. The French expert, who is used to debates on the observations and findings made in the framework of the French expert report, will no doubt be surprised by the paucity of the dialogue between the German expert and the parties' counsel. However, it is not certain that the parties to the French proceedings would be allowed to participate in the meetings organised by the German expert, since this is not foreseen; it is up to the expert to decide whether he wants to meet the parties to the foreign proceedings or not.

The German court could also ask the French expert to "testify as an expert"[70]. This could, for example, be useful where the expert has already conducted investigations on a case of which the German court is also seised.

But a hearing in the German proceedings in which the expert appears as a witness can only concern facts that the expert has found in the course of his investigations. He has to swear an oath as a witness and cannot be rejected for lack of impartiality, which he could be if he was acting as an expert. In this context, he can only provide facts and submit his observations as a witness with particular technical expert report. The court has to pay attention to not allowing the expert to present his conclusions — the line between a description of the facts and personal conclusions being particularly difficult to draw in this case[71]. Moreover, he will receive the same compensation as a witness.

However, an expert cannot act as an expert proper and must simply give evidence in the form of observations on the subject-matter of the dispute, without being able to respond to the technical issues raised by the court. This solution is therefore very unsatisfactory.

[69] 134 ZRHO.
[70] "*Sachverständige Zeugen*", para. 414, ZPO.
[71] Commentary ZPO, Zöller para. 414 no.1, para. 373 no 1.

4. CONCLUSION

Taking into account the above, one could ask whether this constitutes the proper administration of justice: where an expert report is prepared in a Member State of the European Union, a second trial on a related question takes place in another Member State, but the court of the second country may not use as evidence the first expert's conclusions, it is the citizens who pay the cost of the lack of harmonisation. An expert report prepared abroad may only be admitted where the judge can be certain that the expert report from the other Member State has been prepared in accordance with the requirements of a fair trial, by an expert subject to similar rules regarding competence, independence and impartiality.

It is evident that the current situation is, at best, unsatisfactory. At worst, it could lead to a denial of justice. This might be the case where destructive inspections have been carried out on the object of the dispute, for example construction materials, in the context of an expert report prepared earlier, and its findings cannot be used before the foreign court, because of a lack of agreement on what constitutes an expert report.

This practical approach shows — if proof were needed — that there is a pressing need to find common principles governing expert reports at European level. If parties had confidence in foreign expert report and accepted that the expert's work provided the basis for the settlement of their dispute because common standards had been observed, certain disputes, including international ones, would be resolved by a transaction that follows immediately after submission of the report.

These common principles could be a first step towards a harmonised procedure governing expert reports.

As a second step, a procedure for a European expert report could be created, to ensure that in cross-border cases expert reports are exchanged among the courts of different Member States.

This will bring us one more step closer to a single area of justice inside the European Union, as conceived by its founders.

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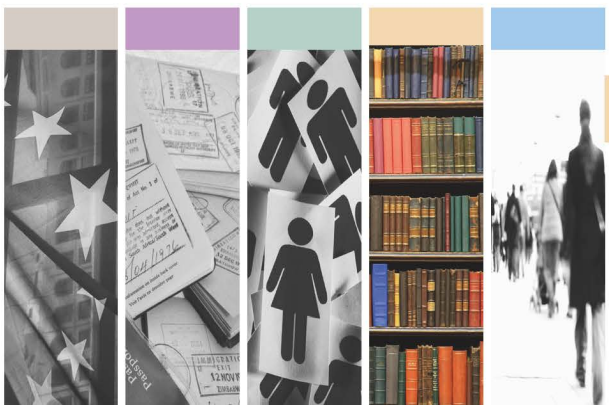

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