



# The Effective Use of Expert Witnesses in France

## An Overview of the Use of Damages Experts in French Litigation

Party appointed experts are increasingly being used in French litigation, reflecting the greater sophistication of commercial disputes. In this article, we consider the specificities of the use of expert witnesses in French civil court proceedings.

Court-appointed experts, referred to in France as “experts judiciaires” (judicial experts) are appointed by domestic courts to provide an opinion on technical or financial aspects of a case. Unlike in common law jurisdictions, the use of court-appointed experts has been the norm in France historically, as in many civil law jurisdictions.

Although not a legal requirement, French judges often select experts from lists published by the courts of appeal or the Cour de cassation (the French Supreme Court). These lists include a host of different categories of expertise (such as “electric power”, “accounting”, “company management”, or “financial markets and derivatives”).

Judicial experts take their instructions directly from the judge appointing them and report to the court. They have, therefore, an exclusive duty to the court which appoints them.

In performing their engagement, judicial experts are required to follow an adversarial process, hearing both parties’ positions on the subject matter (a key condition for their conclusions to be considered as valid) and submitting their preliminary conclusions to the parties for potential observations before issuing their final report to the judge.

Where the judicial expert appointed by the judge does not have the full set of skills required to perform their duties (for example where a damages analysis requires both economic and technical expertise), the designated expert can appoint another expert (“sapiteur”) to assist with their analyses.

Judicial experts are bound by a code of conduct, crafted by the “Conseil National des Compagnies d’Experts de Justice” (CNCEJ), a professional body overseeing all associations of judicial experts in France (there are dozens of such associations in France, grouping experts by location, or special interests, such as accounting or finance).

The code of conduct of the CNCEJ sets out the duties of judicial experts in the course of their engagement and deals with a wide range of matters, including due process, independence and impartiality. The code also covers a host of other issues, such as the proscription of the use of the ‘judicial expert’ status to solicit (usually more lucrative) party appointments, or the need to be polite and respectful vis-à-vis other judicial experts.

Judicial experts’ fees are subject to an ex-ante control by the judiciary and are typically much less than experts would typically charge under market conditions. This has

raised concerns that judicial experts could be tempted to deprioritise these court-appointed engagements, or decline appointments altogether.

In parallel, parties can also appoint their own expert witnesses. These party appointed experts, similar to expert witnesses in the UK or in the US, will produce evidence on technical or financial issues. This evidence will help parties discharge their burden of proof regarding liability or damages and assist the court (or the judicial expert, where one is also appointed) in their assessment of a party's case.

The use of party-appointed experts has developed significantly in recent years, especially in complex, high-stakes commercial disputes. However, unlike in the UK or in the US, there are (as of the date of this article) no binding procedural rules regarding the role and duties of party-appointed experts in France.

This can lead to misconceptions of the role of expert witnesses among practitioners, with concerns that some might place their client's interest above any duty to the court (in contrast with the UK or the US where party appointed expert hold an overriding duty to the Court).

Generally, experts evidence advocating a party's position and lacking objectivity or independence will be given little weight, if not wholly disregarded, by courts. However, in the absence of formal rules, judges seldom single out inappropriate behaviour in their decisions (a risk which in the UK or in the US typically ensures compliance with procedural rules).

Recently, some welcomed doctrine in the form of "technical notes" issued by a working group of the Paris Court of Appeal issued some guidance on the duties of party-appointed expert witnesses.<sup>1</sup> Although not binding on experts, it recommends that the provisions of the code of conduct of the judicial experts should apply to all experts providing evidence in court. It also provides

guidance in relation to matters of due process (e.g. transparency in the methods and assumptions used to reach their conclusions).

In French civil cases, expert witnesses will seldom present their evidence in court orally, or be cross-examined by the opposing party. Although not incompatible with the procedural provisions of the French civil code, this practice is not (yet) developed in France.

However, with the increasing complexity and internationalisation of matters brought before French courts, many practitioners consider that orality, including in relation to expert evidence, will inevitably develop in the future in complex commercial litigation, in particular the recently constituted international chambers of the French commercial and civil courts.

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<sup>1</sup> See Fiche technique 22 of the Paris Court of appeal: « Quelle place pour l'expertise dans un processus amiable »



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