

THE ROLE OF TECHNICAL EXPERTS – SPANISH EXPERIENCE

西班牙经验：技术专家的作用



Ángel GALGO PECO 23.05.2022
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TAKING OF EVIDENCE IN CIVIL PROCEEDINGS 民事诉讼程序中的证据采纳

- Non-formalistic 非形式主义
- Means of evidence are not listed in the law in an exhaustive manner 法律法规未对证据手段作穷尽列举
- Admissibility ruled by the principle of relevance 依据关联原则确定证据可采性

“Where certainty about relevant facts may be attained by any other means not expressly set forth in the preceding paragraphs of this provision, the court may, at the request of a party, admit such means as evidence and shall adopt any measures which may turn out to be necessary in each case”

“可以通过本条前款未明文规定的其他证据手段确定相关事实的，法院可以应当事人请求，采纳该等证据手段，并采取任何可能必要的措施。”



TAKING OF EVIDENCE IN CIVIL PROCEEDINGS cnt'd 民事诉讼程序中的证据采纳 (续)

- Rules 规则

... imposing, excluding particular means of evidence in relation to certain categories of facts

.....要求实施、排除与某类事实相关的特定证据手段

... determining the probative value of / assigning different probative value to certain means of evidence

.....确定某些证据手段的证案价值 / 向某些证据手段赋予不同证案价值

are rather exceptional

均为极少数情况

- Adversarial system 对抗制

*“The civil court shall resolve on the matters **by virtue of the submission of facts, evidence and claims of the parties**, unless the law establishes otherwise in certain special cases”*

“民事法院应**依据双方提交的事实、证据和主张**进行决议，某些特殊情形下法律另有规定的除外。”



EXPERTS' OPINION 专家意见

- Aim and purpose: *“to provide scientific, artistic, technical or practical knowledge that may be necessary to ascertain any facts or circumstances that are relevant to the matter or to acquire certainty about them”*
- 目的和宗旨: *“为认定、查明案情的任一相关事实或情形, 提供所需的科学、艺术、技术或实用知识”*
- Qualifications 资质
 - Competent in his field: Experts “having the relevant knowledge” 在专业领域具备胜任力: 专家需 “具备相关知识”
 - Official title corresponding to the subject matter and the nature of the opinion 具备与涉争事务及意见性质相应的正式职称
 - In the case of matters not included in official professional titles, the expert shall be appointed among individuals well acquainted with the subjects concerned 涉争事务不在正式专业职称体系内的, 应在十分熟悉涉争事务的人员中指定专家
 - Scientific and cultural institutions 科学文化机构
 - Legal persons legally qualified for issuing an opinion on specific matters 具有合法资质, 能够就涉争事务出具法律意见的法人
- Honest & impartial: *“Upon issuing an opinion, all experts shall state under oath or promise to say the truth AND that they have acted or, as appropriate, shall act as objectively as possible, taking into consideration both what may favour as ell as whatever may harm any of the parties, AND that such expert is aware of the penalties that may be imposed on him should he fail to fulfil his duty as an expert”*

诚实公正: “出具意见时, 全体专家必须宣誓或承诺据实以告, 并且已经 (或将会) 尽其所能客观行事, 充分考虑可能对任一当事人产生利弊两面影响的因素, 同时知晓其如若未能履行专家义务可能受到的处罚。”

EXPERTS' OPINION cnt'd 专家意见 (续)

- Appointment 指定专家:
 - **By a party**, in the course of preparation of a case 在案件准备期间, 由**一方当事人**指定
 - **By the court, in the following cases 有以下情形的, 由法院指定**
 - If the party is entitled to free legal assistance 当事人接受免费法律援助的
 - If the plaintiff / the defendant applies for the appointment of an expert by the court in his claim /statement of defence 原告/被告在起诉状/答辩状中申请由法院指定的
 - If, as a result of complementary allegations or pleas admitted at the hearing, any of the parties requests the appointment by the court of an expert to issue an opinion, provided that the court considers it relevant and useful 听审中采纳补充指控或申诉后, 任一当事人请求法院指定专家出具意见, 法院认定请求与案件具有相关性、实用性的
 - Ex officio, if the court considers the expert's opinion relevant (proceedings concerning kinship, paternity or maternity, capacity of individuals, or matrimonial proceedings) 法院依职权认定专家意见与案件相关的 (关于亲属关系、亲子关系、个人身份、婚姻关系的司法诉讼程序)



EXPERTS' OPINION cnt'd 专家意见 (续)

• Submission 提交意见

- How? In writing, accompanied, as appropriate, by documents, instruments or materials suitable to put forward the opinion of the expert, as well as those documents deemed suitable for a more accurate assessment of the opinion
- 方式: 书面形式, 酌情随附载有专家意见的文件、文书或材料, 以及有助于对专家意见作出更准确评价的文件
- When 何时:
 - Submission with the claim and the statement of defence 随起诉状和答辩状提交
 - Announcement of opinions when the latter cannot be attached to the claim/the statement of defence → Submission at a later stage 专家意见无法随起诉状/答辩状提交的, 需在后续阶段提交意见公告
“... as soon as they have them at their disposal and in any event five days before commencement of the hearing”
“.....获取专家意见后, 即时提交, 但不得晚于听审开始前五日”
Objective justification is required 需要客观理由
 - Submission of opinions depending on the procedures subsequent to the claim 诉讼程序中酌情提交的意见
“... opinions whose necessity or usefulness becomes evident as a result of the pleas of the defendant in his statement of defence or the complementary allegations or pleas admitted at the hearing”
“因被告在答辩状中的答辩或听审过程中采纳的补充指控或答辩, 成为显然必要或有用的意见”



EXPERTS' OPINION cnt'd 专家意见 (续)

- Hearing in court (347) 听审 (347)
 - At the request of any of the parties → the court may deny the request for intervention ONLY IF, in view of its objective or content, it must be considered irrelevant or useless (meaningless) 应任一当事人的请求 → 法院可以拒绝发言请求, 但仅限目的或内容无关或无用 (无意义) 的发言请求
 - Remove ambiguities 消除歧义
 - Reply to questions and objections as regards the method, premises, conclusions of the opinion 就意见的方法、前提、结论, 答复相关问题和异议
 - Reply to applications for an extension of the opinion to other connected issues 针对将意见适用性扩大至其他相关问题的申请作出答复
 - Critical evaluation of the opinion produced by the expert of the counter-party 批判性评价对方专家出具的意见
 - How 方法:
 - The party which has appointed the expert submits questions first 指定专家的一方当事人首先提问
 - The opposing party submits questions thereafter (“Cross-examination”) 之后, 对方提问 (“交叉询问”)
 - The judge may also pose questions and requests explanations (usually) after the parties 法官一般在双方当事人之后进行提问并请求解释
- Assessment of the expert opinion? In accordance with the “rules of sound criticism” (reasoned judgment)
- 如何评价专家意见? 根据 “合理批评规则” (判断需有理可依)



PATENT PROCEEDINGS – SPECIFITIES 专利诉讼程序：特殊规定

- Announcement of opinions when the latter cannot be attached to the statement of defence / Submission at a later stage → It does not apply in the case of the claimant and, in the case of the defendant, it applies only if the latter “demonstrates fully” the impossibility to submit the opinion together with the statement of defence
- 专家意见无法随起诉状/答辩状提交的，需在后续阶段提交意见公告 → 不适用于原告；仅当“充分证实”无法随答辩状提交意见时，方可适用于被告。
- (Nullity cases) Where any of the parties applies for it, the judge may request either the National Patent Office or another specialized institution to produce a written opinion on specific points where disagreement exists between the experts’ opinions submitted by the parties
- (无效案件) 一方当事人提出申请的，法官可请求国家专利局或其他专业机构就双方专家意见的具体争点出具书面意见



ASSESSMENT OF EXPERT'S OPINION BY THE COURT 法院对专家意见的评价

- Major role in patent litigation 在专利诉讼中的主要作用
 - For the most part, legal principles are well settled, but they typically require fact-based inquiries into technical matters
 - 多数情况下，法律原则已有定论，但需要对技术问题进行事实调查
- ... HOWEVER, decision of the case should not be “passed on” to the expert → the technical questions fall within the scope of the legal aspects of the question
- 但是，案件不应“交由”专家裁决 → 技术问题应为法律范畴所规制
- Role of the expert 专家的作用：
 - Illustrate the Court and the parties on those matters that require specialized knowledge
 - 向法院和双方当事人说明需要专业知识的事项
 - “Illustrate” → not only conclusion but also explanations and analysis on which they are based on should be taken into consideration
 - “说明” → 不仅提供结论，还要提供得出结论所依据的解释和分析
 - It is not for the expert to elucidate legal questions (e.g. infringement, inventive step, etc.) → he is not replacing the “jurist” who is confronted with a technical question
 - 专家不负责解释法律问题（例如侵权、发明步骤等） → 专家不等于处理技术问题的“法学家”



ASSESSMENT OF EXPERT'S OPINION BY THE COURT cnt'd 法院对专家意见的评价 (续)

Expert's must be evaluated "in accordance with the rules of sound criticism" → the court must evaluate the expert testimony (written opinion/oral explanations and replies at the hearing) and determine
必须根据“合理批评规则”对专家意见进行审查 → 法院必须审查专家证词（书面意见/口头解释以及听审过程中的答复），并且决定

- whether to credit it; and 是否采信；以及
- where appropriate, use it as a basis for its decision 酌情用作判决依据

ASSESSMENT OF EXPERT'S OPINION BY THE COURT cnt'd 法院对专家意见的评价 (续)

- Credibility/Admissibility (Dauber standard) 可信/可采性 (道伯特标准)
 - Reliability → Methodology 可靠性 → 方法
(Are the method(s) used by the expert sufficiently, precisely described? Does the expert justify why he chose them for the case? Are they generally accepted by the scientific community? Have they been empirically tested?)
(专家使用的方法是否得到充分、精确的描述? 专家能否合理解释选择该方法的原因? 方法是否得到科学界的普遍认可, 是否经过实证检验?)
 - Relevance → Data / Facts 相关性 → 数据/事实
(How were the data gathered? Were they solely provided by one of the parties? Is it missing any factor relevant to the industry or market concerned?)
(数据是如何收集的? 是否完全由一方当事人提供? 是否遗漏与所涉行业或市场相关的要素?)
 - Consistency → Analysis 一致性 → 分析
(Is there a logical link between the assumptions, the reasoning and the conclusions? Does the testimony of the expert contradict known facts about the industry or market concerned?)
(假设、推理和结论之间是否有逻辑联系? 专家证词是否与所涉行业或市场的已知事实相抵触?)



ASSESSMENT OF EXPERT'S OPINION BY THE COURT cnt'd 法院对专家意见的评价 (续)

- Critical assessment of contents 批判性评价内容
 - The judge is not bound by the expert opinion 法官不受专家意见的约束
 - The judge has to assess the outcome of the expert opinion 法官必须评价专家意见的结果
 - The performance of this task should not be hindered by the fact that the expert's opinion refers to matters that require technical knowledge 批判性评价不应因为专家意见涉及技术知识而受到妨碍
 - It is not intended that the judge intervenes as a super-expert
 - 并非意在让法官作为“超级专家”进行干预
 - Assessment of expert's opinion rather involves applying common experience maxims: reasonableness test / ordinary standards (critical capacity of understanding and appreciation)
 - 评价专家意见需要运用共同经验原则：合理性测试/一般标准（批判性理解和鉴定能力）
 - In case of plurality of expert opinions, the assessment by the court does not imply an “elective judgement” but a “deductive judgement” → the court may either assume any of the expert opinions in full or in part, or establish its judgement on the different opinions produced, or even discard the conclusions provided by the experts.
 - 存在多种专家意见时，法院应当通过“演绎判断”而非“选择判断”进行评价 → 法院可以全部或部分采纳任一专家意见，或者基于专家出具的不同意见形成独立判断，甚至可以弃用专家提供的结论。



THANK YOU
感谢聆听

