

Restrictions on the expert witness rates to be eased



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The problem of the shortage of experts, long waiting times for expert opinions and their poor quality, which translates into lengthy proceedings, has been unresolved for years.. / *Shutterstock*

All it takes is the consent of one of the parties for the court to be able to order an expert opinion for a rate higher than that set out in the Regulation issued by the Ministry. Provided that the total fee does not exceed PLN 5,000.

Low rates for expert opinions result in a lack of experts willing to prepare them. This translates into long waiting times and, consequently, overly lengthy trials. The remedy for this is to enable the court in civil cases to order opinions for higher rates than those specified in the Regulation. All it takes is the consent of one of the parties (today it must be a joint decision of the defendant and the claimant) to pay more for an expert opinion, but no more than PLN 5,000.

The Ministry of Justice hopes that this will encourage experts of rare specialisations. According to lawyers, this change should make it easier to obtain opinions in small cases. However, it is unlikely to speed up large commercial disputes. – A more appropriate way to improve the institution of expert witnesses would be a significant increase in the rates of their fee combined with stricter verification of

their qualifications, says Adam Zwierzyński of the law firm Radzikowski, Szubielska i Wspólnicy.

The problem of the shortage of experts, long waiting time for expert opinions and their poor quality, which translates into lengthy proceedings, has been unresolved for years. The Act on expert witnesses, despite the work carried out by successive governments, has never been enacted, and the amounts offered to experts drastically differ from market realities. Therefore, one of the more interesting solutions of the civil procedure reform of 2019 (Journal of Laws 2019, item 1469 as amended) was the addition of Article 89a to the Act on court costs in civil cases (consolidated text: Journal of Laws 2020, item 755 as amended). Article 89a makes it possible to agree with an expert witness on a higher fee than that resulting from the Regulation on the rates. The change has passed almost unnoticed. Perhaps this is because both parties have to agree to order an expert opinion for a higher sum.

Now, on the occasion of work on the amendment of the Code of Civil Procedure (it is supposed to eliminate the shortcomings of the reform from two years ago), the legislator decided to improve the solution which allows to bypass the bottleneck in the form of regulations limiting the experts' fees. According to the legislative bill, the consent of both parties to order an opinion for a higher fee will not be required if one of them pays the required advance within the time limit set by the court and the total amount of the fee and reimbursement of expenses claimed by the expert does not exceed PLN 5,000.

Financial carrot

- The proposed solution is meant to increase the possibility of agreeing on the fee of an expert witness via negotiation, when the will to cooperate is expressed by at least one of the parties (by making an advance payment in an appropriate amount), and this does not violate the legitimate interests of the other party. The new solutions should encourage experts of rare specialisations to cooperate with the court, regardless of the rigid rules of Article 89 of the Act on court costs in civil cases, states the explanatory memorandum.

This applies in particular to medical, construction or land surveying experts. In turn, the introduction of the PLN 5,000 limit is supposed to prevent the risk of abuse in the form of a kind of economic terror. It is a situation where, for example, a bank or a developer would demand an opinion for a dozen or several dozen thousand zlotys, thus causing a chilling effect on the other party, which is afraid to continue the dispute in the knowledge that if it loses, it will have to bear these costs.

On the other hand, when both parties, e.g. two large entities in a commercial case, agree to a higher expert fee in the amount specified by the expert, the limit will not apply.

The weakest will benefit

- This is certainly a step in the right direction compared to the current regulation, which requires the consent of both parties for a higher expert fee. The consent of only one of the parties, who will be ready to pay an advance on the expert's fee at more attractive rates, will certainly facilitate obtaining an opinion and speed up the proceedings, particularly in small civil cases, e.g. involving consumers or micro-enterprises, says Wojciech Łysek of Dentons' Litigation and Arbitration Practice.
- Of course, the limitation to the amount of PLN 5,000 means that it will not be possible to use this procedure in all disputes. However, the cases in which the expert's fee exceeds this amount will probably most often concern large commercial disputes, the participants of which usually take this into account in advance. Often the parties file similar requests for the appointment of an expert witness, so there is a chance for consensus also on the fee for the opinion. Of course, this is only the case if both parties hope for a quick settlement. If one of the parties only wants to delay the proceedings and does not agree, the limitation to the specific amount may have the consequence that in commercial cases the effect of speeding up the case cannot be achieved, says the advocate.

Attorney Wojciech Łysek hopes that if the planned solution proves successful in practice, the legislator will increase the limit on expert witness cost with the consent of one of the parties, making it dependent on, for example, the value in dispute or the nature of the case.

No blind estimates

Adam Zwierzyński of the law firm Radzikowski, Szubielska i Wspólnicy believes that this solution is still only a prosthesis. – I think that a better way to improve the institution of expert witnesses should be a significant increase in the rates of their fees, combined with stricter verification of qualifications of the persons admitted as expert witnesses. The proposed solution is a half-measure, which in some cases may make it possible to find an expert ready to draw up an opinion more quickly, but in general it will not significantly speed up proceedings, says Zwierzyński. – Perhaps increasing the “incentive” would improve the situation, as reaching the amount of PLN 5,000 at the prevailing rates is easy for experienced experts even now. When studying experts' work cards, one may be surprised how much workload can be involved in some of their activities, adds the advocate.

Preliminary inspection of the case file

But that is not all. The legislative bill also provides for an amendment to Article 280 of the Code of Civil Procedure. According to the amendment, the court will be able to provide access to the case file to the extent necessary to estimate the cost and time of preparing an opinion to a person who has not yet been formally appointed as an

expert witness. Many experts make their decision to draw up an opinion and are able to determine its costs only after having had the opportunity to read the case file.

- In exceptional cases, reading the case file by an expert or an institute, even before admitting evidence and defining the relevant thesis, may be helpful in determining the specialisation of an expert who should prepare the opinion (or a team of experts, which is particularly important in complex cases), and in determining whether it is at all possible to answer the questions contained in motions of evidence, states the Ministry of Justice as the reason for the amendment.

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