

COMITE MARITIME INTERNATIONAL

COURT APPOINTED
EXPERTS IN
MARITIME CASES
A Comparative Law Study

By
ARTHUR M. BOAL
and
DAVID R. OWEN

INTERNATIONAL MARITIME COMMITTEE

EXPERTS - 13
111 - 81

Published By
COMITÉ MARITIME INTERNATIONAL
17, Borzestraat
B-2000 ANTWERP
BELGIUM
May, 1981

COMITE MARITIME INTERNATIONAL

COURT APPOINTED
EXPERTS IN
MARITIME CASES
A Comparative Law Study

By
ARTHUR M. BOAL
and
DAVID R. OWEN

INTERNATIONAL MARITIME COMMITTEE

INTRODUCTION

At the 9th Assembly of the C.M.I. held in Hamburg in March, 1978, it was resolved to conduct a comparative study of the various means followed under different legal systems of introducing expert evidence in maritime cases. Accordingly, a questionnaire was prepared and submitted to the national Maritime Law Associations under date of 7th June 1978. A copy of this questionnaire follows this Introduction.

Replies were received from the following Associations:

Argentina	Great Britain	Norway
Belgium	Greece	Portugal
Brazil	India	Soviet Union
Canada	Ireland	Sweden
Denmark	Italy	Switzerland
Federal Republic of Germany	Japan	U.S.A.
France	Mexico	Venezuela
	Netherlands	Yugoslavia

The answers to the various questions have now been compiled and are submitted herewith.

QUESTIONNAIRE

	<u>Page Nos.</u> <u>Herein</u>
QUESTIONS: How are expert questions determined in your jurisdiction?.....	1
1. Do your courts have authority to appoint their own experts? If so, what discretion does the court have in appointing experts?....	11
2. Are the court appointed experts subject to cross examination?.....	26
3. When the court appoints experts, are the parties permitted to call their own experts? If they do, is the evidence considered by the court's own experts in making its recommendation to the court?.....	34
4. May the court reject the advice of experts if he sees fit and decide the questions contrary to the expert opinions?.....	42
5. Who determines the compensation of the court appointed experts and who pays them?..	48
6. Are the experts selected by the court from an approved list and if so, how is that list established?.....	56
7. Do the Appellate courts have their own experts and do they review the opinions of the experts in the lower court and advise the Court of Appeals whether or not to follow them?.....	63
8. How does your system work?.....	71
9. Have you any suggestions as to how this practice can be improved?.....	78

HOW ARE EXPERT QUESTIONS DETERMINED
IN YOUR JURISDICTION?

GENERAL COMMENTS

ARGENTINA

In the first place we must make it clear that in our country experts are appointed only to express opinions upon questions of fact when special knowledge is needed in respect of some science, art, industry or specialized technical activity.

It is not admissible according to our legal system to appoint experts to express opinions on problems of a juridical nature, which must be reserved exclusively to the judgment of the judiciary. Neither must they express juridical views upon the points they are dealing with and, in case they should do so, the Court will not take their opinion into account.

The expert evidence, with the limitations pointed out, that is, circumscribed to the appreciation of technical points, is included in the classes of evidence foreseen by the laws of procedure.

BELGIUM

The replies which are given hereafter deal with surveys in civil, social or commercial matters as ordered by the justice of the peace, the tribunal of first instance dealing with civil matters, the tribunal for labour disputes, the Commercial Court, the Court of Appeal dealing with civil matters and the Court of Appeal for labour disputes. Such matters are governed by Articles 962 to 991 of the Judiciary Code of Procedure of the 10 October, 1967.

Private maritime law cannot, however, ignore surveys in criminal matters. These are ordered by the King's Attorney, the examining magistrate, the lower and higher

General Comments cont.

criminal courts, the Court of Appeal dealing with offences; in principle, these surveys are kept secret. Shipowners, whose ships or craft have been involved in a collision, might find their rights or their defence jeopardized by a survey which they might have been unable to be made acquainted with. In practice, the examining magistrate and the expert are given sufficient discretion for having authority to keep the parties informed and to examine them. The party concerned who would fear to be unable to safeguard his rights, might find it useful to bring about a parallel nautical survey in a civil action. The survey ordered in criminal matters will have repercussions on the judgment rendered in respect of damage to properties when the party who suffered the damage joins in the criminal proceedings, and also when he abstains. Indeed, in line with case law that the Supreme Court has so far confirmed, the matter judged by a criminal court has an "erga omnes" value, that is, even vis-a-vis persons who were not a party to the proceedings. In the course of subsequent proceedings, the judge dealing with civil matters cannot decide that the party has committed the act for which he has been acquitted and which, precisely, may be the act that caused the damage to the plaintiff, who was absent at the criminal proceedings. Likewise, the party who is vicariously responsible and who has been summoned to the criminal proceedings, would be unable to contest that his servant had committed the act for which the latter has been condemned. The survey conducted in pursuance of the rules of criminal proceedings, and therefore without privity to the parties concerned, will more often than not be ordered by a criminal court because this court is competent when a collision has caused personal injury or death. When a collision (or other accident of navigation) has only caused damage to property, it often happens that the navigating parties are prosecuted before the Police Court for a breach of the rules of navigation. In such a case a survey is not usual and the prosecuting magistrate has in his file only the reports received from the river or

General Comments cont.

the Port Police. It frequently happens, when the parties have not appointed a nautical expert by common agreement, that one of them will serve a complaint with a civil court for the appointment of an expert. The judge of the criminal court is not bound to wait for the report of the expert; however, he may prefer to dispose of such an item of appraisal and put off to a later date the pleadings on the criminal issues.

CANADA

Jurisdiction in maritime matters in Canada is shared between the Federal Court of Canada and the Courts of the provinces, with the jurisdiction of the Federal Court of Canada encompassing "all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class or subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned". Thus while the Federal Court may be considered to be Canada's "admiralty court", the provincial courts have a concurrent jurisdiction in maritime matters.

This memorandum deals only with the practice and procedure pertaining to the appointment of experts, known as "assessors", in the Federal Court of Canada.

It should be mentioned at the outset that although there is jurisdiction under the Federal Court Act, for the court to appoint its own "experts" in admiralty matters as well as in other areas in which the court has jurisdiction (for example, matters involving patents and copyright), the practice appears to be very limited. In recent years, there have been only a handful of cases in which assessors have been appointed, generally in trials dealing with collisions in which difficult questions of navigation and seamanship arise. The much more usual practice in all civil matters, is for the parties to retain their own experts, who are called as witnesses are

General Comments cont.

subject to cross-examination by the opposing party, and are independent of the Court.

Such experts are considered to be the witnesses of the party calling them and their fees are usually part of the costs of litigation and are paid by the unsuccessful party.

FRANCE

The question of expert evidence in civil and commercial proceedings (this note is not concerned with criminal proceedings) is governed by articles 232 and 263 of the new Code of Civil Procedure, that has taken over after adapting and modernizing them, the provisions of the former Code of Civil Procedure as they had abundantly been interpreted by case law. The current provisions, albeit they are more up to date, are not revolutionary and do not constitute a rupture with the former practice.

GREAT BRITAIN

This note is not concerned with criminal proceedings or with the giving of expert medical evidence to which special rules apply.

In civil proceedings in England expert evidence is normally given by witnesses called by the parties themselves and is now governed principally by the Civil Evidence Act 1972 and by Order 38 Part IV of the Rules of the Supreme Court. Except where all the parties are agreed as to how such evidence should be given, an application will be made to the Court prior to the trial of the action at which the Court will give directions. These will normally include a requirement that the parties disclose their experts' written reports to each other before the trial takes place and may also limit the number of expert witnesses which each party is permitted to call. Experts' reports can be tendered in evidence at

General Comments cont.

trial with or without additional oral testimony, but if an expert witness does not give oral evidence he is subjected to the same processes of examination and cross-examination as is any witness of fact. It is solely for the Court to decide whether or not to accept the expert evidence that is given; the experts are not called upon to perform any function of a judicial nature.

The BMLA believes that the role of an expert witness called upon to give evidence in the English Courts will be seen to be rather different from the role of his counterpart under Continental jurisprudence. Whereas under Continental jurisprudence, the expert is frequently appointed by the Court and is required to give evidence of the facts established by his expertise, expert witnesses in the English Courts are called by the parties to the dispute and are frequently asked to draw deductions, based upon their expert knowledge, from the facts established by other witnesses.

In practice, it is only rarely that an English Court will appoint an expert, although in Admiralty cases it is fairly common practice for the Court to sit with nautical assessors. These situations are dealt with in more detail in the answer to the specific questions which follow.

GREECE

This memorandum refers only to Expert Evidence in civil and/or commercial matters (the latter term also covering matters pertaining to Maritime Law) tried by Greek Courts.

As a general rule, the object of Expert Evidence may be "facts which may have a material influence on the outcome of the proceedings". The Court, after considering the allegations of the litigants judgment which, inter alia, defines the matters on which evidence should be produced by each party in the litigation (onus of

General Comments cont.

evidence) and the means of evidence (moyens de preuve) to be used by each party for this purpose.

Expert Evidence is one of the Means of Evidence provided for by the law and it may be ordered only in matters where, in the Court's opinion, a special knowledge of science or art is required (art. 368 paras 1 and 2 of the Code of Civil Procedure, hereinafter referred to as CCP).

When speaking of Expert Evidence we must distinguish from the term "Experts' Opinion" as used in the CCP (art. 390). Broadly speaking, Expert Evidence is produced following an order of the court, whereas Experts' Opinion is produced by any of the parties to the dispute, without the intervention of the Court. Even though the term Expert Evidence, when used in reply to the questions hereinbelow, refers exclusively to Expert Evidence produced by an order of the Court, it must be pointed out that Experts' Opinion carry the same evidentiary weight and both are ultimately subject to the Court's free evaluation.

IRELAND

It is essential in any discussion of this matter to distinguish between (a) expert evidence called by a party to the action, and, (b) experts (always called in Irish Law "Assessors") who sit with the Judge to advise him on technical matters, and to answer any questions which the Judge may put to them in private as to the meaning of technical terms. The Assessor does not decide the case and does not give a judgment. His function is advisory only.

Expert questions are determined in the Irish Courts either by Judges sitting alone or by Juries. In the High court civil actions in negligence are heard by a Judge sitting with a Jury. In such cases either side is free to call expert witnesses to give evidence on a

General Comments cont.

particular specialized matter. Where both parties to an action call expert evidence it is a matter for the Jury to decide which evidence they prefer. In non-jury actions parties are free to call expert witnesses in the same manner. Where a conflict arises on expert evidence it is for the Judge to decide which evidence he prefers in the circumstances.

ITALY

Expert questions are determined in Italy by means of appointment by Court experts who are requested to generally give their assistance to the Court or to reply to specific questions.

- (a) All answers given herein refer only to the rules in force in civil litigations. No mention is made of criminal proceedings, which seem to be out of the area of the questions, although the main rules governing the expert evidence in criminal proceedings are rather similar to those dealt with below.
- (b) The maritime disputes mentioned in art. 589 of the Italian Navigation Code (herein referred to as "cod. nav.") "collision, damage to fixed objects, damage caused by employment of cranes etc., damage caused to fishing gears, salvage, general average and finding of derelicts) have some specific rules with regard to expert evidence as it will be indicated below.

MEXICO

In Mexico, expert evidence is produced on request by any of the parties of the Court.

General Comments cont.

That who offers expert evidence should also provide a questionnaire -- concerning the dealing case. This questionnaire may be enlarged by the opposite party or by the Court.

PORTUGAL

In accordance with the Portuguese Code of Civil Procedure of 1961, expert evidence aims at the perception or appreciation of facts which need special knowledge that the judges are not necessarily supposed to have.

Experts express their views on matters of fact, which are accounted for by the Court in coordination and at the same level of all other evidence.

The Court is not bound by the evidence produced, which is appreciated on the grounds of its inside conviction.

Expert evidence has thus no peculiar stature in the Code, being just one of several forms through which the parties can prove their statement.

SWITZERLAND

Questions pertaining to procedure and in particular to evidence are depending on the municipal law of the Court to which the dispute has been referred and the experience in the field of the unification of law clearly shows that it is very difficult to unify such rules of procedure on an international level. The States care for their rules of procedure and are only seldom prepared to modify their own in favour of international rules. It would be wise to be extremely careful in this matter in order not to run right away the risk of a failure in the attempts of unification.

In Switzerland the experts are appointed by the Court, either before the lawsuit has actually been ini-

General Comments cont.

tiated by an order of the President of the Court or by the Court during the proceedings. In general the judge asks the parties to submit proposals as to whom to appoint and as to what questions to put to the expert. The judge is not bound by the proposals of the parties. If the parties do not agree, he will decide and appoint the expert(s) and fix the questions to which he (or they) will have to reply. The expert must be impartial and unrelated to any of the parties. He must, like the witnesses, make a veracious report.

U.S.A.

Expert evidence is almost always produced through expert witnesses employed, called, and paid by the parties. (Legal expense is taxable as costs only in a limited number of situations.) The basic rule governing expert testimony is embodied in Rule 702 of the Federal Rule of Evidence, enacted by statute effective 1st July 1975:

"Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Expert witnesses are subject to cross-examination, and the admiralty judge must ultimately determine their credibility and the extent, if any, to which he will accept their opinions.

VENEZUELA

To start with it should clearly be emphasized that in Venezuela the experts are appointed only to express an

General Comments cont.

opinion on questions of fact, when scientific, artistic or industrial knowledge or knowledge of a specialized technical performance is required.

In our legal system it is not admitted that experts be appointed for advising on questions of law: these are exclusively left for the consideration of the judges. It is not permissible for the experts to express opinions on points of law in their reports; should they do so, their opinions would not have to be taken into account by the judges. Expert evidence, within the limits that have been mentioned above, is restricted to questions of fact and is part of the proofs that are provided for by the Civil Code and the Code of Civil Procedure as well as by the Code of Commerce on questions of procedure in commercial matters.

Both the Civil Code and the Commercial Code expressly mention that the judges are not bound to abide to the advices of the experts and that, at any moment, they are at liberty to take a decision different from that indicated by the experts, basing themselves on their own conviction only.

QUESTIONS NO. 1

DO YOUR COURTS HAVE AUTHORITY TO APPOINT THEIR OWN EXPERTS? IF SO, WHAT DISCRETION DOES THE COURT HAVE IN APPOINTING EXPERTS?

ARGENTINA

Yes. If the parties come to any agreement regarding the appointment of one or three experts, the court must accept the appointment. In the same way, if the parties mutually agree to the appointment of two experts, one for each side, the Court will accept them, according to the Umpire.

If the parties expressly agree to it, or if there should be no agreement between them, the Court must appoint either one or three experts, according to the importance of the case.

In some cases and even although the parties may not have asked for it, once the procedural stage of presentation of the evidence is concluded, and before rendering judgment, the Court may officially appoint an expert who is to express his views on technical points, and to make it possible to terminate the lawsuit.

BELGIUM

In order to solve a dispute brought before him, or in the event of an impending dispute, the judge may appoint experts with the task of making investigations or of giving a technical opinion (Art. 962 of the code of procedure).

The appointment of an expert, however, concerns the parties in the first place. If the parties have agreed to appoint an expert before the judgment ordering the expertise, the judge must be content with enacting their agreement (Art. 964, para. 1). Furthermore, any expert nominated by the judge may be

Question No. 1 cont.

replaced, provided that he has not yet been advised of his appointment and an agreement has been signed by the parties and duly registered.

Subject to the reply to question nr. 6, the judges are free to appoint the experts of their choice, unless the parties have reached an agreement pursuant to Article 964.

BRAZIL

Yes, the Courts have authority to appoint their own experts and one may say that they should do so, when they feel it appropriate. One may add that no limitations are imposed on the Courts in this field, except, of course, when the appointment has been ordered, without it being required.

CANADA

The authority of the Court to appoint assessors is found in Rule 492 of the General Rules and Orders of the Federal Court of Canada, which provides as follows:

"Rule 492 ASSESSORS

- (1) The Court may, if it thinks it expedient so to do, call in the aid of one or more assessors, specially qualified, and hear and determine a matter, wholly or partially, with the assistance of such assessor or assessors.
- (2) A party who proposes that the Court call in the aid of one or more assessors under this Rule may apply, at any time, to have the Court consider his proposal and for incidental directions.

Question No. 1 cont.

- (3) An order made pursuant to an application under paragraph (2) may contain a direction that the Registry be reimbursed in respect of the fees and allowances paid to the assessor either in whole or in part by the party or parties who have proposed that an assessor be called in aid.
(See Tariff A remuneration of assessors.)"

The Court may enlist the assistance of assessors whenever "it thinks it expedient to do so", usually upon the application of a party but presumably it may do so on its own motion. The court is not bound to appoint an assessor on the request of a party and it has discretion to refuse to do so - as a matter of practice, the Court will grant such a request where it appears that an assessor would be of assistance and where there are no strong reasons advanced against the appointment.

DENMARK

Yes, but only upon the application of a party.

FEDERAL REPUBLIC OF GERMANY

Yes. The courts are free to nominate any expert with two limitations: a) Parties may reject the expert if he is not neutral or impartial. b) Courts are bound to appoint any experts the parties have agreed upon.

FRANCE

Yes, the courts have authority to appoint experts. Indeed, the experts are always appointed by the courts which, in civil and commercial matters, have discretion to appoint anyone they want. (art.232). The expertise is one of the "measures of investigation" provided for by articles 232 and following. The

Question No. 1 cont.

expertise is ordered either by the court itself or, at any earlier stage, during the "mise en etate" by the judge in charge of this preliminary procedure or also as an urgent measure not prejudicing the substance by the judge in chambers. The decision ordering the expertise may be issued separately, before the judge decides on the merits of the case, or be limited to some items of the dispute whilst a judgment in substance is taken on others.

Apart from the expertises proper, the new Code of Civil Procedure provides for surveys and consultation (all these measures being measures of investigation entrusted to technicians). Actually there is not really "expert evidence" as the experts perform only verifications or material findings.

GREAT BRITAIN

Yes. There are these situations in which a court might appoint an expert:

- (i) On application of any party to the action, the choice of expert should, if possible, be agreed between the parties, but in the absence of agreement the court has the power to nominate an expert in the exercise of its discretion.
- (ii) In the exercise of its own inherent common law powers when the evidence tendered by any expert witness or by any of the parties is so conflicting or unsatisfactory that the court requires additional impartial expert assistance.
- (iii) In certain admiralty proceedings, principally collision cases, the court may think it sees fit to call for the assistance of one or more specially qualified assessors who

Question No. 1 cont.

would form part of the Tribunal to which each party would present its case, but who nevertheless would only act in an advisory capacity to assist the court; the decision in the case remains solely with the judge.

The court may sit with assessors in a similar manner in other cases (the jurisdiction in all cases is derived from s 98 of the Supreme Court of Judicature (Consolidation) Act of 1925 which is in general terms) but rarely does so, although new provisions have recently been introduced concerning the use of assessors in patent actions.

GREECE

- (a) May appoint expert(s) whenever it considers that there is a matter the comprehension whereof requires a special knowledge of a science or of an art.
- (b) Is obliged to appoint expert(s) when a party in the proceedings applies for such appointment, provided always, that in the court's opinion there is a need for special knowledge of science or art.

In both cases, the Court has practically no limit in appointing Experts (cf. also answer to question no.6). The appointment of Experts may be revoked by order of the same Court, following request filed by the Experts themselves or by any of the litigants, for certain reasons which might influence the impartiality of the Experts, or if the Experts are civil servants and their superiors have forbidden to them

Question No. 1 cont.

the exercise of their duties as Experts for reasons related to the service, or if there are any other important reasons.

Cannot be nominated as Experts (1) those who were deprived from their civil rights after having been sentenced for certain criminal acts as per art. 59 to 63 of the Greek Penal Code (2) those who are deprived from the free exercise of their profession, as long as such penalty is maintained (3) those who are deprived from the free disposition of their assets and (4) the Judges, Public Attorneys and the Clerks of the Court.

INDIA

Only High Courts which have Admiralty and Vice-Admiralty Jurisdiction have authority to appoint experts who are called Assessors in claims for Salvage, Towage and Collision. The discretion of the Court in appointing is absolute but naturally the court will appoint persons with experience and who are in no way concerned with the parties litigating before the court.

IRELAND

The Irish courts have authority to appoint their own experts, i.e. assessors. Order 64, Rule 43, of the Rules of the Superior Courts stated:

"The Judge may appoint assessors in any Admiralty action either at the insistance of either party or in case he shall deem it requisite for the due administration of justice."

Order 64, Rule 45, states:

Question No. 1 cont.

"In an Admiralty action the Judge or the master may in such way as the Judge shall think fit obtain the assistance of Accountants, Merchants, Engineers, Actuaries, and other scientific persons, the better to enable any matter at once to be determined and may act on the Certificate of such persons."

Order 36, Rule 40, of the Rules of the Superior Court, states:

"Trials with assessors shall take place in such manner and upon such terms as the court shall direct."

The Court may appoint any expert to act as assessor but usually tries to get the agreement of the parties to the person to be appointed. Assessors have sat in Irish Courts on admiralty, patent, chemical and building matters. If the parties cannot agree, the Judge appoints an assessor and before doing so, will inform the parties of the person he proposes to appoint and will hear any objection to him.

As the Rules of the Circuit Court and District Court, which are inferior in jurisdiction, do not provide for assessors or expert witnesses the Rules of the Superior Courts apply to the inferior Courts.

ITALY

Yes. All our judges have full authority of appointing their own experts, even if none of the parties to the proceedings applies for such appointment. This means that the expert is regarded by our law mainly as an assistant to the judge, whenever he must deal with technical matters, exceeding the area of the knowledge of the judge (See art. 61 and following, art. 191 and following, Code of Civil Procedure); and in fact the questions to which the expert will have to

Question No. 1 cont.

answer are put to him by the judge - of course with the cooperation of the parties, if they have something to object, remark, or suggest.

It must be noted, however, that in the maritime disputes mentioned in art. 589 cod. nav., the judge is bound to appoint one (or more) experts, unless the final decision depends only on issues of law.

JAPAN

- (i) Under Japanese Law, the party may offer an expert evidence to the court, either voluntarily or following the suggestion of the court, by specifying the matter(s) that he intends to prove by such evidence. He may, but is not requested to, provide the name(s) of an expert(s) in the offer. When an expert evidence is so offered, the court shall determine with its free conviction whether or not it is necessary for deciding the case. When the court decides on it in the affirmative, it shall designate an expert or experts at its discretion, but duly taking into consideration the candidate expert, if offered by the party (Art. 304 of the Code of Civil Procedure; Articles cited hereafter are those of this Code, unless otherwise indicated.)
- (ii) Thus, the court would usually adopt an expert evidence when it is requested by the party, but the court may order ex-officio an expert to give an expert testimony, when it deems necessary for deciding on the matters relating to jurisdiction (Art. 28), as well as for clarifying the relations of the litigation

Question No. 1 cont.

(in other words, for grasping definitely what is really in dispute in the litigation concerned). (Art. 131, para. 1, sub-para. 4). The court also may do the same when it is necessary.

MEXICO

Yes. Mexican courts have the authority to appoint their own experts - however, experts are first appointed by the parties, and if such experts agree on the expert opinion, then the court does not appoint its own experts.

NETHERLANDS

There are two kinds of regulations in the Netherlands. Firstly, the general regulations are set out in the Articles 222-236 of the Code of Civil Procedure; secondly, on various places in the legislation special provisions are to be found.

General Regulations

According to Article 222 of the Code of Civil Procedure a Court may on its own authority or on the application of one or more of the parties - made in one of the ordinary procedural statements or in an incidental application - either in a preliminary decision or in an interlocutory judgment order that an investigation by experts be made. Parties have the right to appoint their own experts but they have to come to an agreement about those before or within 8 days after the date of the judgment by which an expert report has been ordered (art. 223). In that judgment the names are mentioned of the experts appointed by the Court in case parties do not come to an agreement within the period of 8 days, unless parties did already previously (i.e., before the Court rendered its judgment) agree as to which experts

Question No. 1 cont.

should be appointed, in which case such experts are nominated immediately.

Unless parties agree to the investigation being done by one expert, three experts are to be appointed. The Court may reject the application of one or more parties to appoint experts or, on the contrary, may on its own authority order, whenever it deems necessary, an investigation by experts to take place.

Special Provisions

Commercial Code: Article 94 with respect to transportation of goods in general, Article 483 with respect to carriage of goods by sea and Article 825 with respect to carriage of goods over inland waterways stipulate that the carrier as well as the cargo receiver (consignee) have the right to apply to the President of the Court of First Instance (or, as the case may be, according to the Article 94 and 825, the County Court) to appoint an expert to investigate the condition in which the goods will be or are being delivered and to estimate the damage found therewith.

Article 489 gives the receiver of the cargo the possibility of applying to the President of the Court of First Instance for the appointing of experts in order to investigate the stowage of the goods on board of a seagoing vessel and the possible cause of damage in case the receiver apprehends damage to the goods. Article 459 gives the charterer of a vessel the right to appoint an expert in order to inquire into the seaworthiness of this vessel.

In all of these articles of the Commercial Code the opposite party of the petitioner is given the opportunity to object against the application to have the matter investigated by experts. Though it is possible to propose the appointment of a particular expert, the Court, in its discretion, may appoint another expert.

Question No. 1 cont.

Article 275 of the Commercial Code provides that parties to an insurance agreement with regard to a certain object have the right to appoint experts in order to value, if required confirmed on oath, the insured object prior to its being covered. The insurer cannot object to this determined value afterwards except in case of fraud or other special legal exceptions.

Other provisions also provide for expert evidence, e.g., in cases of applications for patents and consular jurisdiction. The Code of Criminal Procedure gives a separate regulation for expert evidence as well.

NORWAY

Chapter 18 of the Norwegian Civil Procedure Code of August 13, 1915, as amended, contains a set of rules for court appointed experts, how to select them and in what manner they shall perform. The parties are also free to bring in their own experts who will then be witnesses and be examined in the ordinary way. The courts do have authority to appoint their own experts. If the parties are in agreement as to who ought to be appointed, the court is as a general rule supposed to appoint that expert. Otherwise, the court will normally appoint the expert from a panel established in the jurisdiction for a four-year period. When it so feels the court is at liberty to appoint as expert any other person it sees fit.

PORTUGAL

The court may order expert evidence to take place, in which case one expert will be officially appointed.

If the parties agree, they can choose one or three experts, which the court will accept.

Question No. 1 cont.

Should this agreement fail to be reached, each party chooses one expert and the court appoints a third, who is the court's expert.

This one is the first to be designated, the choice falling, whenever possible, on a person with special knowledge of the matter.

Parties will then choose their experts, with the limitation that they can't be of a higher rank than the Court's expert.

There are other limitations concerning the choice of experts, since some persons are not allowed to fulfill this task on account of their public functions or other causes. They're listed on article 580 of the Code.

SOVIET UNION

In accordance with the Soviet legislation in force (Arts. 17 and 18 of the Fundamentals of Civil Procedure of the USSR and the Union Republics, Arts. 49 and 74 of the Civil Procedure Code of the RSFSR and the Arts. concerned of the Civil Procedure Code of other Union Republics), courts have authority to appoint their own experts to clear the questions arising in considering a case requiring special knowledge in the field of science, technique or trade.

SWEDEN

Yes. Generally, it is so arranged that the court informs the parties whom the court intends to appoint as an expert and asks the parties about their opinions. The experts appointed are well-known persons in the field in question. They must of course, be impartial.

Question No. 1 cont.

SWITZERLAND

The courts have authority to appoint experts who must be neutral, impartial and have the necessary expertise.

U.S.A.

Yes. The court, particularly an admiralty court, has inherent power to appoint experts of its own choosing. In addition, the federal courts generally are granted such power by the Federal Rules of Evidence. Rule 706 follows:

Rule 706. Court Appointed Experts

(a) Appointment - The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(b) Compensation - Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow.

Question No. 1 cont.

The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment - In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection - Nothing in this rule limits the parties in calling expert witnesses of their own selection.

This rule does not limit the court's discretion, except perhaps as to the details of the procedure to be followed in appointing the court's expert.

VENEZUELA

In Venezuela, anyone of the disputing parties or the judge ex officio may bring an expertise into operation; this is provided for by the articles 331 of the Code of Civil Procedure and 1105 of the Commercial Code in commercial matters. The judge has also been granted the authority by way of an extraordinary procedure called "auto para mejor proveer" (an arrest for better providing, as per al.4 of article 407 of the Code of Civil Procedure) to order the resort to an expertise, after having examined the case and before deciding on it. In Venezuela the law does not provide for an exhaustive questionnaire to be submitted to the experts. However, it is necessary that the

Question No. 1 cont.

expertise would deal with some "points of fact" that will have to be mentioned in advance when the expertise is put into operation by one of the disputing parties or by the judge, depending on circumstances. Article 1105 of the Commercial Code provides that "in case of the examination of accounts, books, material of the dispute, documents or registers, the judge may, at any stage of the proceedings, refer the parties to one or three experts who will be appointed by the Court and who will make their best efforts for conciliation and, if they do not obtain it, will report on the points that have been submitted to them. In the other cases the Code of Commerce provides that for carrying out the expertise, one or three experts will be appointed. These experts will be appointed *ex officio*, i.e. by the Court, if the parties would not come to an agreement regarding their appointment within the time 24 hours that will have been granted to them.

As one may understand, the Court is at liberty to appoint the experts provided the parties have not agreed on the appointment of an expert 24 hours after the expertise has been decided.

YUGOSLAVIA

The Court will call expert evidence when it considers that for establishing or interpreting the facts professional knowledge, that it has not, is necessary (article 250 of the law on civil proceedings). The experts are appointed by the Court, after it has heard the parties concerned (article 251, para. 1 and 2). The Court may replace an expert by another (article 251, para.4).

QUESTION NO. 2:

ARE THE COURT APPOINTED EXPERTS SUBJECT TO
CROSS-EXAMINATION?

ARGENTINA

No. The parties may ask for explanation from the experts and criticize or challenge their report and the Court may in turn ask for explanations, but there is no real cross-examination.

BELGIUM

The practice of cross-examination is unknown in Belgian law.

Article 987 enables the judge to call the expert in Court. It is the judge who examines him. The parties may suggest questions but it is the judge who decides whether or not these will be put. (Art. 987). It happens that the Court orders the expert to appear but such cases are rather exceptional. Generally, "the judge finds in the report the necessary clarifications".

It is of paramount importance, under Belgian law, that the expertise be made common to all parties. The parties are convened to all the activities which the expert performs, unless he has been dispensed by the parties of doing so. (Art. 978, para. 3). Article 972 provides that the experts hear the parties and that the parties call on the experts for any requests they might think fit. The report must mention that the parties were present at the performance, their declarations and requests, and it must also contain a list of the documents and notes handed over by the parties to the experts (Art. 979). At the end of the operations the experts will make the parties acquainted with their findings and put their observations on record (Art. 978).

Question No. 2 cont.

The law makes it an obligation to the experts to make such a communication to the parties to which, in practice, has been given the name of "pre-reading of the report", only as far as their findings and not their conclusions, arrived at from the facts that have been ascertained, are concerned. In Antwerp, however, the usual practice is for the experts to communicate their report at full length before having it registered, so as to allow the parties to express their observations, not only on their findings but also on their conclusions.

Before the code on the rules of procedure was enacted, experts, who had been nominated in chamber, were refused all competence by certain Courts other than that of making material findings. The new code expressly provides that they are entitled to give their advice on the causes of the facts that may have given rise to disputes. They collect all possible information and to that effect, in addition to calling the parties, they may call witnesses and executives of the administration; but no oath is taken from such persons. (The code also provides another method of investigation, i.e. that enquiry during which the judge, this time on oath, will hear witnesses, the parties being duly represented and having the possibility of putting questions through the medium of the judge).

BRAZIL

One may not say that there is a procedure of "cross-examination" in Brazil. The Code of Civil Procedure provides that the parties are entitled to ask for clarifications to the experts, provided they notify to the latter that they should appear at the hearing and formulate in the act of notification the questions they wish to be clarified by the experts.

Question No. 2 cont.

CANADA

Assessors appointed in the Federal Court are not "witnesses" in the usual sense - rather, they are appointed to assist the Court, they hear the evidence with the Court, and their function is to advise the judge on technical matters falling within their expertise. It is a matter of long-standing practice in the Federal Court, and in its predecessor, the Exchequer Court of Canada, that assessors are not subject to cross-examination. Indeed, there is no requirement that counsel be advised by the Court of the questions to be put to the assessors or the answers given. The process may take place between the judge and the assessors, in camera, it being in the discretion of the judge whether to refer to the advice of the assessors in his Reasons for Judgment. In a recent judgment dealing with the subject, (The "Sun Diamond" v. "The Ship 'Erawan'" (55 O.L.R. (2d) 1938), it was suggested that Counsel should be afforded the opportunity to assist the court in formulating formal questions to be put to the assessors and that the judge should set forth in his Reasons for Judgment the questions which he has posed to the assessors and the answers given.

DENMARK

The experts will give their opinions in writing and may be cross-examined by the party upon application.

FEDERAL REPUBLIC OF GERMANY

Cross-examination is not known in Germany. However, the parties either directly or through the court, may put questions to the experts.

Question No. 2 cont.

FRANCE

The so called "cross-examination" is not known in France. However, the experts must perform their duties within the privity of all concerned; as a result the parties and their lawyers have, at any moment, the opportunity of making the expert acquainted with their views and to discuss them with him in the presence of the other side. Each party has the right to submit a written "Dire" to the expert wherein he expresses his views and draws the attention of the expert on certain points. The expert must examine these points, give an answer and attach these "Dires" to his report, if the parties ask him to do so (art. 276). In case the Court requires the expert to attend the sitting in order to give word for explaining and implementing his report - this happens very seldom (art. 262 and 283), the parties will be at liberty to put questions to him, not directly as if he were subject to cross-examination, but through the court which decides on the opportunity to put such or such a question proposed by the parties.

GREAT BRITAIN

Assessors appointed by the court are not subject to cross-examination. Experts appointed under Order 40 or under the inherent jurisdiction of the court are subject to cross-examination.

GREECE

Usually, the experts are ordered to give their opinion in writing and the relevant report is filed with the court after the experts have concluded their task. The court has the right to summon the experts to appear at a hearing of the case in order to provide explanations on their report. At the hearing the litigants and/or their representatives and/or their attorneys and/or their technical advisors are entitled

Question No. 2 cont.

to question the experts directly or through the president of the court.

INDIA

The court does not appoint any experts but only appoints assessors. They assist the court and are not subject to any cross-examination.

IRELAND

Assessors can never be cross-examined.

ITALY

In Italian civil proceedings there is not precisely what in the English-speaking countries is called cross-examination; in fact, it is the judge himself who puts the questions to the expert: the lawyers must submit to the judge the questions for the expert (as well as for the witnesses) and the judge decides whether to put these questions to him or not. However, the practical result of such a way of proceeding is to some extent rather similar to the cross-examination: the Court's expert in fact, - but also the private expert - must answer the questions coming from each party, albeit through the judge. This may happen whenever the judge deems it necessary to call his expert - and the private expert too - in public hearing or in restricted hearing (camera di consiglio), for elucidations and further comments in his report.

JAPAN

Yes. The expert appointed by the court must give his testimony either verbally or in writing, but usually in writing and is subject to cross-examination.

Question No. 2 cont.

MEXICO

Yes. All experts - those appointed by the parties and one appointed by the court, are subject to cross-examination.

NETHERLANDS

There is no cross-examination. The parties have a right to make suggestions to the experts and after report has been made, have the right to make objections to it. In that case the court might appoint other experts or reject the advice of the experts.

NORWAY

Normally, the experts submit a written expert opinion to the court answering specific questions put to them by the court or by the parties through the court. However, at the request of either the court or the parties the expert may be called as a witness. He will then be examined as any other witness. However, in such case he is allowed to be present in court and listen to other witnesses as he may wish, and he is also entitled himself to ask questions necessary for him to form his opinion.

PORTUGAL

Yes. During the hearing and before the witnesses produce their evidence, the questions put to the experts and their answers are read. The court and the parties can ask for explanations. The parties are free to criticize the report.

SOVIET UNION

The experts appointed by the court may be subjected to cross-examination on questions connected with

Question No. 2 cont.

explanation and completion of their conclusions (Art. 180 of the Civil Procedure Code of the RSFSR).

SWEDEN

Yes.

SWITZERLAND

After the expert has delivered a written report to the court the parties may submit observations on the report and ask for clarification. The expert will often be called to him directly or through the court. There is, however, nothing like cross-examination.

U.S.A.

Prior to the adoption of Rule 706, an expert appointed by the federal court sitting in admiralty to act as an assessor was not subject to cross-examination, which was the same procedure imported from the High Court of Admiralty in England. Rule 706, however, specifically provides that a court-appointed expert "shall be subject to cross-examination". While the question has not been ruled upon, it would seem that Rule 706 now governs the details of procedure in maritime cases. The parties may, of course, agree to a different procedure, as has actually been done in at least one case.

VENEZUELA

All experts, both those appointed by the parties and those appointed by the court are subject to the parties' comments but the parties will have to let the experts discuss and deliberate among themselves.

Question No. 2 cont.

YUGOSLAVIA

The judge asks questions of the experts and allows the parties to ask supplementary questions. The initiative belongs to the court.

QUESTION NO. 3

WHEN THE COURT APPOINTS EXPERTS, ARE THE PARTIES PERMITTED TO CALL THEIR OWN EXPERTS? IF THEY DO, IS THE EVIDENCE CONSIDERED BY THE COURT'S OWN EXPERTS IN MAKING ITS RECOMMENDATIONS TO THE COURT?

ARGENTINA

If any of the parties offers a Survey as evidence, the appointment of the experts who will carry it out may be made by the Judge directly or, at the proposal of the parties, in the form indicated in the reply to appoint 1.

In the case that one of the parties, extrajudicially and without having obtained the consent of the other party, should appoint an expert in a unilateral form and should present his Report on that survey in the Court file, the evidence value shall be very weak because according to the rules of procedure it is necessary that the expert evidence be carried through under the surveillance of the opponent.

If the Surveyor who has intervened in a private manner for account of one of the parties is called upon to declare as a witness, his explanations must be restricted to the facts which have actually come to his knowledge. Even although, on account of his knowledge, questions may be put to him related to circumstances connected with technical points, the Survey proceedings must be carried through the experts appointed judicially, in accordance with the rules which expressly regulate that form of providing evidence, because it cannot be substituted by the proof of witnesses.

BELGIUM

If several articles in the code on the rules of procedure guarantee that the expertise be made common to the parties and consequently to the lawyers who

Question No. 3 cont.

represent them, the law does not provide for the assistance of parties by their own expertises, and to make comments both by way of word and in writing. There is little doubt that the parties, which are present at the expertise in person or by means of their lawyer, can make their own the declarations of the private expert and have them recorded. The notes of the private expert, which have to be submitted to the expert by the parties or by their lawyer, must be discussed in the report. This results without doubt, be it impliedly, from Article 979.

BRAZIL

1st question: yes, the parties are permitted to call their own experts, provided there is not more than one expert for each side. The side where there is more than one party may call its expert at the majority of the votes or when a tie results the expert will be chosen by drawing lots.

2nd question: the answer may be in the affirmative, provided that the expert appointed by the court considers that the evidence is appropriate. In any case, the court is at liberty to decide the questions contrary to the experts' opinion.

CANADA

No. Although there is no express prohibition against it in Rule 492, the practice in the Federal Court of Canada follows the English admiralty practice, that where the court sits with Assessors the parties are not generally entitled to call their own expert witnesses. There may be an exception to this Rule where a party wishes to call expert evidence on an issue which does not fall within the assessors' sphere of expertise - presumably in such a case the party would be permitted to adduce expert evidence and the

Question No. 3 cont.

assessors might be asked by the court to comment on it.

DENMARK

Yes, but the court may in its discretion exclude evidence that it regards as immaterial and may exclude evidence of experts appointed by the party for the same reason.

FEDERAL REPUBLIC OF GERMANY

At any time parties are permitted to call their own experts but after the appointment of an expert by the court, the court is no longer bound to nominate the expert parties have agreed upon. So, the findings and conclusions of a private expert - the court is not bound to - have the same value as that of statements of the parties and are considered as such. The expert appointed by the court may take them into account.

FRANCE

There is no expert appointed by a party, even if some names have been proposed or suggested by the parties; the expert is an authorized agent of the court. Usually only one expert is appointed. (Article 264). During the survey the parties can be assisted by their own experts who are then simply counsel of the parties and have no right to participate in the decision of the expert appointed by the court or to participate in the writing of his report.

GREAT BRITAIN

Yes, if they are appointed under Order 40 or under the inherent jurisdiction of the court. The parties are limited to one expert witness each unless they obtain the permission of the court to call further

Question No. 3 cont.

expert witnesses, but this will only be granted in exceptional cases.

The parties will not normally be permitted to call expert evidence where the court is sitting with assessors on matters within the expertise and competence of those assessors but will be entitled to call expert evidence on other matters arising in the action.

The court experts will, as a matter of course, be invited to express their own view on the evidence given by experts called by the parties, but it is in all cases for the court to decide which, if any, of the expert evidence it will accept and which it will reject.

GREECE

The parties are entitled to appoint (at their own expense) their own Technical Advisors to assist the Experts appointed by the court. Such Technical Advisors have the same powers as the court's experts including the right to submit to the court their own opinions on the report issued by the latter.

The court's experts are not compelled to take into consideration the opinions/reports of the parties' own Technical Advisors when making their recommendations to the court by way of submission of their report.

INDIA

When the court has appointed assessors to assist it, the court would not usually permit parties to call their own experts unless such experts are in a branch in which the assessors are not qualified. The court would, however, take the assistance of its assessors in evaluating the evidence of such experts.

Question No. 3 cont.

IRELAND

Parties to an action are always permitted to call their own experts. This would apply even when the court appoints assessors. The assessor, if asked by the judge, may express to the judge in private his views but the judge is not bound by this view. The assessor must hear all the evidence.

ITALY

Yes. It is right of each party to choose and appoint one expert - or more if deemed necessary - in order that a full defense is assured also during the technical survey (in fact the lawyers could not be able to give an effective assistance to their clients when technical matters are in dispute). This "consulente di parte" or private technical advisor is entitled to attend survey operations, to submit remarks and questions, and the court's expert must keep him informed of all steps he is going to take (such as inspections, sampling, etc.), otherwise all his activities will be null and void. The experts of the parties may also attend the hearings before the judge whenever the judicial expert is present, and to express their views in written report or by oral answer to questions put to them by the judicial expert or by the judge, on the matters investigated or on the advice of the judicial expert. This means also that the judicial expert is bound to consider the views of the experts of the parties but is free to share or refute them, with the sole duty of giving sufficient reasons in this last case.

JAPAN

No. The parties are not permitted to call their own experts who are allowed to give an expert testimony only when the court so ordered.

Question No. 3 cont.

MEXICO

The experts are first appointed by the parties and the court will only call its own expert if experts have not come to an agreement in their expert opinion. The opinions of the experts are only as an advice to the court.

NETHERLANDS

General Regulations: As discussed in the answer to Question (1), the parties have the possibility to appoint in joint consultation their own experts and experts are only appointed by the court in case parties do not come to an agreement. The court makes no difference, as far as the evidential force is considered, between reports of experts appointed by parties or by court.

Special Provisions: In general the court has discretion to deviate when appointing an expert when the applying party suggested a certain expert to be appointed.

NORWAY

The parties have an absolute right to call their own experts. Their evidence may or may not be considered by the court's own experts as determined by the court.

PORTUGAL

The parties have always the right to appoint their expert, provided they do it within the legal time limit.

Once their conclusions are reached, the experts produce a written report, in which they state their

Question No. 3 cont.

findings and give an answer to the questions which were put to them.

The answers can express the views of all the experts, or only of some of them, in which case the other or others will also give their opinion and the way he reached it.

Each expert can state the nature of his findings and reasons of the report he has made.

SOVIET UNION

In appointing the experts the court takes into account the opinions of the parties as to the candidates concerned and the range of questions on which the experts shall make their conclusion.

SWEDEN

Yes. The experts appointed by the court study the opinions of the experts nominated by the parties.

SWITZERLAND

The parties are permitted to call their own experts; however, the value of their evidence is not equal to that of the expert appointed by the court. The findings and conclusions of a private expert have the same value as that of the contentions of the parties and are considered as such. The expert appointed by the court may, if he is convinced that the findings of a private expert are correct and duly substantiated, take them into account but he is not compelled to do so. All depends on the conviction of the court surveyor. The law provides that the court has authority to order an additional survey by the same expert or by another expert, if the court suspects that the first survey was incomplete or erroneous. The private surveys of the parties may war-

Question No. 3 cont.

rant such a step when they succeed in convincing the judge of an error or omission of the expert.

U.S.A.

The answer is "yes" to each question.

VENEZUELA

As just indicated, in commercial law matters, in case the parties do not agree on appointing their own experts, the experts will be appointed by the court and the, parties may no longer appoint their own experts. However, even after the survey has been decided by the court, a party to the suit can also bring up a new survey.

YUGOSLAVIA

The parties may not appoint their own experts.

QUESTION NO. 4

MAY THE COURT REJECT THE ADVICE OF EXPERTS
IF HE SEES FIT AND DECIDE THE QUESTIONS
CONTRARY TO THE EXPERT OPINIONS?

ARGENTINA

The evidence value of the Report shall be estimated by the judge in accordance with the provisions of Article 476 of the Code of Procedure. He may decide the question contrary to the expert opinion when he may reasonably consider that is not the right solution.

BELGIUM

The conclusions of the expert have no decisive value. "The judges are not compelled to follow the advices of the experts if their conviction are opposed to" (Art. 986). "If the judge finds that the report is not sufficiently enlightening, he may either instruct the authors of the report to carry out an additional expertise, or order a new expertise by other experts".

BRAZIL

In reaching its decision the court in its discretion may disregard the opinion of the experts.

CANADA

Yes. In all cases the decision must be that of the judge. He must not surrender his duty to decide the case to the assessors. However, the advice of the assessor in technical matters is compelling.

DENMARK

Yes. The court is free to evaluate the expert opinion.

Question No. 4 cont.

FEDERAL REPUBLIC OF GERMANY

Yes, the court is free to judge the value of the advice of the expert. So he may decide the questions contrary to the expert opinions or appoint another expert.

FRANCE

The court is entirely free to rule according to its own judgment. The expert's opinion is a simple compilation of information. The court can adopt the expert's opinion, but is bound to give the grounds for its decision and to explain why it adopts or rejects some of the expert's conclusions of fact.

GREAT BRITAIN

The court may reject the advice of experts but it is unlikely that it will do so.

GREECE

Yes. The expert's opinion is subject to the further evaluation of the court but if the court rejects the expert's advice, he must be fully justified in doing so.

INDIA

The court has powers to overrule the opinion of the experts but the court would have no experience in technical matters and on rare occasions the court would give an opinion contrary to that of experts.

IRELAND

The court is free to reject the advice of the assessor if it thinks fit. It may reject the evidence of any expert called as a witness. The parties may call any

Question No. 4 cont.

person as an expert; it is for the judge to decide whether he is an expert.

ITALY

Yes. The Court may either share the whole advice of expert or share it partially, or reject it and accept the advice of one of the experts of the parties, or reject all experts' advices and choose its own way. No judge is in any way bound to follow the expert appointed by him, because, according to our law, the judge is deemed to be "peritus peritorom". This attitude of our law on civil (as well as on criminal) proceedings derives from the firm and basic statement that the judge is free of evaluating any evidence apart from some specific and limited cases (notarial documents, sworn declarations of the parties, etc.).

It must be added however that, when disagreeing with the findings of the expert, any judge must give sufficient and satisfactory reasons for that, in order to avoid that his freedom becomes arbitrary and his decision may be reversed by superior judges.

JAPAN

Yes. The court is absolutely free from any control in weighing and evaluating all the evidence including an expert testimony (Art. 185). In other words, an expert evidence can in no way bind the court. If the opinion of the expert is considered by the court to be unconvincing, the court is quite free not to take it into account, in rendering the judgement.

MEXICO

Yes. The court may reject the expert's opinion but must have good reasons for so doing.

Question No. 4 cont.

NETHERLANDS

Article 236 of the Code of Civil Procedure stipulates explicitly that the Courts are under no obligation to follow the opinion expressed by experts, if it is contrary to the Court's conviction. Statements of experts obtained by virtue of special regulations will only serve as normal pieces of evidence from which the Court will be free to differ.

NORWAY

In Norwegian procedural law a basic principle is the doctrine of "free evaluation of evidence". Thus, the court within certain limits may consider any evidence presented to it and may accept or reject the advice of experts as he sees fit.

PORTUGAL

The expert's report is estimated by the Court on the same level of all the evidence, that's to say, on the basis of the intimate conviction of the judges.

The Court can decide against the expert's opinions. However, it must be remembered that those are only concerned with matters of fact, and should never deal with points of law, which only the Court has power to decide upon.

SOVIET UNION

The court considers the opinion of the experts as other kinds of evidence on the ground of its inside conviction (Art. 56 of the Civil Procedure Code of the RSFSR). However the disagreement of the court with the conclusion of experts shall be motivated without fail in the judgement (Art. 78 of the Civil Procedure Code of the RSFSR). If the expert conclusion is not clear or complete sufficiently, the court has authority

Question No. 4 cont.

to prescribe additional experts (Art. 181 of the Civil Procedure Code of the RSFSR) the opinion of those not valid also for the court in advance and may be rejected (sic).

SWEDEN

Yes, but it rarely happens.

SWITZERLAND

If the findings of the expert do not appear to be convincing, the court is at liberty to order a second survey or disregard the findings of the expert.

U.S.A.

Yes.

VENEZUELA

In pursuance to the provisions of the articles 1108 of the Commercial Code of 1426 of the Civil Code, if the Court considers that the advices of the experts are not clear enough, it may ex officio order a new expertise to one or more experts who will also be appointed by the court, always in odd numbers, and who will be allowed to ask to the first experts whatever information that they think appropriate. The article 1108 of the Code of Commerce also provides that in commercial matters, the courts are not bound to follow the opinion of the experts, if this would be against their intimate conviction.

WEST GERMANY

Yes, the court is free to judge the value of the advice of the expert. So he may decide the questions contrary to the expert opinions or appoint another expert.

Question No. 4 cont.

YUGOSLAVIA

When the parties, in their pleadings, submit facts established by their surveyors, the court, if it considers that questions, relevant to the issue of the dispute, are concerned, will appoint one or more court experts in order to obtain an opinion, that it may accept or reject. This derives from the principle of the appreciation of the evidence (Article 8).

QUESTION NO. 5

WHO DETERMINES THE COMPENSATION OF THE COURT APPOINTED EXPERTS AND WHO PAYS THEM?

ARGENTINA

The judge taxes the fees according to the amount of the claim and considering the amount of work involved, as well as the importance of the evidence presented for the decision of the lawsuit, the fees taxed in favour of the other professional men who have intervened, and to the provisions of the Taxation laws, payable according to the various different specialties.

The experts are considered as the Court's auxiliaries and they may, in consequence, demand the payment of their fees by any of the parties to the proceedings.

The party who in the judgement is condemned to pay the costs of the proceedings, is the one who must in the end bear the outlay which is included in the definition of costs. If the losing party has mentioned during the course of the proceedings, upon being informed of the request for a survey made by the opponent, that it has no interest in that evidence, he may be exempted from the payment of the fees and costs which may be incurred in having the survey carried out, provided always that it would not have been necessary for solving the dispute.

In addition to the fees, the Judge may order that the expert be reimbursed the expenses which he may have incurred for carrying through his task.

BELGIUM

The remuneration of the experts appointed by the Court is fixed by Articles 98, 984 and 990 of the code on the rules of procedure. The expenses and fees of

Question No. 5 cont.

the experts are part of the total of the costs which are taxed, and they finally rest with the losing party. In pursuance of Article 984, when the expertise is ended, the expert will claim payment for it, either from the party which requested the court for the expertise or, but only when the expertise was ordered by the judge ex officio, from the party which requested the expert to accomplish his duties.

Article 990 rules the deposit of retainer fees at the Court Registrar.

It is also customary for the retainer fees to be paid direct to the expert and for the latter to ask for a retainer fee that equals the sum of his expenses and fees, before depositing his report at the Court Registrar.

BRAZIL

The court determines the compensation of the court appointed experts. The party, that has made an application for an expertise pays the compensation of the expert or of the expert who has been appointed ex officio by the court or at the request of the Public Prosecutor. When both parties have made an application for an expertise, the compensation must be paid by the plaintiff.

The experts called by the parties are paid by the latter (each one pays its own expert); the winner will be entitled to be reimbursed.

CANADA

Rule 492, subsection 3 provides that the order appointing the assessor may contain a provision that the Court's Registry be reimbursed "in respect of the fees and allowances paid to the assessor either in whole or in part by the party or parties who have

Question No. 5 cont.

proposed that an assessor be called in aid". The Tariff of the court makes provision for the payment to an assessor of "such amount as the Court may approve on being satisfied that, having regard to all the circumstances, it is reasonably necessary in order to obtain the services of properly qualified persons".

Generally, the order appointing the assessor will fix the rate of compensation and, on the conclusion of the court will direct that the unsuccessful party pay the costs, including the costs of the assessors.

DENMARK

The court fixes the expert's compensation. The party requesting the expert's appointment pays his compensation but if he wins the court may decide that the losing party pay.

FEDERAL REPUBLIC OF GERMANY

The compensation of the expert is determined by the court according to the law on the compensation of witnesses and experts. A higher compensation is possible, if agreed between the parties. The court appointed expert is paid by the court but in the final judgment the court has to decide upon who has to pay the costs of legal proceedings including the compensation for experts.

FRANCE

The compensation to which the expert is entitled for his fees and expenses is determined by the court, that has appointed him. Its amount is included in the costs in proceedings. Before the expertise is being performed the judge of the "mise en etat" or the court, which appointed the expert, determines at the Registrar and by which party the deposit must be made; this retainer corresponds to the disbursements

Question No. 5 cont.

(travelling, analyses, investigations) that the expert may incur (art. 280-284).

It is the common rule that he who asks for the expertise, should pay the retainer; however, the court or the judge of the "mise en etat" may decide that all the parties will pay a contribution and he will apportion this temporary expenditure accordingly.

At a later stage in the final decision the court will decide who will ultimately bear the burden of the cost of the expertise, which is assimilated to the other costs of the proceedings. If only one party is entirely on the losing side, it will be burdened with all the costs; if each of the parties loses on some of the complaints, the court is at liberty to apportion the costs between them, including the cost of the expertise.

GREAT BRITAIN

The court fixes the remuneration of the experts appointed by it and has the power to order payment by the parties in such proportion as it sees fit. In the absence of any order the parties are jointly and severally liable for the expert's remuneration.

This is a fixed scale of fees payable to assessors which is determined by the court. Assessors are paid by the parties in equal shares in the court of first instance and by the appellant in the Court of Appeal, unless the court directs otherwise.

GREECE

The Expert Evidence, as any other means of evidence provided for by the CCP, has to be produced by the party which was ordered by the court to produce such evidence. It follows that such party has to disburse the fees of the Expert(s) the amount of

Question No. 5 cont.

which is fixed by the Experts themselves "ex aequo et bono". The amount so paid is part of the costs of the litigation and it is taken into consideration by the court when costs are awarded to the winning party.

INDIA

The assessors appointed by the court have to be paid fees by such parties as the court may direct.

IRELAND

Order 64m Rule 44, of the rules of the Superior Court, states:

"Each assessor shall be paid such sum as may be fixed by the Judge for each day on which he shall attend, and the fees of each assessor shall be paid by the party for whom or in whose favor judgment shall be given, and shall be costs in the cause; but where damages are divided such fees shall be paid by the parties equally."

ITALY

At the end of his activity (which never coincides with the end of the proceedings) the court's expert submits to the judge his bill of fees and expenses; and the judge by decree fixes the amount to be paid to the expert and states who must pay it; very often, at this stage of the proceedings the judge will require both parties jointly to effect payment, so that the expert will be in a position to claim full payment from each of the parties.

At the end of the case the judge will state which party must finally bear, and to which extent, the cost of the official survey.

Question No. 5 cont.

JAPAN

The expert is paid his remuneration by the court, and, if he traveled, also his hotel charges and other traveling expenses (the law concerning the Cost of Civil Procedure, Arts. 18, 20). The amount of the remuneration shall be determined by the court; taking into account all the relevant factors including the actual expenses incurred by the expert in preparing the testimony as well as how valuable and how difficult the work is. This payment shall be included in the cost of civil procedure of the litigation concerned, and shall be borne, as determined by the court, by the party or the parties, who is usually the losing party.

MEXICO

Each party has to pay its own experts' fees and all parties should share the fees of experts appointed by the court.

NETHERLANDS

The costs of experts are for account of the losing party. Until it is established which is this party the costs shall be borne by the party that asked for an investigation by experts, or, in case the evidence by experts has been ordered by the court on its own authority, by the party that has most interest in the investigation.

NORWAY

The experts' compensation is determined and paid by the court who in turn charges it to the parties under the normal court fee rules.

Question No. 5 cont.

PORTUGAL

The fees of the experts are fixed by the court according to the Code of Legal Fees, and paid by the party who, in the final decision, pays the costs of the proceedings.

SOVIET UNION

The compensation of the experts shall be determined by the court and paid by the losing party.

SWEDEN

The court decides the compensation and directs the parties to pay it.

SWITZERLAND

The expert is paid by the court, which fixes his indemnity and requires deposits from the parties. In the judgment, the apportionment of the costs of legal proceedings, including the expenditure for a survey, is decided upon. Generally, the losing party pays all these fees and expenses.

U.S.A.

The court determines the compensation of court-appointed experts, which is paid by the parties in such proportion as the court directs and may be taxed as part of the court costs. Presumably, the losing party would pay the fees of court-appointed experts.

VENEZUELA

In case one of the parties has brought the expertise into operation, that party will have to pay the fees of all the experts that have been appointed, i.e. those

Question No. 5 cont.

who have been appointed by that party as well as those that have been appointed by the court.

If the court has appointed the experts, the fees of the latter will also be charged to the parties.

YUGOSLAVIA

The expert is permitted to ask the reimbursement of his expenses and a remuneration for the report submitted to the court as well as for the attendance, if any, to the hearings. For the payment of these amounts, the court may require the parties to constitute a fund and, depending on the circumstances, it may order that payment be made by one of the parties or by both but ultimately these costs will have to be borne by the losing party (articles 249 and 256).

QUESTION NO. 6

ARE THE EXPERTS SELECTED BY THE COURT FROM AN APPROVED LIST AND IF SO, HOW IS THAT LIST ESTABLISHED?

ARGENTINA

The Court of Appeal prepares lists, according to the specialties when they relate to professions which are legally regulated and the Judges must appoint the experts from amongst those who registered in the court and consequently figure in the aforesaid lists. To draw up such lists, it is necessary that the applicants comply with the provisions of the laws indicating the requirements to carry out their profession.

In the case that it should be necessary to appoint experts whose professions are not governed by rules, they are appointed by the Judge who bears in mind the competence of the person in the technical questions on which he has to express his opinion. Article 528 of Navigation Law, which has not as yet been regulated and is not applied in practice reads as follows:

528. "The experts appointed by the Judges for the purposes indicated in this Chapter must be persons with specialized knowledge of the task they must perform. For that purpose the Judges must periodically ask the professional Associations which represent Commerce and Industry in the respective localities, for a list of several experts in any of the various classes of goods which are habitually subjected to transport by water, especially relating to the import trade, from among which the Judge may select the Surveyour".

BELGIUM

The parties, and subsidiarily the court, choose the experts with perfect freedom and do not have to pick

Question No. 6 cont.

them out of an approved list. In most of the Public Prosecutors' offices, a list is drawn up by the King's Attorney, to which hierarchical authority appertains vis-a-vis his "substitutes". Some presiding judges have drawn up unofficial lists but these have only an informative value.

Whilst on this subject, one should mention an organization which is strictly praetorian and the result of a long practice: the Association of Maritime experts, which bears the title of "Nautical Commission to the Commercial Court of Antwerp". Those experts, at the moment eight in number, are all master mariners having commanded ships; they are appointed at the general assembly of the Commercial Court of Antwerp. They have no private practice. Owing to the organization of a common pool, they are readily available to the parties. They are most frequently appointed in collision cases and in cases involving litigation in maritime and river transport, even by courts, the seat of which is situated outside the jurisdiction of the Court of Appeal of Antwerp. They are also appointed in maritime and river transport cases of a more technical nature involving, for instance, machinery damage or breakdown. In such cases, they are frequently assisted by specialists who may also be independently appointed by courts. Nautical experts also accept to carry out surveys following an agreement by the parties, without the court intervening.

Article 991 provides that Courts and Tribunals may draw up lists of experts according to rules laid down by the King. However, no decree providing for the enforcement of the law has yet been taken. The object of the legislation is not to limit the choice of the parties or of the court, but rather to inform them and to avoid a person who has already been appointed by the judge from abusively assuming the title of expert to that court.

Question No. 6 cont.

BRAZIL

There is no approved list of experts.

CANADA

There is no approved list of assessors. The court will rarely appoint its own assessor without the advice or suggestions of counsel. In some cases counsel have agreed on one or more assessors and the court has followed their suggestion. In the absence of an agreement each party has submitted a list to the court and the court has appointed an expert from each list.

DENMARK

The Maritime and Commercial Court at Copenhagen which deals with the majority of maritime litigation has a list of experts. Other courts do not have lists of maritime experts. Even the Maritime and Commercial Court is not bound to use its own list and will usually consult the parties and try to find experts acceptable to both parties.

FEDERAL REPUBLIC OF GERMANY

There are approved lists with the Chamber of Commerce. However, the court is free to nominate any expert.

FRANCE

The courts are at liberty to appoint as experts the individuals whom they consider to be most qualified for performing the duties that they wish to entrust to them.

Question No. 6 cont.

However, lists of experts actually exist. - a national list at the Supreme Court - a list at each Court of Appeal.

The enlisting is consequent upon an application made by the candidate to the Attorney General who examines it and submits it to the court sitting in General Assembly. Measures may be taken against the experts (omission, radiation).

The Performance of the expertises takes place under the control of a judge designated in the decision; in Paris and in the important Courts of Appeal there is an organization controlling the expertises; it provides for the relations with the experts at the level of general administration.

GREAT BRITAIN

Nautical assessors will normally be drawn from the ranks of the Elder Brethren of Trinity House. In the Court of Appeal the court's assessors are appointed from a panel prepared by the Master of the Rolls upon the advice from the Admiralty Register. The assessors will either be merchant navy masters or officers of the Royal Navy.

GREECE

Each court has a list of experts. This list of experts is made on recommendation of the Minister of Justice. If the court needs an expert of a different nature from the list, he may make an appointment of a suitable expert not on the list.

INDIA

There is no approved list of assessors.

Question No. 6 cont.

IRELAND

The courts are free to select an expert assessor or witness from persons known to have experience in that particular field. Lists of well-established experts in a particular field are not kept by the courts in Ireland.

ITALY

Yes, generally speaking. Each tribunal has an official list - or "albo" - of experts, including various branches corresponding to various technical fields - and always there must be these specific categories: medical, industrial, commercial, agricultural, bank, insurance. However, an expert is included in the list only if he expressly files a petition for that; his application will be examined and accepted or rejected by a Committee formed by the President of Tribunal, the Public Prosecutor and one representative of the professional category concerned.

The judge must, as a rule, choose their experts from this list; however, they are allowed to appoint an expert out of this list but only when that is absolutely necessary, and after having consulted the President of the Tribunal.

JAPAN

There is no list in Japan. The court is always free to use an expert whom he deems appropriate to the issues under consideration.

MEXICO

In maritime cases there is no previously approved list as in other cases. The Navy Ministry provides upon request a list of three names, then the court appoints one of them.

Question No. 6 cont.

NETHERLANDS

The court does not have a formal list of experts, but there are names of experts who enjoy good reputations registered with the court.

NORWAY

As stated above there is a list of experts in each jurisdiction and such list is established by municipal authorities for a four-year period. However, the court is free when it sees fit to appoint other experts than those on the list.

PORTUGAL

Any person having a sound technical knowledge of the subject may be appointed as an expert, provided he doesn't belong to the list mentioned in article 580 of the Code.

SOVIET UNION

The lists of specialists from which the experts may be selected is not established in the Soviet courts. Any person having necessary knowledge may be appointed as an expert (Art. 75 of Civil Procedure Code of the RSFSR).

SWEDEN

There is no list.

SWITZERLAND

In Switzerland there are no lists of sworn experts. The judge is not limited to choose an expert according to existing lists. He chooses the person whom he considers to be the most appropriate for the mission.

Question No. 6 cont.

U.S.A.

No.

VENEZUELA

Neither in the civil nor in the maritime cases, is there a list of experts prepared in advance. In general the courts have lists of experts and make their choice out of these lists. However, the parties may choose and appoint the experts of their choice and they will not be bound to choose them out of the lists or in accordance with the names that the courts may suggest to them.

YUGOSLAVIA

The experts are chosen, mostly, from the experts' list, but expert evidence may be put in the hands of a specialized institution. (Faculty, Hospital, Laboratory, etc.) (Art. 252). The experts list is drawn up with the collaboration of scientific or professional organizations.

QUESTION NO. 7

DO THE APPELLATE COURTS HAVE THEIR OWN EXPERTS AND DO THEY REVIEW THE OPINIONS OF THE EXPERTS IN THE LOWER COURT AND ADVISE THE COURT OF APPEALS WHETHER OR NOT TO FOLLOW THEM?

ARGENTINA

The evidence is, generally, presented in the First Instance stage. It is only possible to present evidence, including surveys, in the Second Instance stage, when a new occurrence is alleged to have taken place after the order of presentation of evidence has been given in the case in the Court of First Instance or when the litigant has been declared negligent in the presentation of evidence and this party renews the issue before the Court of Appeal based on the Argument that he had not incurred any negligence, and the Court of Appeals considers that such is the case.

BELGIUM

The Courts of Appeal do not have their own experts in the sense that there would be some experts only intervening on appeal. On appeal, the same rules as on first instance apply to the survey. The court can order a survey even though one was not conducted in the court of first instance. The court can hear the experts appointed on the first instance and order a new survey if it thinks it necessary.

On cases judged on appeal, the judge can also appoint an expert who does not give a written report but only reports orally during the hearing (Article 989).

BRAZIL

1st question: yes, if they think it is necessary. 2nd

Question No. 7 cont.

question: yes. 3rd question: yes.

CANADA

There is jurisdiction in the Appeal Division of the Federal Court of Canada, which hears appeals from the Trial Division, to sit with assessors. The practice of the Appellate level is relatively infrequent - even more infrequent than in the Trial Division since, as a general rule, appellate courts in Canada do not receive additional "evidence" but decide the case on the basis of the record in the court below and oral argument of counsel. Where the Appeal Division sits with the assessors and where the questions asked of the assessors by the trial judge and the answers given are a part of the "record" the assessors will comment upon the opinions expressed below.

The Supreme Court of Canada hears appeals from the provincial appellate courts and from the Appeal Division of the Federal Court of Canada. Section 31 of the Supreme Court Act provides:

- 31(1) The Court may, in any Admiralty appeal, in which it may think it expedient to do so, call in the aid of one or more assessors specially and try and hear such appeal, wholly or partially with the assistance of such assessors.
- (2) The remuneration, if any, to be paid to such assessors shall be determined by the Court.

There are no reported decisions of the Supreme court of Canada in which that Court has sat with assessors.

Where a trial judge has sat with assessors but has not recorded in his Reasons for Judgment that advice which he has received, the Appeal Court may be at a particular disadvantage, both in understanding the technical evidence and in reviewing the trial judge's

Question No. 7 cont.

findings. Such a situation might necessitate the use of assessors at the appellate level.

DENMARK

The Court of Appeals does not have a special list of experts, but may upon a party's application appoint experts who may review the opinion of the experts in the lower court.

FEDERAL REPUBLIC OF GERMANY

The Appellate Courts do not have their own experts. The Appellate Courts may follow the opinion of the expert in the lower court or may appoint the same or another expert.

FRANCE

As stated above, there are lists of experts at the Courts of Appeal, but these experts have no greater authority than that of other experts be they not mentioned on a list.

The Appellate Court does not systematically appoint an expert to control the work done by the expert appointed in the lower court. Only in case no expertise had been ordered before or when the court feels that the first expertise is insufficient, does the Appellate Court order an expertise.

There is no precedence among experts; a decision of an Appellate Court may be based on the findings of an expert appointed in the lower court or set them aside albeit they had been confirmed by that latter court. In order to account for local situations that might bring suspicion to the impartiality of an expert a court may appoint an expert who comes from outside the territory over which it has jurisdiction; the same may happen for dealing with some unusual peculiari-

Question No. 7 cont.

ties or in case of a very important dispute for which it is appropriate to appoint a very qualified technician.

GREAT BRITAIN

Where the lower court sits with assessors, the Court of Appeal will do the same unless it has ordered otherwise on the application of one of the parties. The assessors who sit in the Court of Appeal are additional to and not in substitution for the original assessors and the Court of Appeal is entitled to reject their views and to prefer those of the assessors in the lower court if it sees fit. The decision in the case, as always, rests with the court alone but the assessors will normally advise the court in the manner contemplated by the question.

In all other cases where a court expert has been appointed, the Court of Appeal will not have separate experts of its own.

GREECE

The Court of Appeal do not have their own Experts' List and the experts who may be appointed by them are those mentioned in the Experts' List kept by the Courts of First Instance. The Experts nominated by the Court of Appeal may review the opinion of the experts appointed by the lower court and are free to give to the Appellate Court any advice they consider appropriate in the matter. The opinion of the experts appointed by the Court of Appeal is not binding for the Appellate Court which is again free to evaluate the opinion of its experts.

INDIA

Appellate Courts are entitled to appoint assessors to assist them and Appellate Courts and assessors

Question No. 7 cont.

appointed by it would have powers to review the opinion given by the assessors in the lower courts.

IRELAND

It is a matter of discretion for the Appellate Court as to whether it wishes to have its own assessor. If the Appellate Court appoints its own assessor, the terms of his appointment are a matter for the discretion of the court. In admiralty matters the Appellate Court will fix the fees of the assessor and give them to the successful party as part of its costs.

ITALY

No specific rule prevents the Court of Appeal from appointing their own experts, whenever they deem it necessary; but of course such courts must be persuaded that actually the report of the expert already appointed is unsatisfactory or wrong. It is not so simple, in other words, to obtain a second technical survey in the second stage of the case, when another survey has already taken place in the first stage. However, when this occurs the expert of Court of Appeal has full liberty of reviewing (or confirming) the opinions of the first expert, as well as the court has full liberty of sharing or not his views.

It must be added that, in maritime disputes, the appointment of an expert is obligatory by the Court of Appeal as well as by the Tribunal.

JAPAN

1. The Appellate Courts, just like the court of lower instance do not have their own experts in any way belonging to the courts.

2. The experts chosen by the Appellate Court must give to the court his expert opinion in the same way

Question No. 7 cont.

as his counterpart of lower court does. Of course, he will, if requested by the court, review the opinion of the latter, and will put in his own opinion his comment thereon.

MEXICO

The Appellate Court does not have its own experts but may review the reports of the experts of the lower court and determine whether or not to follow them.

NETHERLANDS

In appeal the court may order again an inquiry by experts in case the report drafted in first instance will be insufficiently convincing while the Court of Appeal may also order a new expert investigation on its own authority. The experts institute a new investigation and, therefore, they are not starting from the report drafted in the first instance.

NORWAY

As stated above there is a list of experts in each jurisdiction and such list is established by municipal authorities for a four year period. However, the court is free when it sees fit to appoint other experts than those on the list.

PORTUGAL

Except in very special circumstances the Court of Appeal does not appoint its own experts.

SOVIET UNION

Ascertainment of facts in the case in the Soviet law of procedure is attributed solely to the jurisdiction of the first instance (lower) courts. Owing to this the

Question No. 7 cont.

Courts of Appeals (higher courts) do not appoint any experts.

SWEDEN

No, the Courts of Appeal have no special experts. A Court of Appeal however has a possibility to appoint an expert of its own. (See 1).

SWITZERLAND

The Appellate Courts do not have their own experts. They verify whether the evidence (surveys) has been submitted appropriately in the lower courts, or whether a call for a survey has been wrongly rejected. They can also order a survey, or even a second additional survey. Usually they follow the survey made in the lower courts.

U.S.A.

Rule 706 applies not only to the United States District Courts but also to the United States Courts of Appeals. Consequently, a Court of Appeals may appoint its own experts pursuant to the Rule. There is, however, no reported instance of this having been done, and therefore it is a moot question whether experts appointed by an appellate court would review the opinions of experts appointed by the trial court. Presumably, they would do so because the latter's opinions would be part of the record on appeal.

VENEZUELA

The Courts of Appeal can appoint some new experts if they find it necessary and can also, as we have already indicated, consider appointing new experts upon a previous decision ordering a new survey.

Question No. 7 cont.

YUGOSLAVIA

The Courts of Appeals do not have any experts of their own.

QUESTION NO. 8

HOW DOES THE SYSTEM WORK?

ARGENTINA

The system works relatively well and the improvement of the medium of obtaining evidence would have to be searched in the selection of the experts. In this sense Article 528 of Navigation Law should be applied. The criticism which may be formulated to our system does not refer to the procedural ruling, but to the fact that the Judges do not pay enough attention that the appointment falls on persons who are really competent to carry out the task entrusted to them.

BELGIUM

The system provided for by the Judicial Code is satisfactory. The defects of the surveys, principally their length and their mediocre quality, concern more imperfections of human nature than the law.

The possibility of the expert being paid only by the party who has asked the court for his appointment is rather sad, especially if one considers that a not very solvent defendant often requests the survey to delay the payment of his debt, the procedure of deposit being dimly viewed.

BRAZIL

The court appointed expert may be chosen by the court:

- a) when the parties make an application to that effect,
- b) when the Public Prosecutor applies for it,
- c) when the Court feels itself that such an appointment is necessary.

Question No. 8 cont.

If the three are in agreement, which is rather exceptional, all three sign the report. If they do not, each expert signs his own report. The parties may ask for clarifications as per the procedure mentioned at nr. 2.

The court may decide according to its own conviction and also appoint another expert; this appointment does not annul the first expertise as, indeed, the court has discretion to consider the two expertises.

CANADA

The Federal Court of Canada's use of assessors is uncommon and the appointment is generally in collision cases.

The reluctance of counsel to the appointment of assessors may be due to the fact that the court will get the opinions of the assessors in private and there will be no cross-examination.

Some of these concerns could be met by permitting counsel to participate in formulating questions to be put to the assessors and by requiring that the questions and answers be made a part of the record.

Further, where the court appoints assessors on its own motion, or where the case is specially complex, litigants should be free to call their own experts.

DENMARK

This system works satisfactorily although not perfectly.

Question No. 8 cont.

FEDERAL REPUBLIC OF GERMANY

It is generally considered that the system under the German Civil Procedure Act has so far worked quite well. There are no plans to change this.

FRANCE

Criticism is mainly directed against the cost and the delays of the expertise. On these two points recent measures have been taken to remedy them; it is too early to express an opinion regarding the results. In practice it is found that the parties may use the expertise as a way to delay matters by not submitting to the expert the documents that he requires.

However, generally, the system works well. The expertises are of assistance to the courts in as much as they are saving them the trouble to investigate technical questions that are out of their province and allow for the discussion outside the sittings, where time is short, of these questions amongst technicians.

A written report prepared by an independent expert is a paramount element for the study of a file and for the preparation of the pleading at one's leisure.

GREAT BRITAIN

Where the assessors are appointed to sit with and to assist the court the system generally works satisfactorily although it is thought in some quarters that the assessors are tending to assume a judicial function contrary to the original intention behind their appointment. As has been indicated, the appointment of a court expert in other cases is rare; normally each party calls its own expert witnesses, and this frequently results in the court

Question No. 8 cont.

being presented with conflicting expert opinions between which it has to choose according to the comparative competence and credibility of each party's experts both in their written reports and in their oral testimony. This procedure can result in a considerable increase in the duration and expense of trials while at the same time not necessarily providing much real assistance to the court, but the recent legislation and rules of court referred to in the opening remarks to this note have gone some way towards overcoming these problems.

GREECE

The principle of the system is correct but some procedural aspects thereof are rather complicated; it also implies costs. Thus in practice there is no wide use of the expert evidence and the courts, unless requested by the parties to order such evidence, are not usually inclined to do so. It follows that for the proof of most technical or scientific matters the court will order the parties to produce the respective evidence by witnesses.

INDIA

The power to appoint assessors is contained in the Civil Procedure Code but there are hardly any salvage, towage or collision claims coming up before the courts and hence it is difficult to give any comment on the question as to how the system works.

IRELAND

It is unusual in the Republic of Ireland for assessors to be appointed by the court. In most cases expert evidence is called by the parties to the action and the judge or the jury, as the case may be, decide which evidence they prefer.

Question No. 8 cont.

ITALY

Generally speaking the system is working in a rather satisfactory way.

JAPAN

It is generally considered that our system has so far worked quite well and there is no opinion nor movement that suggests any amendment to the system.

MEXICO

The system works satisfactorily.

NETHERLANDS

It would seem that our system functions well. Especially in Rotterdam, the system is quite flexible. In different cases, it is customary that the court discusses with the lawyers which experts must be appointed. In some, if not most cases, the lawyers agree beforehand which experts must be appointed or agree that a number of experts are mentioned from among whom the court can choose one or three experts. Our system is certainly not so rigid as seems to be the case in some other countries where the courts appear to follow their court expert almost always.

In our country this is certainly not so and, e.g., in admiralty cases sometimes surveyors are appointed at the beginning, certainly in cargo damage cases which are very frequent. The basis for the expert evidence is then formed by the contradictory survey, which usually casts light on almost all aspects of the case. The work of the court expert is then confined to giving his opinion on the points on which the surveyors of the parties disagree. He has then

Question No. 8 cont.

more or less the task of an umpire, although his opinion is not binding on the court or on the parties. Another advantage of our system is that the parties are always able to give all their comments or to file into court additional comments of their own surveyors or experts. This can be done either by filing written statements into court, but in important or difficult cases, upon the request of the lawyers, or one of them, handling the case, an oral argument may take place, wherein the lawyers can give their full opinion about the expert evidence before the court gives judgment. Such oral argument can be held also before the interlocutory judgment of the court will be given, i.e. the judgment whereby it is decided that expert evidence should be furnished so whenever it is decided that expert evidence should be furnished so whenever the system does not function this will be just as much the fault of the lawyers, handling the case, as of the court.

PORTUGAL

The system works well. No improvement seems to be necessary.

SOVIET UNION

This system is satisfactory.

SWEDEN

The system works very well.

SWITZERLAND

The system works satisfactorily.

Question No. 8 cont.

U.S.A.

The system has worked well when used but the court's inherent discretion to appoint experts has been rarely exercised. The adoption of Rule 706 in 1975 has, however, resulted in the appointment by the courts of experts in a number of reported cases. None of them, however, has been a maritime case.

VENEZUELA

Up to now our system has worked rather well. More than that of the way it works, the practical problem that arises is that in many instances there is a lack of experts or of experts qualified for delivering the proper advices. However, it must be said that albeit the judges are at liberty not to submit to the advices of the experts, in cases when a rather specialized knowledge of the facts is required, the judges have a tendency to submit to the opinion of the latter.

YUGOSLAVIA

The system is working satisfactorily.

QUESTION NO. 9

HAVE YOU ANY SUGGESTIONS AS TO HOW THIS
PRACTICE CAN BE IMPROVED?

ARGENTINA

None.

BELGIUM

Practicians should work harder at trying to take advantage of certain innovations in the judiciary code, i.e. the attendance of the expert at the inquests, at the visits of the scene and at other measures of investigation (Art. 985), the appointment at the Appeal stage of an expert committed to make an oral report at the sitting, the deposit of retainer fees at the Registry, the observance of the time allowed by the court to the expert.

The recruiting of experts would certainly be simplified if unofficial lists of experts were drawn up, in line with the rules fixed by Royal decree (Art. 991).

It seems equitable and practical to grant the expert an action for the payment of his expenses and fees not only against the party that requested the expertise but also against the plaintiff and against the party that pursued it. Returning to the situation that prevailed before the judiciary code would often give the expert a sufficient guarantee and would then avoid depositing retainer fees at the Court Registrar, which inevitably results in appreciable delays and costly procedural actions by the court, the expert and the parties.

BRAZIL

Yes. We feel that it would be an improvement if, after the court has appointed the expert of its

Question No. 9 cont.

choice, the parties might be given time for examining the report and submit their observations, that may be supported, if they think it fit, by a technical document prepared by another expert called upon by them.

That would be a real solution in line with what happens with us in practice.

This is what we feel necessary for clarifying our system of expert evidence.

CANADA

Where an expert has been appointed by the court against the wishes of a party that party should be permitted to call its own expert.

Litigants should be permitted to call their own experts as witnesses.

DENMARK

No. This reply deals with civil jurisdiction. As far as penal matters are concerned other rules apply. It should also be added that the court of first instance in civil, maritime litigation will consist of not only the normal legal educated judges but also of a minimum of two lay judges with maritime experience, e.g., a forwarding agent, a ship owner or a ship master.

FEDERAL REPUBLIC OF GERMANY

No changes are suggested.

FRANCE

The procedures are new. They unquestionably represent progress. It is only after a few years that

Question No. 9 cont.

one will be able to tell if further changes are necessary.

GREAT BRITAIN

Where the assessors are appointed to work with and to assist the court the system generally works satisfactorily although it is thought in some quarters that the assessors are tending to assume a judicial function contrary to the original intention behind their appointment. As has been indicated, the appointment of a court expert in other cases is rare; normally each party calls its own expert witnesses, and this frequently results in the court being presented with conflicting expert opinions between which it has to choose according to the comparative competence and credibility of each party's experts both in their written reports and their oral testimony. This procedure can result in a considerable increase in the duration and expense of trials while at the same time not necessarily providing much real assistance to the court, but the recent legislation and rules of court referred to in the opening remarks to this note have gone some way towards overcoming these problems. In any event the commercial interests represented in the BMLA feel the present system operates satisfactorily at present.

The BMLA shares the view expressed by the Japanese Association in reply to questions 8 and 9.

GREECE

Examination of witnesses may become a time-consuming matter and, ultimately, when only evidence by witnesses is used in the particular proceedings, the court remains without great help in the comprehension of the technical scientific aspects of the case.

Question No. 9 cont.

INDIA

As regards suggestions for improving the practice court cases of salvage, towage and collision are so few in India, that it is really not possible to evaluate the system of assessors/experts evidence and only after admiralty law develops and there are more court cases, that the question of improving the system can be considered.

IRELAND

No.

ITALY

Some slight improvements could make the system work in a still better way.

a) It would be advisable, in many cases, that the parties should be ordered to pay the expert, or to deposit with the chancery, a sum covering his first expenses or to give him an advance in his final fees. It often occurs, in fact, that the expert meets with great difficulties in getting payment of what is due to him from the parties or from that required to bear this cost.

b) Often the experts do not accomplish their duty within the period of time fixed by the judge, and apply for extensions and the judges do that. This makes the course of the survey too long and as a consequence delays the course of the proceedings. It would, therefore, be advisable that the judges would be more strict in requiring the compliance by the experts of the time limit fixed by them. Both these suggestions would not need, in our opinion, changes in the text of the law in order to be realized. A better use by the judges of powers they already have would suffice.

Question No. 9 cont.

JAPAN

We have no suggestions as to how this practice can be improved at an international level. It seems to us that the unification at an international level of the rules of procedure, including those in respect of expert evidences, is one of the most difficult tasks, since these rules of a state have their own historical background and stand on the basis of the legal system peculiar to that state, and, for this reason, we presume that few countries would care for the amendment and would easily be persuaded to change their laws for the purpose of international unification. Further, it would be necessary, in our view, to call on the people in other fields of law to join in this work if it is to be further advanced, because, perhaps in many states, these rules are held applicable not only to the civil cases of Maritime Law, but also to those of all other fields of law.

MEXICO

Our system is up to the mark. We have no suggestions to make any changes.

NETHERLANDS

No suggestions for improvement.

PORTUGAL

No suggestions.

SOVIET UNION

No changes are suggested.

SWEDEN

No suggestions for any changes.

Question No. 9 cont.

SWITZERLAND

We do not see what improvements could be made.

U.S.A.

No.

VENEZUELA

No suggestions.

YUGOSLAVIA

The new civil procedure was promulgated in 1977 and came into effect in 1978. It is, therefore, too early to suggest any modification.