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Content

The Position and Role of the Expert Witness in Czech Insolvency Law

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Abstract

The objective of this article is to critically analyse the legal position of expert witnesses within the context of Czech insolvency law. The analysis focuses on whether and to what extent their role differs from the traditional understanding of expert witnesses in standard civil court proceedings. The author draws upon relevant legislation, in particular Act No. 254/2019 Coll., on Experts, Expert Offices and Expert Institutes; Act No. 99/1963 Coll., the Civil Procedure Code; and Act No. 182/2006 Coll., on Bankruptcy and Methods of Its Resolution, while also examining related case law and doctrinal approaches of both Czech and foreign origin. The article primarily concentrates on the role of experts during the reorganisation phase of insolvency proceedings. It is assumed that, in this context, experts often exceed the traditional, relatively passive role of procedural assistants to the court and instead take on a significantly broader function. This shift has notable implications for their procedural status and the required quality, clarity, and defensibility of expert evidence in insolvency proceedings' dynamic and adversarial environment.

Keywords: Expert, expert opinion, insolvency proceedings, reorganisation, status of the expert, Insolvency Act

Introduction

The role of the expert witness in civil court proceedings has traditionally been understood as that of a professional assistant to the court. The primary task of the expert witness is to assist the judge in resolving factual matters that require specialised knowledge, usually by providing an expert opinion. This concept is deeply rooted in established case law and procedural theory and has been consistently reflected in legal doctrine and practice.

However, it should be noted that this role may undergo significant transformation within the context of insolvency proceedings, particularly during the reorganisation phase.

This article seeks to examine the procedural status of expert witnesses in Czech insolvency law and to determine whether—and to what extent—their role differs from the general concept of expert witnesses in standard civil litigation.

Methods and Data

This paper combines descriptive-analytical and comparative legal methods. The research is based on an analysis of relevant legislation, particularly Act No. 254/2019 Coll., on Experts, Expert Offices and Expert Institutes (hereinafter "ZnalZ" or "Expertise Act"); Act No. 99/1963 Coll., the Civil Procedure Code (hereinafter "o.s.ř." or "Civil Procedure Code"); and Act No. 182/2006 Coll., on Bankruptcy and Methods of its Resolution (hereinafter "InsZ" or "Insolvency Act"). In addition, the analysis considers relevant case law and academic literature from both Czech and international sources.

The study specifically examines the role of the expert in reorganisation proceedings, where the expert formally acts as a neutral party to the court. In practice, however, the expert becomes more active in a broader procedural framework, with their opinion subject to creditors' professional, practical, and strategic assessment. The creditors hold the authority to approve or reject the expert's opinion during the creditors' meeting. This distinction fundamentally alters the expert's role and responsibility compared to conventional expert practice. It raises significant questions regarding the limits of expertise, the expert's procedural accountability, and potential tensions between formal accuracy, professional integrity, and the subjective interests of the parties involved.

General Status of the Expert

Defining an expert report is relatively straightforward, as it typically relies on the existing definition of an expert witness. However, identifying a clear, primary definition of the expert witness's role and legal status proves far more challenging. The Czech legal system lacks a comprehensive legal definition of expert opinions despite their central importance in judicial proceedings. This gap is evident in the ZnalZ and other relevant legal instruments regulating the role of expert witnesses. Article 1(1) of the Expertise Act provides a clear definition of "expert activity," describing it as "*the performance of expert acts, in particular the preparation and submission of an expert report, its supplement or explanation, and activities directly related to such submission*." However, the provision remains silent on who the expert is and what their role is. Notably, this lack of a legal definition is not unique to Czech law; other Central European legal systems face a similar issue. For instance, the Austrian legislation currently finds itself in a virtually analogous situation. While it addresses experts similarly in several legal provisions, it lacks a legal definition (Attlmayr, 2021).

A possible approach to defining an expert is to reference Section 1299 of the ABGB (Austrian Civil Code/Allgemeines Bürgerliches Gesetzbuch), which concerns liability for damage caused by an expert. According to this provision, the term "expert" is described as follows: "*Anyone who publicly claims to exercise an office, art, trade, or profession, or who, without necessity, voluntarily undertakes a task requiring special expertise or exceptional diligence, thus demonstrating that they possess such expertise and corresponding diligence; they are, therefore, liable for any deficiencies in that regard…*" This definition, however, has significant limitations, as it applies to all individuals with professional expertise. Importantly, it does not distinguish between those designated as 'expert witnesses,' recognised based on their formal registration as experts.

One proposed definition comes from Hora, who states in his work on the subject: "*An expert is a person distinct from the parties and the court, who communicates their subjective judgment to the court on specific facts, events, or conditions presented, drawing on their specialised expertise*" (Hora, 2010). Similarly, Pražák historically defined the role of the expert (cf. Pražák, 1999), stating that "*Experts are individuals who are not parties to the proceedings before the court; they possess specialised knowledge, acquired through education or practical experience, and can therefore assist the court in clarifying the facts of the case through their opinions, which, due to their specialised nature, the judge could not otherwise obtain*" (Pražák, 1940). However, it is important to recognise that these definitions are historical and may no longer fully reflect contemporary perspectives. This is primarily due to a significant shift in the scope of expert activities in which an expert is now involved (further elaboration follows).

When defining an expert witness, authors often refer to the role of a 'court assistant.' In Czech jurisprudence, Ott argues that "*the law treats experts as assistants to the court, tasked with providing their professional knowledge and experience to help ensure a comprehensive understanding of the facts underlying a disputed case. This understanding is believed to be beyond non-experts' reach in primary production, trade, industry, commerce, or specific sciences and arts*" (Ott, 2012).

A similar definition can be found in German literature by Saueressig, who asserts that *the expert's role is to serve as an assistant to the judge*. However, many European authors, particularly French scholars, have rejected this subordination. They argue that a forensic expert (expert witness) who practices their profession as a primary activity cannot be considered a 'court assistant,' as their expertise is seen as a secondary function within the public service for the judiciary. As a result, a forensic expert is seen more as an 'occasional collaborator.' Unlike a court employee or other court assistants, an expert witness typically does not engage in forensic activities as part of their primary occupation related to the role of 'court assistant' (Boulez, 2006).

However, the practical implications of categorising an expert as a 'court assistant' under the Czech-German model or as an 'occasional collaborator' under the French model are arguably minimal in terms of practical application unless the term is interpreted as a

potential threat to the objectivity of the expert's work. More important, however, is the distinction between the role of the expert witness and that of other experts. In this context, Bradáč et al. (2004) discuss the "special qualifications of an expert witness," distinguishing them from general experts.

The reasoning behind this distinction is that an expert's findings are typically shared with individuals closely involved with the subject matter. These individuals are usually connected to the expert's field of expertise. The approach to their work is guided solely by their reasoning, and they may gather the necessary information in whatever manner they deem appropriate for the specific case. In contrast, an expert's opinion must simplify the complexities of a specific domain into a format that is understandable to the authorities involved in the relevant proceedings and those affected by the outcomes. In doing so, the expert's approach must align with the procedural principles of the case. As a result, there is a need for a specific framework, where the expert's expertise alone is insufficient for effectively carrying out their duties and fulfilling their role. This expertise must be paired with the ability to communicate the subject matter to non-specialists in a way that makes the expert's conclusions and interpretations of past events applicable in judicial decision-making. This ability sets forensic experts (expert witnesses) apart from those considered "experts."

Another salient issue in defining the role and status of an expert is the scope of their activities, or more precisely, the question of how experts might be systematically applied. In the Czech Republic, expert activities are often described as dichotomous. This means that expert witnesses prepare opinions as part of their appointment by a court or public authority for specific proceedings. However, they can also prepare reports for private individuals or legal entities.

The distinction between expert activities under private and public law mainly concerns the method and circumstances of remuneration. Experts appointed by courts or public authorities must submit their opinions in legal proceedings, with fees set by law. Exceptions to this general rule exist, particularly in Section 18f of the ZnalZ. In private law, experts can choose their clients and negotiate their fees, as statutory rates do not bind them. This creates an unavoidable systemic conflict, as experts prepare their opinions under the same requirements regarding structure, quality, etc., but for different purposes. Specifically, they work for a court or public authority for a predetermined or contractual fee. In the latter case, they may even enjoy privileges, such as using an expert stamp with the state symbol (Ševčík, 2015; Ševčík et al., 2023).

Higher courts have addressed the nature of expert activities within this dichotomous framework. In a ruling by the High Court in Prague (File No. CmZ 38/92), it was stated that "*Experts are compensated for their endeavours, gaining financial reward, which serves as a motivating factor for engaging in expert work. Therefore, expert activities should be perceived as business activities, subject to fulfilling the other two conditions listed in Section 2(1) of the Commercial Code.*" In the European Union, the status of experts was addressed

in March 2011 in joint cases decided by the Court of Justice of the European Union (File Nos. C-372/09 and C-373/09). The Court ruled that expert witnesses' services were considered services within the meaning of Article 57 of the Treaty on the Functioning of the European Union. This provision stipulates that "*services shall be deemed to be provided under contracts for services when they are normally provided for remuneration*." Therefore, expert services constitute an economic activity, similar to the term "business" in the Czech Republic. The Constitutional Court of the Czech Republic later clarified the nature of expert activities (Pl. ÚS 13/14), stating, among other things, that "*An expert's work in preparing opinions requested by public authorities for use as evidence in court or other proceedings before a public authority cannot be considered purely commercial activity for profit, as the expert witness (unlike an entrepreneur) does not bear the business risks, and their remuneration does not cover the costs incurred (which are reimbursed separately). Therefore, this is considered an activity in the 'public interest' for proceedings before public authorities.*"

The Constitutional Court's conclusion regarding the specific nature of expert activities—viewed primarily as a socially significant activity with many aspects of a public function—has been accepted by Czech scholars (Dörfl et al., 2021). Given the complex dichotomous approach of Czech legislation, it seems there is no alternative but to accept it as the current framework.

If the objective of this article is to define the position and role of an expert witness within the Czech judicial system, in accordance with the aforementioned facts, it can be outlined by the following characteristics, which may elicit broader academic consensus:

An expert witness is an individual who (a) has been duly registered in the register of experts as stipulated by the ZnalZ, having demonstrated adequate professional competence for the designated scope of expert authorisation and fulfilled other legal requirements; (b) plays the role of elucidating professional facts relevant to court proceedings or other legal acts of natural or legal persons in a manner comprehensible to the lay public, and; (c) maintains complete autonomy from the court, the parties involved in the proceedings, and any other individuals or entities during the course of their duties.

The Role and Status of Expert Witnesses in Insolvency Proceedings

The previous section addressed the expert witness's status and role in general terms. However, it is essential to explore potential differences in the status and role of an expert within insolvency proceedings.

There are no significant differences in the purely procedural status of an expert in insolvency proceedings. Section 14(1) of the Insolvency Act stipulates that the parties to the proceedings are the debtor and the creditors who assert their rights against the debtor. Based on this definition, an expert witness is not considered a party to the proceedings. It is also noteworthy that, according to Section 9 of the Insolvency Act, an expert is not classified as a procedural entity. Procedural subjects are understood to be

parties capable of influencing the course of the proceedings (Šínová et al., 2014). The law reserves this role exclusively for the insolvency court, the debtor, the creditors, the insolvency administrator or another administrator, the public prosecutor's office, and the debtor's liquidator. However, the role of the expert in this context must be considered. Experts are assigned the role of participants in the proceedings. While they cannot directly influence the proceedings through their actions, they have specific rights and obligations that arise directly from the Insolvency Act (InsZ), the Expert Witness Act (ZnalZ), or civil procedural regulations. Šínová further elaborates on the expert's involvement, noting that they may be considered a party to the proceedings for a brief period, specifically when a decision pertains to their subjective right, such as in matters concerning compensation. Therefore, an expert is not a party to the proceedings for their entire duration but only for a specific period, after which a decision is made on their subjective right, and they return to the participant position (Šínová et al., 2014).

The expert's role in procedural law is associated with the insolvency court as the procedural entity that appoints them. A bilateral procedural relationship of a public law nature is thus established between the expert and the court, with the expert's position contingent on their relationship with the insolvency court. This relationship can be conceptualised as a "secondary" procedural relationship (Dvořák in Lavický et al., 2023), often referred to as "secondary," "additional," or "auxiliary" (Coufalík, 2020). However, when implementing Section 153(2) of the Insolvency Act, it should be considered that this relationship may become tripartite. The creditors' meeting may appoint an expert to the court to evaluate the assets, making the court the entity that appoints the expert. Even in the case of a tripartite relationship, the expert remains a participant in the proceedings (Winterová, 2014).

The crux of assessing an expert's position in insolvency proceedings pertains to the ambit of their expert activities.

While Czech case law has not yet reached a definitive conclusion, there is a growing body of opinion in German jurisprudence asserting that the role of an expert in insolvency proceedings differs from that in civil proceedings. Vuia (Stürner et al., 2019) argues that "*the role of an expert extends beyond merely providing expert knowledge or assistance to the court in its legal evaluation of the facts. The primary distinction in their respective roles is that the insolvency court delegates investigative responsibilities to the expert. The expert's primary duty is to clarify the facts relevant to the insolvency proceedings and evaluate them professionally. To obtain a comprehensive overview of the debtor's financial situation, the expert must conduct their investigation and explore the debtor's overall financial picture. The expert must possess advanced knowledge of economics and the law to assess the debtor's assets and liabilities. They must also verify the scope of third-party rights and claims and evaluate the validity and effectiveness of the debtor's legal actions*."

Pape emphasises the differing roles, particularly regarding investigative duties: "*The legal status of an expert in insolvency proceedings partially differs from that in civil proceedings.*

While professional competence is important in civil proceedings, the focus in insolvency proceedings is on investigative activities. Such proceedings are initiated ex officio, rather than by the parties involved in a dispute" (Uhlenbruck et al., 2019).

Kramer (Skauradsun et al., 2022) provides a more definitive assertion, stating: "*An expert in insolvency proceedings is generally a legal expert, as their role is to determine the legally relevant facts. Unlike in civil litigation, where expert testimony is subject to constraints, such as the inability to shift the burden of proof, these restrictions do not apply in insolvency proceedings. The expert's role is to provide the court with observations and conclusions*." Niessen (Bork, Hölzle, et al., 2014) concurs, asserting that "*the requirements for expert opinions in insolvency proceedings are higher than in civil proceedings, as economic figures alone are insufficient for responsible decision-making*."

An examination of the Insolvency Act, particularly Section 155, reveals that the approval of an expert opinion in reorganisation proceedings is not granted by the court, as in civil proceedings, but by a meeting of creditors. After deliberation, creditors either approve or reject the opinion. Should they reject it, they may appoint a new expert. However, it should be noted that the insolvency court cannot determine the price of the assets without the approval of the expert opinion by the creditors' meeting.

Section 155 of the Insolvency Act stipulates the following:

"(1) To determine the value of the assets, as per the decision made by the insolvency court under Section 153, it is deemed that the debtor's business has ceased as of the date on which the expert opinion is submitted. Additionally, any assets to which a right of satisfaction from the security is asserted are to be valued separately in the expert opinion.

(2) The expert opinion, as outlined in paragraph 1, is to be submitted by the relevant expert witness to the insolvency court. Consequently, the court shall immediately convene a meeting of creditors to discuss and approve the expert opinion, and the expert witness shall be summoned to attend this meeting. The expert opinion is to be published in the insolvency register no later than 15 days before the date the creditors' meeting is to be held.

(3) Following the deliberation of the expert opinion, the creditors' meeting shall reach a decision on its approval. The resolution of the creditors' meeting approving the expert opinion shall be adopted if at least two-thirds of all creditors registered as of the day preceding the meeting vote in favour of it, calculated according to the amount of their claims.

(4) Following the resolution of the creditors' meeting that endorsed the expert opinion, the insolvency court is obligated to deliver a decision on the valuation of the assets. It is imperative to note that no appeal may be lodged against this decision."

In light of the above, it can be concluded that the role of the expert witness is more prominent in reorganisation insolvency proceedings than in standard civil proceedings. This is primarily due to the fact that the acceptance of the expert opinion by the creditors'

meeting constitutes a prerequisite for the successful termination of the insolvency process – an element absent from civil proceedings. In civil litigation, the court applies the principle of free evaluation of evidence, allowing it to assign varying degrees of probative value to individual items of evidence. Consequently, the court may reach a decision that deviates from the conclusions contained in the expert opinion. Such flexibility, however, is not available in the context of insolvency proceedings. The proceedings cannot be successfully concluded if the creditors' meeting does not approve the expert report. Therefore, the expert must defend their opinion before the meeting. It may often be the case that creditors are more willing to tolerate minor deficiencies or inaccuracies that a court, in its role as an evaluator, would otherwise reject—provided the expert succeeds in convincingly justifying the conclusions of their report. In this respect, the expert assumes a pivotal role in the reorganisation process, and it may be asserted with a high degree of certainty that their function here surpasses that in civil proceedings.

It is also essential to recognise the investigative nature of the expert's role within insolvency proceedings. The expert is expected to understand the debtor's financial situation and overall standing comprehensively. Compared to civil litigation, this role is subject to more stringent limitations. Notably, the expert must closely adhere to the court's instructions, which are designed to preserve the procedural integrity of the proceedings—particularly the principles of burden of assertion and proof characteristic of adversarial litigation. This is ensured by prohibiting the expert from introducing new facts into the proceedings that have not already been asserted and substantiated by the parties.

Conclusion

(i) The role of an expert witness in insolvency proceedings—particularly in the assessment phase of a reorganisation—is significantly more prominent than that of an expert in civil litigation. This stems from the fact that the insolvency proceedings cannot be successfully concluded without the acceptance of the expert opinion by the creditors' meeting. In contrast, in civil litigation, the expert opinion does not hold such a determinative procedural weight, as the court may decide the case on grounds that diverge from the expert's conclusions.

(ii) In insolvency proceedings, the expert's role includes an investigative component that partially supplements the court's fact-finding obligations. The ex officio nature of such proceedings emphasises this distinction. Unlike in civil litigation, where the expert's role is predominantly reactive, in insolvency proceedings, the expert is expected to act with considerable initiative and independence.

(iii) The qualifications required of an expert in insolvency proceedings are notably more demanding. Beyond advanced economic expertise, the expert is expected to understand legal principles, including assessing the validity and

effectiveness of the debtor's legal acts, the nature of substantive legal relationships, and the credibility of disputed claims.

(iv) Expert opinions in insolvency proceedings must meet heightened standards in terms of expertise, coherence, and persuasive force. This is particularly important given that, in certain phases of the proceedings, such opinions are not evaluated by a court of law but rather by the creditors themselves.

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