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## PRIVATE EXPERT OPINIONS FOR THE PRESERVATION OF EVIDENCE UNDER HIGH TIME PRESSURE

## THE SUCCESS FACTORS

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### IMPRESSUM

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### 1 ABSTRACT

If unforeseen events with major damage potential occur in the middle of a construction phase, decisions must be made quickly. Before clearing or continuing construction, important evidence must be secured immediately and a suitable procedure to do so must be chosen. By appointing private experts, the evidence can be secured reliably and legally sufficient. The basic requirements for the high probative value of private expert reports are the formation of an interdisciplinary team of experts with a high level of technical and methodological expertise, their independence, the participation of the stakeholders involved in the assessment, and transparency in the procedure. A systematic approach and strict differentiation between factual and legal issues are crucial for the preparation of a private expert opinion.

### 2 UNPLANNED EVENTS

A fire, construction accident, collapse or unplanned contract cancellation – such unforeseen events usually lead to complex factual and legal issues, which often result in conflicts and lengthy court proceedings. This article shows which evidence preservation procedures are available and how evidence about the conditions on the reference date and decisions about measures to remedy the damage can be reliably and legally secured by ordering private expert opinions.

In cases such as those described above, the duty to minimise damage is an obligation that applies to all parties involved in the conflict. In order to minimise the damage or consequential damage, construction work must be continued quickly. To do this, the damaged area must be cleared, the damage repaired and the components restored to a condition on which new construction or further construction can continue. A decision must be made quickly as to which components can be used or what needs to be replaced and the risks to be expected in one case or another must be weighed up.

Clearing the site of damage, repairing the damage or continuing to build always means destroying evidence. Evidence that is not preserved in time is lost forever. This means that the condition encountered and the effects may be disputed later. The appropriateness of decisions taken on dismantling or measures to remedy damage and, of course, the resulting costs can also be disputed. The challenge to define a procedure within a short period of time that reliably documents the conditions and decisions on the reporting date. The search is on for the most suitable procedure to secure the evidence under high time pressure in such a way that the probative value is as high as possible and the evidence is legally sufficient for later proceedings.

The following considerations are based on many years of experience and on insights gained from preservation of evidence following a fire on a major construction site of the Swiss Confederation. The Swiss Confederation is a





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selfinsurer, which is why no insurance company is obliged to make an advance payment or take the lead in settling the claim after a fire.

### 3 PRESERVATION OF EVIDENCE UNDER HIGH TIME PRESSURE

In the event of unplanned incidents, all decisions regarding the course of action and the preservation of evidence must be made quickly. Initiating court proceedings is generally not an option because such proceedings usually take several years. Even a preliminary evidence procedure in accordance with Art. 158 ZPO usually takes one to two years and is therefore also out of the question for the preservation of evidence. Preliminary evidence procedure is when the court evidence is presented in separate (preliminary) proceedings before a lawsuit is pending.

An expert-arbitrator procedure is an advantageous option for reliably preserving evidence. An expert-arbitrator procedure is an expert opinion that is commissioned by mutual agreement between two or more parties in order to have a disputed or unclear factual issues clarified by an independent expert in a binding manner. In the case of an expert-arbitrator procedure, the parties conclude an agreement in which it is stipulated that the parties accept the result of the report as binding. However, an expert-arbitrator determination agreement must be concluded with all parties and the expert(s) before an expert-arbitrator procedure is initiated. This takes a lot of time and it is not always possible to convince all parties to submit to the verdict of the chosen expert in advance. In addition, it is not always clear from the outset which parties need to be involved or included in the expert-arbitrator procedure.

The notarial deed about findings is another means of preserving evidence. In the notarial deed about findings, the notary documents the condition which he can determine and document on the basis of his observations. However, it is not possible to carry out examinations or assess findings within the framework of a notarial deed because the notary is not an expert and does not carry out any examinations or investigations.

Finally, the private expert opinion is used to preserve evidence under high time pressure. A private expert opinion is an expert opinion that is commissioned by a private individual, a company or an organisation and serves to clarify facts and issues in a specific area of expertise. The private expert opinion is not commissioned by a court or an authority. The statements contained in the private expert opinion are therefore not binding for other parties involved in the proceedings or the court.

In Switzerland, according to the revision of the ZPO, which has been in force since 2025, private expert opinions will take on a new significance. With the Swiss ZPO revision, private expert opinions are now recognised as documents and not merely as party assertions. Private expert opinions

are now considered as evidence and can be assessed by the respective court. Although this is a positive change, private expert opinions can still be disputed.

Based on the aforementioned explanations, approaches are sought that give the private expert opinion the highest possible probative value. The following explanations apply equally to the preservation of evidence under high time pressure in accordance with Swiss law (ZPO/OR/Norm SIA 118), as well as in an international context, e.g. for contracts based on the “ICC Model Contracts and Clauses” or “FIDIC Contracts” templates.

### 4 THE COMMISSION OF THE PRIVATE EXPERT OPINION

The key basic requirements, which give the private expert opinion a high probative value, are listed below:

- 1. Commissioning:** In the event of unplanned incidents on construction sites, it is often in the interest of the client to secure evidence quickly. In this case, the client must initiate rapid preservation of evidence by means of a private expert report, find and commission a suitable leading expert and advance the procedure. The commissioning of a private expert opinion for the rapid preservation of evidence must always be carried out by concluding an agreement. This agreement must include at least the following contents:
  - Parties
  - Leading expert, team of experts
  - Consultation of specialists and laboratories
  - Expert questions, whereby these can also be elaborated together after the agreement has been signed
  - Procedure, e.g. status assessment, investigations, measures, cost calculation or submission of partial reports, submission of the final report in the draft, supplementary questions, submission of the definitive final report, as well as the participation of the stakeholders.
  - Deadlines
  - Remuneration
- 2. Professional expertise:** The appointed experts and, in particular, the lead expert(s) must be professionally competent. Expertise is defined as the specialist knowledge required for the comprehensive assessment of a matter. This specialist knowledge must also include experience.
- 3. Methodological competence:** At least the lead assessor(s) must have proven expertise in the methodology of conducting assessments. Methodological competence is the ability to acquire and utilise specialist knowledge and to deal with problems in general. In particular, the expert’s work involves using the correct procedure to determine, collect and structure the facts required for the assessment, as well as interpreting the results correctly and presenting them in a suitable form.



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4. **Independence:** Although the private expert report is commissioned by a party and is primarily committed to the client, the expert must work objectively, independently and impartially to ensure the credibility of the report. If unilateral information is provided to the expert, he or she must disclose it. Vested interests of any kind can jeopardise the value of private expert opinions, because in this case it can be argued that the expert may not have carried out the assessment independently.
5. **Interdisciplinarity:** Interdisciplinary collaboration means that the lead expert – if required – puts together a team of experts from different areas of expertise and works with them to document all findings in a joint report. Teamwork not only increases acceptance. It also means that, in the event of a subsequent trial, several experts are available as witnesses, which ultimately benefits the probative value.

## 5 PROCEDURE OF THE EXPERT OPINION

1. **Systematik:** The preparation of the private expert opinion for the preservation of evidence must be structured. The methodically correct procedure consists of the following three phases:

Phase I.:

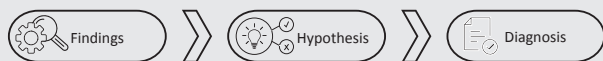
Documentation of the findings: documentation of the condition on the reference date, presentation of the results of the examinations and the secondary findings.

Phase II.:

Documentation of the working hypotheses: Presented causes, other possible causes, causes to be ruled out.

Phase III.:

Documentation of the diagnosis: summarising and evaluating all findings, answering expert questions.



It is important that the entire review process is defined and communicated at the beginning. This enables the client and the stakeholder groups involved to follow the procedure of the expert opinion and participate actively – provided that this is desired.

2. **Transparency:** Complete transparency is another important prerequisite for a high level of acceptance and probative value of the private expert opinion. This means that all files used for the expert's opinion must be made available to all parties involved in the expert's opinion procedure. It goes without saying that all the basics used for the expert's opinion be mentioned in the report.

3. **Participation:** Equal treatment of the client and stakeholder groups affected by the entire expert opinion procedure increases the acceptance and probative value of the private expert opinion. This means that all stakeholder groups affected must be involved in the expert opinion procedure, even though they are not the clients of the private expert opinion. All involved parties should be given the possibility to contribute to drawing up the catalogue of questions, to participate in inspections, and to submit supplementary questions. The participation of the stakeholder groups involved in the expert opinion procedure enables the expert to consider their concerns or better understand their reservations and address them in the expert opinion.
4. **Inspections:** All inspections must be announced. The client and the stakeholder groups involved must be given the opportunity to take part in the inspections. Whether the stakeholder groups involved accept the invitations is their choice.
5. **Surveys:** As a rule, experts are not authorised to conduct interviews. This is a matter for the investigating authorities and the court. However, experts can record and analyse the results of meetings if necessary.

## 6 PREPARATION OF THE EXPERT OPINION

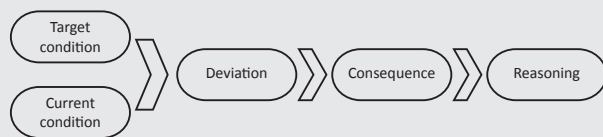
1. **Structure and content of the expert opinion:** Expert opinions must have a logical organisation and a clear structure. The following structure has proven itself for the structure and content of private expert opinions:
  - Name of the lead expert and the team of experts
  - Name of the client
  - Names of the other parties involved
  - Inspections
  - Index of files
  - Presentation of the situation
  - Procedure chosen for the inspection
  - Documentation of the findings
  - Documentation of the working hypotheses
  - Documentation of the diagnosis
  - Answering the expert questions
  - Referenced partial and interim reports
  - Date, signatures

The preparation of interim reports and partial reports (e.g. one partial report per specialist area) is possible and facilitates interdisciplinary cooperation between the experts on the one hand and consultation with the stakeholders involved in the expert opinion procedure on the other.

2. **Factual and legal questions:** Experts only answer factual questions. Questions of fact concern, for example, the description of the actual state, the target state and the description of any deviation. Legal questions concern the interpretation of contracts and the question

of guilt, which is often at the centre of the matter. The answering of such legal questions is the sole responsibility of the lawyers, and in court proceedings, the judges of the court. In order to avoid conflicts, it has proven useful for experts to structure the answers to questions in connection with alleged defects as follows:

- Description of the current status
- Description of the target state
- Description of the deviation
- Description of the consequence of the deviation
- Reasoning



If the “question of guilt” is nevertheless asked directly or indirectly in the experts’ catalogue of questions, the experts should limit themselves to explaining the relationships between cause and effect (diagram of causalities) from a technical perspective.

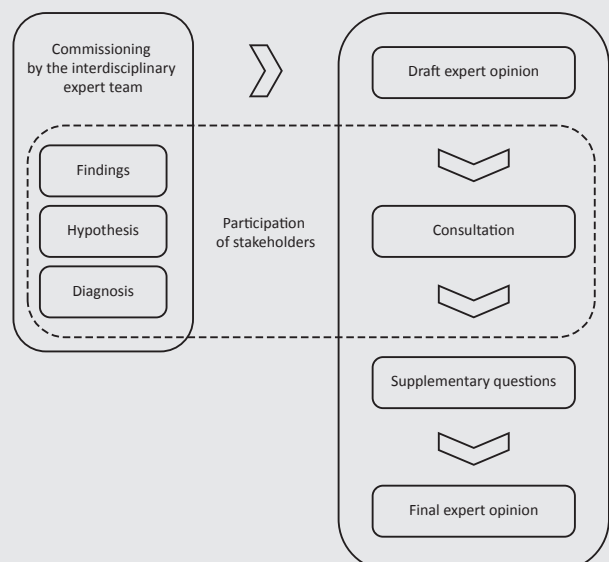
In connection with the above-mentioned investigation of a fire on a major construction site of the Swiss Confederation, the Ecole des sciences criminelles of the University of Lausanne, which specialises in the investigation and assessment of fire incidents, was involved in the inspection to clarify the cause of the fire. The experts from the University of Lausanne carried out investigations, conducted interviews and made their evaluation of the probable cause of the fire in a conclusive manner, without answering legal questions. In this case, the University of Lausanne’s comments were integrated into the expert opinion as a partial report.

3. **Reservations:** If reservations arise during the appraisal, these must be openly stated and well-founded. Such reservations may arise, for example, after a fire when assessing the conservation value of a part of a building. Reservations may also arise when granting guarantees.
4. **Differing judgements:** A private expert opinion to secure evidence can prevent litigation and serve as a basis for an out-of-court settlement. If court proceedings nevertheless take place, the private expert opinion serves as evidence in the trial. For this reason, it is recommended that the private expert opinion should also address differing judgements or circumstances that initially appear insignificant. It is always to be expected that aspects which initially appear irrelevant will also be raised in the main proceedings and that this can lead to uncertainties in the event of an inadequate basis for the expert opinion.
5. **Amount of damage:** It is not uncommon for the amount of damage to be determined as part of the catalogue of questions. The experts can estimate the amount of

damage. As a basis for this, experts can also rely on the current contracts or ask the parties involved for supplementary quotations, although these must then be carefully examined by the experts. If the repair of the damage requires additional types of work, corresponding quotations can be obtained from third parties as part of the expert opinion procedure.

## 7 SUBMISSION OF THE EXPERT OPINION

1. **Consultation:** In addition to the client, the stakeholder groups involved must be informed and consulted at the same time about the results of the condition surveys, the results and interim results of the investigations and the results of the calculation of the amount of damage. This means that all stakeholder groups involved must be included in the expert opinion procedure, even though they are not the clients of the private expert opinion. Both the client and the stakeholder groups involved must be given the opportunity to be involved. This means that relevant information can be provided or any objections raised. Consultation with the client and the stakeholder groups involved in the appraisal additionally increases the acceptance and probative value of the private expert opinion.
2. **Draft:** It has proven to be a good idea to submit the report in draft form and to give both the client and the stakeholders involved the opportunity to ask supplementary questions.
3. **Supplementary questions:** Once the report has been submitted (in draft form), the client and the stakeholders involved are entitled to ask supplementary questions. The supplementary or clarification questions can then be answered before the report is finalised. This procedure also serves to enhance acceptance and evidential value.





**4. Release of the damage site:** The appointed experts and in particular the lead expert(s) must be aware that they must release the damage site or the site for dismantling or further construction after their intervention. Because every delay in construction usually leads to rising costs, there is great pressure to release the damage site as quickly as possible. If the decision to release the damage site lies with the experts, they must ensure that the expert's mission is carried out according to the deadline. The above-mentioned consultation is important because it allows the experts to take into account any concerns or objections of the client as well as those of the stakeholders involved before releasing the damage site.

## 8 CONCLUDING REMARKS

Preserving evidence under high time pressure is demanding and associated with risks. In the event of unplanned incidents on construction sites and high damage potential, a private expert opinion is in fact the only suitable approach of preserving evidence under high pressure.

Although all parties involved are obliged to minimise damage, the project owner generally has the greatest interest in the preservation of evidence. The project owner must therefore take the lead when appointing a private expert to preserve evidence and to ensure that the expert opinion procedure is carried out so as to ensure a maximum probative value. The most important requirement for this is the conclusion of a contract with an interdisciplinary team of experts acting under the leadership of experienced lead expert. In particular, the contract must include the milestones of the procedure and the participation of all stakeholders involved.

The private expert opinion for the preservation of evidence can also be carried out in combination with the notarial deed about findings. Instead of a single lead expert, two lead experts and/or an entire team of experts can be engaged. These measures enhance the probative value even further.