

SECTION 6. LAW AND INTERNATIONAL LAW

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DEFINING THE ESSENCE OF SCIENTIFIC - LEGAL EXPERTISE: ON THE EXPEDIENCY OF LEGAL REGULATION OF SCIENTIFIC - LEGAL EXPERTISE IN UKRAINE

Scientific - legal knowledge is increasingly becoming the subject of services for organising and conducting independent professional expertise. The motivation of legal entities to order a scientific analysis of practical situations is caused by various circumstances, including ambiguity in the interpretation of certain legal or contractual provisions, complications in their practical application, and the need to prove the established legal grounds. In particular, based on the analysis of orders received in 2023 [1], the subject of scientific and legal expertise was:

legal rules governing the legal relations of carriage and hire (lease) in the institutional model of the Civil Code of Ukraine and the sub-institution of legal relations of chartering (charter) within the meaning of the Merchant Shipping Code of Ukraine, as well as the content of contractual provisions under bareboat charter agreements No. 12-P, No. 13-P, No. 14-P, No. 15-P, No. 16-P, No. 17-P, and the establishment of their legal nature;

the grounds for the procuring entity to purchase services under DK 021:2015:72310000-1 Data processing services (Data storage and processing services in the form of a cloud (virtual) data centre), the cost of which equals or exceeds UAH 100 thousand, without the use of open tenders and/or an electronic catalogue for procurement (the period of the legal regime of martial law in Ukraine and within 90 days from the date of its termination or cancellation), from the procurement participant in accordance with the fourth paragraph of subclause 5 of clause 13 of the Peculiarities of Public Procurement of Goods, Works and Services;

a significant change in circumstances that the parties could not have foreseen when concluding the State Contract for the supply (purchase) of products and circumstances that make it impossible to perform the legally related Car Sale and Purchase Agreement.

However, unlike forensic expertise, there is no legal regulation of such expert activity.

Therefore, the expert nature of knowledge holders in various fields of legal sciences, including in the private sector, is also questionable.

In the scientific literature, there are attempts to attribute scientific and legal expertise to a type of scientific expertise within the meaning of the Law of Ukraine "On Scientific and Scientific-Technical Expertise" [2], and accordingly, conclusions are drawn about the existence of legal regulation of scientific and legal expertise in Ukraine by the said law. In particular, M. E. Mochulska, referring to foreign legal scholars, focusing on the hypothesis of the existence of expert law, which is based on legal doctrines created by expert scientists, argues that scientific legal expertise, in those manifestations which we observe in practice, is one of the types of scientific expertise and at the same time one of the types of legal expertise, which is determined by the range of subjects, ways, methods of its conduct, etc. The scholar is convinced that the regulatory framework, which is the basis for conducting scientific legal examinations, consists of laws and bylaws that regulate expert activity in Ukraine. She emphasises that the Law of Ukraine "On Scientific and Scientific-Technical Expertise", which defines the concept of scientific expertise, its objects and subjects, and other general provisions, significantly affects the understanding of the objects of scientific legal expertise. In essence, the relevant provision of the Law of Ukraine "On Scientific and Scientific-Technical Expertise" provides grounds for a broad understanding of the objects. By and large, it refers to the ratio of general, special and particular [3, p.56-57]. This approach is controversial and here is why.

Let's find out the essential requirements of scientific and scientific-technical expertise, which are defined by the Law of Ukraine "On Scientific and Scientific-Technical Expertise" [2].

Scientific and technical expertise:

is an activity that covers such processes as: research, analysis and evaluation of the scientific and technical level of the objects of expertise and preparation of substantiated conclusions for decision-making on such objects (part one of Article 1 of the Law of Ukraine "On Scientific and Scientific and Technical Expertise" [2]);

the objects of which may be equipment and industrial facilities, natural objects, programmes, proposals of various levels, for which it is necessary to conduct a scientifically based analysis, provide an expert opinion for further decision-making on the feasibility of implementation, further use, etc. (part one of Article 5 of the Law of Ukraine "On Scientific and Scientific-Technical Expertise" [2]);

the subjects of which are the customer, the organiser of the expertise, and the experts (part one of Article 4 of the Law of Ukraine "On Scientific and Scientific-Technical Expertise" [2]);

which can be organised by individuals and legal entities regardless of ownership, but which are able to organise and conduct scientific and scientific and technical expertise by statutory authority and have passed state accreditation and received a certificate confirming the qualifications of its recipient in the organisation and conduct of expertise (part five of Article 4 and Article 12 of the Law of Ukraine "On Scientific and Scientific and Technical Expertise" [2]);

whose expert must have a diploma of awarding the degree of candidate or doctor of sciences in the relevant field of knowledge or a certificate of awarding the title of senior researcher, associate professor, professor, as well as documents on election as members and corresponding members of the National Academy of Sciences and national branch academies, without obtaining an accreditation certificate (clause 3.2. The Procedure for State Accreditation of Individuals and Legal Entities for the Right to Conduct Scientific and Scientific and Technical Expertise, approved by the Order of the Ministry of Education and Science of Ukraine of 12.01.2004 No. 12, registered with the Ministry of Justice of Ukraine on 26.01.2004 under No. 110/8709 [4]);

the organiser of which is obliged, upon request, to present documents confirming the experience and level of qualification of the expert authorised to conduct it (paragraph one of part two of Article 20 of the Law of Ukraine "On Scientific and Scientific-Technical Expertise" [2]).

At the same time, it is advisable to consider the essential requirements of forensic examination as defined by the Law of Ukraine "On Forensic Examination" [5].

Forensic examination is the one:
a study based on specialised knowledge in the field of science, technology, art, craft, etc. (part one of Article 1 of the Law of Ukraine "On Forensic Expertise" [5]);
the issues of which are those that are or will be the subject of litigation (part one of Article 1 of the Law of Ukraine "On Forensic Expertise" [5]);
conducted on the basis of a relevant court decision or decision of a pre-trial investigation body or an agreement with an expert or expert institution (part one of Article 71 of the Law of Ukraine "On Forensic Expertise" [5]);
the subjects of which are specialised institutions and forensic experts who are not employees of these institutions and other specialists (experts) in the relevant fields of knowledge; where a forensic expert is subject to mandatory certification during which the assessment of his or her professional level is determined (part one of Article 7 and part one of Article 16 of the Law of Ukraine "On Forensic Expertise" [5]).

The analysis of Ukrainian legislation on the legal regulation of expert activity in Ukraine leads to the conclusion that scientific and legal expertise is not a branch of forensic examination within the meaning of the Law of Ukraine "On Forensic Examination" [5], and is not a type of scientific and scientific and technical expertise within the meaning of the Law of Ukraine "On Scientific and Scientific and Technical Expertise" [2]. This position is substantiated by the following.

Firstly, scientific and legal expertise is not an activity, it is through the term "activity" that the essence of scientific and scientific and technical expertise is revealed according to part one of Article 1 of the Law of Ukraine "On Scientific and Scientific and Technical Expertise" [2]. By its very nature, scientific and legal expertise is more closely related to forensic examination, the essence of which, according to part one of Article 1 of the Law of Ukraine "On Forensic Examination" [5], is defined as "research based on special knowledge".

Secondly, the subject matter of forensic examination is clearly defined in part one of Article 1 of the Law of Ukraine "On Forensic Examination" [5], namely: "issues that are or will be the subject of litigation"; the objects of scientific and scientific and technical expertise are also clearly defined in part one of Article 5 of the Law of Ukraine "On Scientific and Scientific and Technical Expertise" [2], in particular: "objects of technology and industry, structures, natural objects, etc., in respect of which there is a need to obtain scientifically based expert opinions; projects, programmes, proposals of various levels, in respect of which it is necessary to conduct a scientifically based analysis and give a conclusion on the expediency of their adoption, implementation, further use, etc.".

Therefore, there are no grounds to agree with the conclusion of M. E. Mochulska regarding the "broad understanding of objects" [3, p.56-57] according to the Law of Ukraine "On Scientific and Scientific-Technical Expertise" [2]. It is more accurate to note that the list of these objects is not exhaustive. It may be supplemented and changed, but only with respect to such objects in respect of which there is a need to obtain scientifically based expert opinions or it is necessary to conduct a scientifically based analysis and give a conclusion on the expediency of their adoption, implementation, further use, etc. The subject matter of scientific and legal expertise is legal issues related to the need for an objective and legal solution to a practical problem. The very need to solve a practical problem prompts the ordering of a scientific and legal expertise. Thus, unofficial competent interpretation of a legal or contractual provision in all cases is caused by the lack of clear legislative or contractual regulation, which leads to restriction of the legitimate rights and interests of the subjects of legal relations.

It was in order to strengthen its position during negotiations with contractors, resolve various pre-trial disputes, and raise the issue with the rule-making authorities regarding amendments to the relevant regulatory legal act that the customer obtained an expert opinion of scientific and legal expertise. It is possible that an expert opinion of scientific and legal expertise may be required

to assess or verify a legal position before going to court to protect an infringed right or to use it as evidence of one's position in court during a legal dispute.

It should be noted that the expert opinion of scientific and legal expertise, and, if appropriate, a comprehensive scientific expertise, is widely used, it is provided for the competent person to make an appropriate decision, taking into account the justifications and conclusions, if necessary, of experts in the relevant fields of legal sciences. Thus, the subject matter of scientific and legal expertise is legal issues related to the need for an objective and legal solution to a practical problem.

Thirdly, the qualification of experts in various branches of legal sciences is confirmed by a doctorate or PhD (Doctor of Philosophy), and their scientific works, i.e. research within the scientific speciality and the relevant thematic area, are an additional confirmation. In this regard, it is advisable to draw an analogy with the requirement for experts of scientific and scientific-technical expertise under the Law of Ukraine "On Scientific and Scientific-Technical Expertise" [2] that there is no need for accreditation. On the contrary, forensic experts are required to confirm their level of qualification by undergoing accreditation under Article 1 of the Law of Ukraine "On Forensic Expertise" [5]. It seems that this requirement is determined by law, since there is no requirement for a forensic expert to have a scientific degree.

Thus, scientific and legal expertise is not a forensic examination within the meaning of the Law of Ukraine "On Forensic Examination" [5] and is a scientific and scientific and technical expertise within the meaning of the Law of Ukraine "On Scientific and Scientific and Technical Expertise" [2]. Scientific and legal expertise has its own subject matter and requires its own legal regulation. Although certain requirements set out in the Law of Ukraine "On Scientific and Scientific-Technical Expertise" [2] may be extended to the organisation and conduct of scientific and legal expertise, in particular, regarding: the definition of subjects of expertise (part one of Article 4), the rights and obligations of the organisers of expertise (Article 20), the rights and obligations of experts (Article 21), state accreditation of legal entities whose charters provide for expert activity (part one of Article 7), the contract as the basis for expertise (Article 22), validity of the expert's conclusions (Article 26), financing of the expert's examination at the expense of the expert's customer (Article 33).

The knowledge of forensic experts is defined in procedural law by the universal term "special knowledge". We believe that such a universal term should define the knowledge of experts in various branches of legal science. Given that in the theory of state and law, legal science as a system of knowledge is the science of the laws of the process of development of the state and law and the essence of the state and law, it studies their place and role in public life; according to the proposed classification, the system of legal sciences is presented as: general theoretical and historical legal sciences, branch legal sciences, complex legal sciences, applied legal sciences, international legal sciences [6, p.20]. An expert is a knowledgeable specialist in the relevant branch of legal sciences that corresponds to a scientific speciality. Therefore, it is appropriate to talk about such a universal term for defining the knowledge of experts in various branches of legal sciences as: specialised legal knowledge.

Specialised legal knowledge is a set of information of a specialised type possessed by experts (knowledgeable persons) in accordance with a scientific speciality in the system of legal sciences, which is used to objectively solve practical problems that prompted their acquisition.

In view of the above, it is reasonable to conclude that scientific and legal expertise is a study of practical problems requiring the use of specialised legal knowledge and the provision of an expert opinion for further decision-making by a competent person, if such specialised legal knowledge is required. Therefore, the issue of expediency of legal regulation of this type of expert activity in Ukraine remains relevant.

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MAY, 2023

SYDNEY, AUSTRALIA

CURRENT ISSUES OF SCIENCE, PROSPECTS AND CHALLENGES

IV INTERNATIONAL SCIENTIFIC AND THEORETICAL CONFERENCE



**EUROPEAN
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PLATFORM**





5 May, 2023

Sydney, Australia

**CURRENT ISSUES OF SCIENCE,
PROSPECTS AND CHALLENGES**

IV International Scientific and Theoretical Conference

Sydney, 2023



Chairman of the Organizing Committee: Holdenblat M.

Responsible for the layout: Bilous T.

Responsible designer: Bondarenko I.

- C 95 **Current issues of science, prospects and challenges:** collection of scientific papers «SCIENTIA» with Proceedings of the IV International Scientific and Theoretical Conference, May 5, 2023. Sydney, Australia: European Scientific Platform.

ISBN 979-8-88955-780-7

DOI 10.36074/scientia-05.05.2023

Papers of participants of the IV International Multidisciplinary Scientific and Theoretical Conference «Current issues of science, prospects and challenges», held on May 5, 2023 in Sydney are presented in the collection of scientific papers.



The conference is included in the Academic Research Index ReserchBib International catalog of scientific conferences and registered for holding on the territory of Ukraine in UKRISTEI (Certificate № 33 dated January 17th, 2023).

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UDC 001 (08)

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ISBN 979-8-88955-780-7

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SCIENTIFIC PUBLICATION



WITH PROCEEDINGS OF THE IV INTERNATIONAL
SCIENTIFIC AND THEORETICAL CONFERENCE

**«CURRENT ISSUES OF SCIENCE,
PROSPECTS AND CHALLENGES»**

May 5, 2023 | Sydney, Australia

English, Ukrainian, Uzbek and Polish

*All papers have been reviewed. Organizing committee may not agree with
the authors' point of view. Authors are responsible for the correctness of the papers' text.*

Signed for publication 05.05.2023. Format 60×84/16.
Offset Paper. The headset is Times New Roman & Open Sans.
Digital printing. Conventionally printed sheets 11,86.
Circulation: 50 copies. Printed from the finished original layout.

Contact details of the organizing committee:

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21037, Ukraine, Vinnytsia, Zodchykh str. 18, office 81
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E-mail: scientia@ukrlogos.in.ua | URL: www.previous.scientia.report

Publisher [PDF]: Primedia E-launch LLC
TX 75001, United States, Texas, Dallas. E-mail: info@primediaelaunch.com

Publisher [printed copies]: NGO European Scientific Platform
21037, Ukraine, Vinnytsia, Zodchykh str. 18, office 81. E-mail: info@ukrlogos.in.ua
Certificate of the subject of the publishing business: ДК № 7172 of 21.10.2020.