

THE FRENCH DIRECTIONS JUDGE

Based on goodwill of pleaders, an extreme slowness was generated by the civil procedure code in its initial drafting of 1806.

Indeed, the procedure was based on the accusatorial model, as the judge observes a neutral and passive role. The civil trial was “the thing of the parties” as opposed to the criminal trial governed by the inquisitorial model.

The will of speed and the official interventionism which characterized the 19th century were badly adapted to this prejudicial slowness for the person who was hoping for a quick solution to the litigation.

As well, since the creation of a judge charged to follow the procedure (legal decret of 1935), the legislator did nothing but extend the task of that which was going to become, in 1971, the Directions Judge, for the Tribunal de Grande Instance and the Court of Appeal.

For level of the tribunal d’instance, the preparatory proceeding is oral, so it’s quicker and less expensive.

Today, the civil procedure presents an inquisitorial character, one can speak about an increasing parallel to the criminal procedure.

Thus, from a role of simple arbitrator received originally, a real directing judge in charge of a delicate mission has been replaced by the new civil procedure code :

He has to take care of the legal and proper advancement of proceedings

The directions judge is a judge of the Tribunal de Grande Instance, charged to follow the procedure and since 1998 we can say that he has the responsibility to lead the procedure. He is appointed each year by the President of the jurisdiction. Law gives him an exclusive competence but limited in time: from the designation to the opening of the debates.

Actually, the task to see to the legal advancement comprises a double aspect that the practice reveals to be almost contradictory.

Indeed, the directions judge must at the same time:

- make the principle of adversarial nature of proceedings be respected to keep a balance,

and

- avoid the trial getting bogged, with the aim of keeping an efficiency.

To allow him to conclude this task, the directions judge received, progressively by the adoption of texts, more and more powers, some are not very used (for example to hear and conciliate the parties). Indeed hearing and the conciliation are only a simple faculty for the judge and he may propose on this occasion a mediation, which is an alternative way of resolving disputes.

I will divide my presentation in two parts :

I Control powers on the advancement of the trial

1 Fixing deadlines: the practice of procedure contracts.

2 Injunctions to advocates

3 Sanctions: closing order or striking off

The most interesting contribution of the last texts: it falls from now on to the judge to contribute to the case management in an active way.

II Jurisdictional powers

1 the directions judge rules procedural incident

2 he orders investigation measures.

I Control powers on the advancement of the trial

After a first meeting called the president's conference, if the case is complex, the directions judge is designed.

1 Fixings deadlines: the practice of procedure contracts

It is the main task of the directions judge.

According to the new civil procedure code : he sets successively the deadlines necessary for the examination of the case. He causes the advocates to give their opinion but decides according to the nature, urgency and complexity of the case.

The judge sets the periods of time progressively : this flexibility expresses the will to found an intelligent examination likely to adapt to the evolution of the suit in the light of the explanations of lawyers and their writings.

The legislator intended to encourage a dialogue between the advocates and the judge rather than a fixed system. The disadvantage in the great jurisdictions is often the absence of advocates to the conference (meeting of advocates during which the directions judge brings up a certain number of cases (60 to 100 on average).

To manage this difficulty, in agreement with the bars, conventions are signed on the case management to allow to fix calendars from the first call of the case, the case being recalled only if one of the pleaders does not respect this calendar.

You can see two examples of conventions between the jurisdictions and the lawyers (one in Créteil, the other in Meaux) as well as the procedure contracts distributed to lawyers after the first conference, when the directions judge checked the regularity of the act introducing the request, the constitution of a lawyer for the defendant and the communication of written evidence by the plaintiff.

The purpose of these calendars are also to responsabilise advocates who must respect the dates to file their writings without obliging the judge to call them to check. The disrespect of the calendar makes it possible for the adversary to be prevailed about it to request the injunction, the closing order or striking off of the case.

2 Injunctions to lawyers

The first role of the directions judge is to hear the parties and to try to conciliate them. Nevertheless, in practice, it's not frequent. Generally, the judge has only advocates as interlocutors at the time of the case management audiences.

He can hear advocates and give them all useful communications or message, in particular on proceedings of which he is informed in addition. (Bankruptcy of a company for example).

The injunctions are given to advocates by a slip which must be as clear as possible and mention the date, the object of the next audience and the task to be achieved by the advocate.

You have an example of an injunction slip in the joined documents.

Directions judge may invite advocates to put their pleadings in conformity with the provisions of the law oblige them to communicate evidence or documents, make junctions or disjunctions, record the termination of the proceedings by withdrawal or acquiescence.

3 Sanctions: closing order or striking off

If the advocates don't answer the injunction or don't discharge the procedural steps within the time limits set by the directions judge, he has the choice between two types of sanctions :

- if the defect is the fact of only one advocate, the judge may pronounce the conclusion of the examination and may decide to refer the case to the court "ex officio"(of his own accord) or at the request of another party. The judgement could be given but it is necessary however that the deadlines were fixed beforehand by the judge and were not respected by the advocate.

- the second sanction is the striking off. The conditions are, on the one hand, that the judge has set deadlines to discharge the procedural steps and that the advocates did not respect them (if only one part abstains and that the other advocate conclude, the judge cannot strike off), on the other hand, it is necessary that the judge has warned advocates before by a notice.

This order is reasoned and unappealable, nevertheless a copy is sent to each party by ordinary mail to their residence: it is a very heavy sanction for advocates. This case may be re-entered on the list by simple mail upon the evidence of the discharge according to the absence of the different steps which brought about the striking off.

- the third possibility is the withdrawal of the list: It is then about an agreement written of all the parties of the case to withdraw the case off the list, for example when talks or a transaction are in hand.

II Jurisdictional powers

1 the directions judge rules on procedural objections

The directions judge may rule on procedure objections (lack of jurisdiction, pendency of case, connexity, nullities of procedural steps due to formal defects or due to substantive defects and dilatory objections). But, it may not judge the inadmissibility arguments.

- all procedural objections since the decree of December 28, 1998,
- lack of subject matter jurisdiction or territorial jurisdiction,
 - pendency of case (if the same dispute is pending before two courts belonging to the same tier which are equally with jurisdiction to rule upon it, the court referred to in second must relinquish the case in favour of the other if one of the parties so requests or "ex officio")
 - connexity (if there is a link between cases brought before two separate courts, a request may be made to one of these courts to relinquish the case and to refer it for the other court to rule upon)
- nullities of procedural steps due to formal defects or to substantive defects
- dilatory objections
- provisional measures, even academics except for the seizures of the competence of the judge with the common apartment)
- to grant an advance : . An advance for the trial costs, for example in family cases (divorce),

. An advance to the creditor, when the existence of the debt is not seriously challenged.

These decisions are immediately enforceable.

The orders may be challenged by an appeal or a cassation petition with the aim of doing it quickly and to avoid any delay in the procedure.

They are however liable to be appealed against in the case and conditions set out for expert opinions or stays of proceedings. (with authorization of the Appeal Court President if a serious and legitimate reason is given and proved).

They are appealable within fifteen days of service:

- when their consequence is to put an end to the proceedings or when they record the termination of such proceedings,
- when they concern temporary measures in divorce or judicial separation matters
- when they concern the advances
- when they rule upon a jurisdiction, pendency or connexity objection.

2 He orders investigation measures

In this matter, the directions judge can order of his own accord and not only at the request of a party.

- judge's personal verification
- personal appearance of the parties
- inquiry
- turn to a technician : Expertise, consultation, findings.

He will control the execution of the measure or delegate this role to the judge in charge of the control of the expertises.

As regards expertise, he may constantly increase or restrict the scope of the measures prescribed measurements. He judges by orders which are liable to be appealed.

The judge will control the investigation measure, he may travel, but in practice travel is very rare in civil matter taking into account the workload.

When the distance is too significant, the judge may entrust another court belonging to the same level or to a lower level to implement all or part of the operations ordered, by a rogatory letter.

a) the judge's personal verification

It means that the judge may acquire a personal knowledge of the disputed facts in any matter in order to verify them himself.

Without turning to the expertise, he can be assisted by a technician when the dispute presents a too technical aspect.

He must respect the principle of adversarial nature. The place can be at the hearing or in any other place. An official record of the verifications is made.

b) the personal appearance of the parties

It can be required by the judge in any matter and that can be the occasion to propose a mediation.

The judge is free to ask the questions which he wants to ask and the parties must answer without having the support of a draft.

An official record is made and signed by the parties.

If a party refuses to appear or to answer the judge can draw any legal inference.

c) the inquiry

It can be ordered at the request of the parties or “ex officio”.

The party who request an inquiry must state the facts which he intends to bring evidence thanks to the inquiry. The opposing party can also requeste examination of witnesses in order to bring back the contrary proof (inquiry and cross-inquiry).

Witnesses can be heard, the minors (children under the age of 18) are not regarded as witnesses and cannot be heard on the objections called upon by the couple in a divorce case.

Those who have a legitimate reason can be exempted from testifying, like diplomatic agents or doctors held by the professional secrecy, except if they testifie on facts known to them outside of the performance of their duties.

The judge hears the witnesses testify separately and makes an official record. They take an oath to tell the truth. The parties attend the inquiry but cannot intervene during the testimony of a witness.

d)turn to technician

§1 common provisions

- freedom of choice left to the judge as well in the choice of the technician as in the mission which is entrusted to him.
- the technician must take note of the mission and accept it explicitly. If he refuses, he will n be replaced.
- the technician must fulfill his mission personally, must respect the principle of adversarial nature, must discharge his mission conscientiously, with impartiality and

objectivity. He may not directly receive a remuneration from a party, only the judge can fix his remuneration on documents.

- the technician does not have the power to conciliate the parties, but he may propose a solution accepted by the parties and note a transaction, if he did not take the initiative to propose it.

- the technician may ask for the disclosure of all useful documents by the parties or the third parties. In case of a difficulty, he will have to refer it to the judge who will be able to order this communication.

- the judge in charge of supervising the inquiry may attend the technician's operations, cause his explanations and set him deadlines.

§2 the findings

The fact finder's mission is to inform the judge on an issue of fact which requires the lights of a technician. He may not give an opinion as to the consequences in fact or at law which can result from the observations to which he proceeds.

The judge can prescribe findings at any moment, set the time-limit within which the technician will have to deposit the report and the provision which will be paid to the technician as an advance by the parties that he designates.

The technician is informed by court registrar without particular formalism.

When the measure is carried out, the fact finder must consign the findings, except if the judge decided an oral presentation.

§3 the consultation

This measure is adapted to a purely technical question which does not call for long and complex investigations as for the expertise. The implementation is like the preceding measure.

§4 the expertise

Experts are chosen on a list on which they are inscribed after admission by the Court of Appeal.

Parties are not allowed to propose an expert.

It is by far the measure most frequently ordered. As for all investigation measures, it is not intended to make up for default of the parties in the adducing of the evidence, but to enlighten the judge on issues of fact, purely technical questions which call for complex investigations.

In theory, only one expert is appointed except if the judge considers it necessary to appoint several, in particular when the nature of the facts requires to resort to technicians of various specialities (for example, if a pork-butcherery factory burns, four experts are appointed: one to determine the causes of the fire and to possibly seek the responsibilities, the second to evaluate the cost of the rebuilding, the third to evaluate the financial loss and the fourth to evaluate the goods loss, or for instance in medical liability, two experts may be necessary, a surgeon and an anesthetist).

At soon as the decision is made, the court registrar notifies a copy to the expert who informs without delay his acceptance or his refusal and he must start his operations as soon as he is given notice that the parties have consigned. In practice, the court registrar will wait until the parties have consigned to contact the expert.

Indeed, if the provision is not consigned within the time-limit set by the judge, the expert's appointment is no longer valid, unless requiring an extension of the time-limit to consign. The expert must respect the principle of adversarial nature, by convening the parties and their councils.

The parties must hand over all the documents which the expert deems necessary to carry out his mission.

In the event of difficulties, the judge can, either order the production of the documents under obligation, or allow the expert "to be passed in addition to" or file his report as it stands.

The expert has to inform the judge of the investigations steps he has implemented.

In theory, the report is filed with the court registrar and the expert will then request his remuneration, which will be fixed by the judge.

As a conclusion, the case management, such as it results from the texts, appears, in practice, a good solution to reduce the slowness and the cost of a trial.

The directions judge currently acts if not with success, at least with perseverance in spite of the the tradition of a civil procedure, of inquisitorial nature.

But, as for the most jobs, the success is very close to the personnality and the experience of the judge.
