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Court-ordered expert investigations in business litigation: Legal basis and core principles

From world-renowned manufacturers of sophisticated machinery to modest businesses hiring a contractor to install air conditioning in their premises, any company may one day face a dispute involving complex technical issues requiring court-ordered expert investigations.

Such preparatory inquiries are, in fact, almost unavoidable in this type of litigation.

Companies must therefore understand how court-ordered expert investigations work to ensure they are conducted in a manner that respects their procedural rights.

1. Court-ordered expert investigations: When are they used?

When the judge lacks the technical knowledge necessary to rule on a dispute in full awareness of the facts, he/she may appoint a qualified specialist in the relevant field registered on a list established by a Court of appeals or the *Cour de cassation* (French Supreme Court) and entrust him/her with an assignment to clarify the technical aspects of the case.

The court-appointed expert will assist the judge in determining whether one or more of the parties is at fault, apportioning liability among them, and/or assessing the damage suffered by the aggrieved party.

It should be noted, however, that expert investigations may only be ordered when the judge deems it essential for obtaining technical information that is unknown to him/her^[1].

Moreover, they are of critical importance to the parties involved, as the judge ruling on the case will necessarily rely on the findings of the appointed expert to make his/her decision, even though, from a legal standpoint, he/she is not formally bound by the expert's report^[2].

To understand better the types of situations where expert investigations are necessary, let us consider the common scenario of a company operating in the mass retail industry that has commissioned the installation of a cold storage unit for its perishable goods and later discovers that the system is malfunctioning. The company, as the aggrieved party, may then seek to have the equipment replaced or refunded, and possibly claim damages for the damage caused by the cold storage unit malfunction.

This would raise the issue of liability for this malfunction.

Is the installer responsible for errors made during the installation process? Could the manufacturer be at fault for supplying a defective product? Might the maintenance provider have failed to follow essential precautions specified by the manufacturer? Could the malfunction stem from an external cause (such as a damaged electrical system)? Or could several parties have contributed to the malfunction, and if so, to what extent is each one liable?

It is to answer such purely factual questions – that require specific technical knowledge and expertise – that the judge may appoint an expert.

2. Court-ordered expert investigations: Key principles

To guarantee the parties' right to a fair trial^[3], court-ordered expert investigations are strictly regulated, reflecting the crucial role they play in the outcome of the cases in which they are ordered.

Below is an overview of the key principles that govern this type of preparatory inquiries.

a) The expert must fulfill his/her assignment conscientiously, objectively, and impartially

This principle is enshrined in Article 237 of the French Code of Civil Procedure^[4].

The duty to act conscientiously means that the expert must handle his/her assignment seriously and with integrity. He/she must act honestly, ethically, and responsibly, thus living up to the trust placed in him/her by the judge (and, by extension, the French judicial system).

The duty to act objectively stems directly from duty to act conscientiously: The expert must conduct his/her investigations and present his/her work in a faithful and unbiased manner.

The duty to act impartially requires the expert to maintain strict neutrality, refraining from allowing any

personal inclination or reservations he/she may have toward one of the parties. He/she must maintain impartiality avoid any bias or preconceived notions that could affect his/her conclusions. Impartiality also means that the expert's relationship with the parties must never give rise to legitimate doubt about his/her neutrality.

This duty to perform the entrusted assignment conscientiously, objectively, and impartially is reinforced by the requirement that all experts registered with courts of appeal or the *Cour de Cassation* (French Supreme Court) must swear an oath to fulfill their assignment and prepare their reports conscientiously and honorably[5].

b) The expert has a duty of independence

independence means the absence of any economic, legal, or financial ties[6] with the parties that could influence the expert. There must be no connection between the expert and the parties that could compromise his/her objectivity.

More precisely, independence is a prerequisite to performing an expert assignment. The expert must not be subject to any external influence that could bias his/her judgment.

The independence of the expert – not only in relation to the parties but also with respect to the judge and any third party involved in the proceedings – derives directly from the overarching principle of judicial independence. The court-appointed expert is indeed a court officer, appointed by a court decision to assist the judge by providing insight into factual matters.

Any situation likely to give rise to a conflict of interest must be disclosed before the expert investigations begin. In such a case, the expert may be challenged and disqualified by the judge[7].

Finally, independence also means the expert is free to fulfill his/her assignment in the manner he/she deems most appropriate, provided he/she complies with the core principles governing court-ordered expert investigations. The expert is likewise free to determine the content of his/her report and the conclusions he/she draws.

c) The expert has the obligation to personally fulfill the assignment

This obligation is set forth in Article 233 of the French Code of Civil Procedure[8].

The judge appoints the expert based on his/her individual qualifications and specific technical expertise. Accordingly, the expert is required to fulfill the assignment personally and may not delegate it to third parties.

According to consistent case law, the expert's obligation to personally fulfill his/her assignment implies that he/she may not confine himself/herself to reaching his/her conclusions by referring the parties to the dispute to an analysis carried out by a third-party[9].

The *Cour de Cassation* has also logically ruled that meetings conducted by the expert's spouse in the expert's absence are illicit^[10].

Similarly, while the expert may delegate purely material tasks to an assistant – provided the assistant offers adequate guarantees^[11] – he/she may not delegate technical implementing actions that are inherent to the expert's assignment without exercising direction, control, or supervision^[12].

In addition, insofar as the expert is appointed for his/her expertise in a given technical field, he/she may not “subcontract”, even partially, the performance of his/her actions/tasks to another technician^[13].

However, the expert may call on the assistance of another, more specialized technician, referred to as a specialist advisor (*sapiteur* in French)^[14], when confronted with a technical issue outside his/her own field of expertise.

d) The expert must act diligently: Compliance with deadlines set by the court

The expert is required to comply with the deadlines set by the judge for completing the assignment^[15].

If difficulties arise, the expert must request an extension of time from the judge responsible for supervising court-ordered expert investigations. The judge may grant the extension if the expert “*encounters difficulties that prevent the performance of the assignment or if an extension of the scope of the assignment proves to be necessary.*”^[16]

Failure to meet court-imposed deadlines without good cause may result in sanctions, including a reduction in fees, replacement, removal from the list of registered experts, and/or liability claim if the delay has caused a damage to one of the parties.

e) Professional Confidentiality

The expert is prohibited from disclosing information that infringes upon the parties' privacy or any other legitimate interest (such as trade secrets or confidential business documents) outside the proceedings, unless authorized by the judge or with the consent of the concerned party^[17].

f) Duty to report and to share the expert report with the parties

The expert must give his/her opinion on all matters falling within the scope of the assignment entrusted by the court, without exceeding that scope or making legal determinations^[18].

It should be noted, however, that the judge may, at any time, amend the expert's assignment, either at the request of the expert or at the request of the parties. Moreover, the judge is paradoxically permitted to adopt the expert's opinion even if the expert has exceeded the scope of the entrusted assignment.

The expert must deliver the final report to each party^[19] and to their respective attorneys^[20].

g) Compliance with the adversarial principle

Compliance with the adversarial principle (*principe du contradictoire*) is a fundamental requirement of court proceedings and must be strictly observed throughout the expert investigations.

As a court officer, the expert must adhere to the guiding principles governing court proceedings, including the adversarial principle enshrined in Article 16 of the French Code of Civil Procedure^[21].

This principle is often considered the cornerstone of the right to a fair trial. It ensures that parties are aware of the factual and legal arguments upon which the case will be decided and that they have the opportunity to respond to these arguments.

With respect to court-ordered expert investigations, the adversarial principle requires the expert to keep the parties informed of all actions taken, to systematically summon them to attend any meetings, and to allow them to submit comments and observations on the conduct and progress of the investigations (such comments and observations are set forth in a document or series of documents called “Statements to the expert”, *Dires à expert* in French). The expert is required to consider these comments and observations or, if he/she elects to disregard them, he/she must clearly set out the reasons for doing so in his/her final report.

In accordance with the adversarial principle, the expert may not solely make a documentary review of the materials produced by the parties: He/she must make his/her own findings. If the expert relies on materials produced by one party or a private expert report, he/she must share these materials with the other parties so they have an opportunity to review and, if necessary, discuss them in an adversarial manner.

The expert is also required to issue a pre-report to the parties prior to delivering his/her final report, in order to allow them to express any potential comments or objections.

The expert’s report must be well-reasoned and unambiguous. It must set out the actions taken, the factual findings, and the technical analyses underlying the expert’s conclusions. This reasoning enables the parties to challenge the conclusions if necessary, and ensures that the judge can make an informed decision.

Guiding Principles Applicable to Court-Appointed Experts



3. Sanctions for breach of the fundamental principles governing court-ordered expert investigations

Any breach of the above obligations may expose the expert to disciplinary or civil sanctions.

The judge may also order the expert's replacement and/or reduce his/her fees.

Most importantly, from a procedural standpoint, the judge may declare the expert report null and void if the

expert's breaches are likely to have caused harm to the party seeking its annulment[22]. It should be noted that any motion to annul an expert report must be filed before the parties present their arguments on the merits of the case, failing which the motion will be inadmissible[23].

SoulieR Avocats stands ready to assist you throughout the course of court-ordered expert investigations, no matter how technically complex they may be, in order to safeguard your interests and, where appropriate, seek the annulment of expert investigations conducted in breach of the applicable fundamental principles.

[1] Article 263 of the French Code of Civil Procedure: *"Expert investigations shall be ordered only where findings or a consultation would not be sufficient to enlighten the judge."*

[2] Article 246 of the French Code of Civil Procedure: *"The judge is not bound by the expert's findings or conclusions."*

[3] The right to a fair trial is *inter alia* guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

[4] Article 237 of the French Code of Civil Procedure: *"The expert shall fulfill his/her assignment conscientiously, objectively, and impartially."*

[5] Article 6 of Law No. 71-498 of June 29, 1971 on court-appointed experts: *"When first registered on a list drawn up by a court of appeals, experts shall take an oath before the court of appeals having territorial jurisdiction over their place of residence to fulfill their assignment, draft their report, and express their opinion conscientiously and honorably. The oath must be renewed upon re-registration following removal from the list. Experts who are not registered on a list shall take the oath set out in the first paragraph each time they are appointed."*

[6] Article 248 of the French Code of Civil Procedure: *"The expert is prohibited from receiving any payment directly from a party, in any form whatsoever, including reimbursement of expenses, unless authorized by a decision of the judge."*

[7] Article 234 of the French Code of Civil Procedure: *"Experts may be challenged on the same grounds as judges. Where the expert is a legal entity, the challenge may concern either the legal entity itself or the individual(s) approved by the judge. A party wishing to challenge the expert must do so before the judge who appointed them, or before the judge responsible for supervising court-ordered expert investigations, either before the commencement of the expert investigations or as soon as the ground for the challenge becomes known. If the expert considers that grounds for a challenge exist, he/she must immediately inform the appointing or supervising judge."*

[8] Article 233 of the French Code of Civil Procedure: *“The expert, empowered by the judge because of his/her expertise, must personally fulfill the assignment entrusted to him/her. If the appointed expert is a legal entity, its legal representative shall submit to the judge for approval the name of the individual(s) who will fulfill the assignment within the legal entity and on its behalf.”*

[9] Second Civil Chamber of the *Cour de Cassation*, January 11, 1995, No. 93-14697

[10] Second Civil Chamber of the *Cour de Cassation*, April 27, 200, No. 98-13.361

[11] Article 278-1 of the French Code of Civil Procedure: *“The expert may be assisted in the performance of his/her assignment by a person of his/her choice, who acts under his control and responsibility”.*

[12] Second Civil Chamber of the *Cour de Cassation*, June 10, 2004, No. 02-15129

[13] Third Civil Chamber of the *Cour de Cassation*, April 8, 1999, No. 96-21.897

[14] Article 278 of the French Code of Civil Procedure: *“The expert may take the initiative of seeking the opinion of another technician, but only in a specialty distinct from his/her own.”*

[15] Article 239 of the French Code of Civil Procedure: *“The expert shall comply with the deadlines set for the performance of the assignment.”*

[16] Article 279 of the French Code of Civil Procedure: *“If the expert encounters difficulties that prevent the performance of the assignment or if an extension of the scope of the assignment proves necessary, the expert shall so report to the judge. The judge may then, when ruling on the matter, extend the deadline within which the expert must submit his/her opinion.”*

[17] Article 247 of the French Code of Civil Procedure: *“The opinion of the expert may not be used outside the proceedings if its disclosure would infringe upon the privacy of individuals or any other legitimate interest, unless authorized by the judge or with the consent of the concerned party.”*

[18] Article 238 of the French Code of Civil Procedure: *“The expert shall give an opinion on the issues for which he/she was appointed. He/she may not address other issues unless the parties have given their written consent. The expert shall not make any legal determinations.”*

[19] Article 173 of the French Code of Civil Procedure: *“Copies of minutes, opinions, or reports prepared in connection with or following the conduct of preparatory inquiries shall be delivered or sent to each party, either by the clerk of the court that prepared them or by the expert who drafted them, as the case may be. A note of such delivery shall be inserted on the original.”*

[20] Second Civil Chamber of the *Cour de Cassation*, November 24, 1999, No. 97-10.572

[21] Article 16 of the French Code of Civil Procedure: *“The judge must, in all circumstances, ensure compliance with, and personally observe, the adversarial principle. He/she may base his/her decision only on*

arguments, explanations, and documents submitted by the parties if they have had the opportunity to discuss them in an adversarial manner. He/she may not rely on legal grounds raised on his/her own initiative without first inviting the parties to present their observations.”

[22] Article 175 of the French Code of Civil Procedure: *“The nullity of decisions and enforcement measures relating to preparatory inquiries is subject to the rules governing the nullity of procedural actions/documents.”*

[23] Article 112 of the French Code of Civil Procedure: *“The nullity of procedural actions/documents may be invoked as and when they are issued/performed; however, it shall be deemed waived if the party invoking it subsequently enters a defense on the merits or raises a procedural bar without first raising the nullity.”*

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