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Reform of the appellate procedure under French law: The main innovations applicable as of September 1, 2017

Six years after the entry into force of Decree n°2009-1524 of December 9, 2009 referred to as the "Magendie" Decree, the appellate procedure is about to be significantly amended. Indeed, Decree n°2017-891 of May 6, 2017 relating to pleas of lack of jurisdiction and appeals in civil matters, published in the Official Gazette on May 10, 2017, brings about substantial changes to this procedure.

Such changes, which are primarily aimed at speeding up the appellate procedure and limiting court congestion, introduce strict rules that must be followed to avoid serious pitfalls such as invalidation, inadmissibility or nullity which may in the worst case scenario entail the sudden and final end of the appellate proceedings.

This article addresses the main procedural innovations brought about by the reform, such innovations to become effective on September 1, 2017.

1/ New provisions concerning the purpose of the appeal and its so-called *devolutive effect* (i.e. the transfer of jurisdiction to an upper court)

The purpose of the appeal has been re-defined in new Article 542 of the French Code of Civil Procedure (the

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"FCCP") that now reads as follows "*the appeal seeks,* ***through the challenge of the judgment issued by a first degree court****, the reversal or the quashing of said judgment by the Court of Appeals*" (emphasis added).

It follows from this new wording that while the appeal still seeks the reversal of the first-instance judgment, the Court of Appeals may only reverse the findings that are **expressly challenged** by the appellant.

In the same vein, new Article 562 of the FCCP concerning the so-called *devolutive effect* stipulates that the appeal only transfers to the Court of Appeals the power to review the findings that are **expressly challenged** in said appeal and those related thereto.

As such, the Court of Appeals may not reverse the findings of the judgment that are not expressly challenged by the appellant **as early as in the notice of appeal**. Indeed, the notice of appeal must specify *inter alia* the findings of the judgment that are expressly challenged and the **appeal will be limited to the review of such findings**, unless the appeal seeks the cancellation of the judgment or if the subject-matter of the dispute is indivisible (in both cases, the transfer of jurisdiction applies for the whole judgment). If the notice of appeal does not contain this information, it can be held **null and void** (new Article 901§4 of the FCCP).

The new provisions thus prevent appellants from the possibility to state in the notice of appeal that they lodge a so-called "*general appeal*" since the challenged findings must be expressly specified, thereby limiting the scope of the appeal.

2/ New provisions concerning the inadmissibility of the appeal

If the notice of appeal has been invalidated or if the appeal has been declared inadmissible, the appellant will no longer be entitled to lodge a main appeal against the same judgment and against the same party during the limitation period (new Article 911-1 of the FCCP). The appellant may thus only lodge a cross appeal in the appellate proceedings initiated by the other party (as the case may be).

In addition, the cross-appeal by a party to the first-instance proceedings or by a third-party will not be admissible wherever the main appeal is itself inadmissible or invalidated (article 550 of the FCCP).

3/ New provisions concerning timelines

In appellate proceedings where legal representation is mandatory (i.e. appellate proceedings primarily addressed by the reform and the only type of appellate proceedings discussed in this article), the timelines imposed on the various parties to file their submissions have been **aligned**.

For the so-called "*long-circuit procedure*" (i.e. the standard procedure), the appellant still has three months to file its submissions (failing which the notice of appeal may be invalidated) but the respondent will henceforth also have **three months** from the notification of the appellant's submissions (as opposed to two months currently) to file his own submissions and to lodge, as the case may be, a cross appeal (new Articles 908 and 909 of the FCCP) or even to ask that the case be removed from the court docket if the first-instance judgment, even though provisionally enforceable, has not been enforced by the appellant (new Article 526 of the FCCP).

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If this timeline is not complied with, the submissions can automatically be held inadmissible.

Similarly the submissions of the following parties must be notified within a period of **three months** (as opposed to two months currently), failing which such submissions can automatically be held inadmissible:

- The respondent to a cross appeal lodged by a party to the first-instance proceedings or by a third-party (the three-month period starts running from the date on which he/she is notified of the cross appeal),
- The third-party called into the appellate proceedings (the three-month period starts running from the date on which he/she is notified of the summon to compulsorily join the appellate proceedings),
- The third-party who voluntarily joins the appellate proceedings (the three-month period starts running from the date on which he/she files the request to join the proceedings).

Lastly, very short time-lines for the notification of procedural documents will henceforth apply in the so-called "***fast-track*** *procedure*", i.e. the procedure that deals with urgent cases or cases that are trial ready, appeals against summary orders or orders equivalent to summary orders (this is a new provision) or orders issued by the case management judge (new Article 905 of the FCCP):

- The appellant must notify the notice of appeal to the respondent within **ten days** from receipt of the notice of hearing sent by the clerk, failing which the notice of appeal can automatically be invalidated (new Article 905-1 of the FCCP),
- The appellant must notify his submissions within **one month** from the receipt of the notice of hearing, failing which the notice of appeal can be automatically invalidated (new Article 905-2 of the FCCP),
- The respondent must then file his submissions within **one month** from the notification of the appellant's submissions, failing which his submissions can be automatically held inadmissible (aforementioned new Article 905-2),
- The respondent to a cross appeal (whether lodged by a party to the first-instance proceedings or by a third-party), the third-party called into the fast-track appellate proceedings and the party who voluntarily joined such proceedings, must also file their submissions within **one month** (the starting point of the timeline is the same as in the "*long-circuit*" procedure) (aforementioned new Article 905-2 of the FCCP).

Wherever submissions are held inadmissible because of non-compliance with any of the aforementioned timelines, all of the exhibits produced in support of these submissions will also be held inadmissible (new Article 906 §2 of the FCCP).

However, if a mediation process is ordered by the Court, the aforementioned timelines will be suspended until the expiry of the mediator's assignment (new Article 910-2 of the FCCP).

Lastly, the Decree introduces the possibility for the President of the Chamber or the Case Management Judge not to apply the contemplated sanctions if non-compliance with any of the applicable timelines is due to a force majeure event [1] (new Article 910-3 of the FCCP).

4/ New provisions applicable to submissions

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4.1/ Concentration of the pleas

Still with the objective of speeding up the procedure and avoiding delaying tactics, the parties must henceforth specify **in their first submissions** – to be notified within the aforementioned timelines (cf. ***3/*** above) – **all of their claims on the merits**, failing which such submissions can automatically be held inadmissible (new Article 910-4 §1 of the FCCP).

Yet, in order to take into account the developments in the case, claims intended **to respond to the opponents' submissions and exhibits** or dealing with **issues raised after** the filing of the first submissions, the joining of a third-party or the occurrence or disclosure of a fact, could be added in subsequent submissions within the limits of the findings of the first-instance judgment being challenged (new article 910-4 §2 of the FCCP).

4.2/ The format of the submission is further regulated

The formal presentation of the submissions is further regulated. As such, submissions filed in the context of an appellate procedure must henceforth include (new Article 954 of the FCCP):

- **In their header**: The mentions provided for by new Article 961 of the FCCP concerning the parties and allowing to precisely identify them,
- In addition to the claims of the parties and the pleas in fact and in law on which each of these claims is based, the exhibits produced in support of each claim and **their numbering**,
- A statement of the facts and the procedure, the findings of the judgment that are challenged, a so-called "*discussion*" on the claims and pleas, and an operative part summarizing all of such claims. Formally speaking, all of these elements must be set forth **separately** in the submissions.

The other provisions that currently regulate the format of submissions – including the principle of recapitulative submissions according to which the parties must re-address in new submissions the claims and pleas that have been raised in previous submissions, failing which such claims and pleas are deemed waived – shall continue to apply (new aforementioned Article 954).

The case management judge has exclusive jurisdiction to enjoin the parties to comply with the provisions set forth in new Articles 954 and 961 of the FCCP.

Lastly, while the Court rules only on the claims set forth in the operative part, it is now intended that it will examine the pleas raised in support of these claims only if they are addressed in the "discussion" part of the submissions (aforementioned new Article 954 §3 of the FCCP).

4.3/ Notification of the submissions

While the rule remains that submissions before a Court of Appeals must be filed electronically, failing which they can automatically be held inadmissible, it will henceforth be possible to send a document by registered letter, return receipt requested, wherever such document cannot be sent electronically for a reason unrelated

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to the person who is supposed to file it. Until now, in that specific case, it was only permitted to deposit a hard copy of the document at the clerk of the Court of Appeals. These new provisions thus offer more flexibility to the parties and their legal counsels.

5/ New provisions concerning appeals after remand by the *Cour de Cassation* (French Supreme Court)

The timeline within which the case must be referred to the Court of Appeals after remand by the *Cour de Cassation* is reduced to **two months** from the notification of the *Cour de Cassation*'s remand decision (new Article 1034 of the FCCP).

In addition, if the case was adjudicated under the "*long circuit*" procedure, the remand before the Court of Appeals will automatically follow the "*fast-track*" procedure.

In that case, the party referring the matter to the Court of Appeals to which the case had been remanded must notify the notice of referral to the other parties within **10 days** from notice of hearing sent by the clerk, failing which such notice of referral shall be invalidated.

The party referring the matter to the Court of Appeals, the opposite parties and, as the case may be, the party called into the proceedings and the party who voluntarily joined the proceedings must notify their submissions within **a two-month timeline** (the starting point of the this timeline is the same as for the "long-circuit" procedure – cf. ***3/*** above) (new Article 1037-1 of the FCCP).

If this timeline is not complied with:

- By the party having referred the matter to the Court of Appeals or the opposite parties, they will be deemed to limit themselves to the pleas and claims that they raised before the Court of Appeals, the decision of which has been quashed by the *Cour de Cassation*;
- By the party that has been called into the proceedings and the party who voluntarily joined the proceedings, the submissions shall automatically be held inadmissible.

6/ The jurisdictional objection is removed

The reform abolishes the regime governing jurisdictional objections and provides that decisions on pleas of lack of jurisdiction will henceforth be subject to **appeal**.

As such, wherever the first-instance judge rules on the jurisdiction issue without adjudicating the merits of the case, his/her decision may be appealed against (new Article 83 §3 of the FCCP). The same applies if the first-instance judgment addressed a jurisdiction issue and ordered investigative or interim measures (aforementioned new Article 83 §2 of the FCCP).

The appeal must be lodged within **fifteen days** from the notification of the first-instance judgment by the clerk (new Article 84 §1 of the FCCP). The appellant must, within the aforementioned timeline, apply to the

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President of the Court of Appeals either to be authorized to summons the other party(ies) to appear on a fixed date or to have a date fixed for the hearing as a matter of priority (aforementioned Article 84 §2 of the FCCP).

The notice of appeal must not only include the mentions listed above (cf. ***1/*** above and new Article 901 of the FCCP) but also specify that it concerns a judgment on jurisdiction and state the grounds for the appeal, failing which it shall be declared inadmissible. The grounds for the appeal can, however, be set forth either in the notice of appeal itself or in the submissions attached to said notice (new Article 85 of the FCCP).

The provisions concerning the Court of Appeals' power to rule on substantive issues, whenever it has appellate jurisdiction over the first-instance court that it considers to be competent and whenever it considers that **it is in the interest of justice** to enter into a final judgment, are maintained (new Articles 88 and 89 of the FCCP).

7/ Entry into force

Decree dated May 6, 2017 was published in the Official Gazette on May 10, 2017 and comes into force on September 1, 2017.

In addition, a second Decree n°2017-1227 dated August 2, 2017 specified further and amended some of the provisions of the May 6, 2017 Decree dealing with its implementation.

As a result, the provisions concerning pleas of lack of jurisdiction will become effective on September 1, 2017 and apply to judgments rendered as from said date.

The provisions concerning the *devolutive* effect of the appeal and those that amend applicable formal requirements, timelines and related sanctions shall apply to appeals lodged as from September 1, 2017.

The same rules on formal requirements, timelines and related sanctions shall apply to respondents' request for the removal of the case from the court docket filed as from September 1, 2017 insofar as the first-instance judgment, even though provisionally enforceable, has not been enforced by the appellant.

Lastly, the provisions concerning the appellate procedure after remand by the *Cour de Cassation* – that reduce the timeline within which the case must be referred again to a Court of Appeals – shall apply to decisions of the *Cour de Cassation* notified as from September 1, 2017. The provisions regulating the remand procedure within imperative timelines shall apply to procedures initiated, after remand, before a Court of Appeals as from September 1, 2017.

[1] Article 1218 of the French Civil Code, as amended by Ordinance of February 10, 2016 on the reform of contract law and the general regime of obligations defines force majeure as "*an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures, prevents performance of his obligation by the debtor.*"

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