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DECREE N° 2019-1333 OF DECEMBER 11, 2019 REFORMING FRENCH CIVIL PROCEDURE: IMPACT OF EXTENSION OF THE POWERS OF THE CASE MANAGEMENT JUDGE ON INTELLECTUAL PROPERTY LITIGATION

Intellectual Property, Media, and Art Law Patent Law IT and Data Protection Competition, Retail and Consumer Law | 15/01/20 | Grégoire Desrousseaux François Pochart

Entering into force on January 1, 2020, Decree n°2019-1333 of December 11, 2019 reforming civil procedure (the "Decree") has already caused a lot of buzz, in particular in that it details the procedure applicable before the new first instance civil court (resulting from the merger of the *tribunal de grande instance* and the *tribunal d'instance*), simplifies lack of jurisdiction incidents within the same first instance civil court and, above all, enshrines in principle provisional enforcement of court decisions.

The Decree also introduces a major innovation in that it extends the powers of the case management judge by allowing him to rule on all inadmissibilities (**2**). Until now, this prerogative fell within the competence of the court (**1**). This article returns to this single aspect of the reform insofar as this extension of the powers of the case management judge will have major consequences on all intellectual property litigation (**3**).

1) The old regime

In its version in force until January 1, 2020, article 771 of the Code of Civil Procedure (CCP) provided that the case management judge was, until he or she relinquished jurisdiction, the only one to have jurisdiction to the exclusion of any other court formation, to (i) rule on procedural objections, incidents putting an end to the proceedings and requests for advance payments, (ii) order all other provisional measures, even conservatory ones, and (iii) order, even of his or her own motion, any investigative measure.

The case management judge had thus no jurisdiction to rule on inadmissibilities. The French Supreme Court confirmed this in an opinion of November 13, 2006: "*The incidents putting an end to the proceedings referred to in the second paragraph of article 771 of the new Code of Civil Procedure are those mentioned in articles 384 and 385 of the same code and do not include inadmissibilities*.

In concrete terms, insofar as article 122 CCP defines an inadmissibility as "*any means of declaring the adversary's claim inadmissible, without examination of the merits, for lack of right to act, such as lack of standing, lack of interest, prescription, time limit, res judicata*", the court was the only one competent to hear these questions, it being specified that this list is not exhaustive.

Thus, if a party wished to have a preliminary issue of prescription or standing, for example, ruled on, it had to make a request to the case management judge who could decide whether or not to refer the issue to the court for a preliminary hearing. In any event, the case management judge could not rule on this preliminary issue - in the context of an incident, for example - without exceeding his powers.

On the other hand, the case management judge was the only one to have jurisdiction to rule on procedural exceptions (e.g.: an exception of nullity of the summons), even though there would be a certain logic in having these defenses "purged" at the same time as the inadmissibilities, in order to reserve to the court only the questions on the merits.

The result was a certain procedural complexity at the pre-trial stage (the parties were often required to file submissions both before the case management judge and before the court on these preliminary issues), as well as an open hostility on the part of certain judges to "sequencing" the litigation before the court in this way. Thus, the inadmissibilities were very often ruled on by the court at the same time as the merits of the case, even though in certain cases they could have put an end to the proceedings earlier, thus saving the parties from having to file submissions on the merits and thereby relieving the court of its role.

This difficulty had been perfectly identified by the authors of the report devoted to the *Improvement and Simplification of Civil Procedure****[1]***, but they proposed only a partial remedy, suggesting that *the judge in charge of the pre-trial procedure be allowed to rule on the inadmissibilities that do not concern the merits of the law and to raise them ex officio when they are apparent from the file****[2]***.

The Decree went further.

2) The new regime

The powers of the case management judge are now defined in the new article 789 CCP.

The provisions of the former article 771 have been retained but, as a major innovation, they are now supplemented by a 6° as well as three new paragraphs drafted as follows

"When the application is presented after his designation, the case management judge is, until he relinquishes jurisdiction, the only one to have jurisdiction, to the exclusion of any other court formation, to : […]

(6) To rule on the inadmissibilities.

Where the objection requires a decision on the merits of the case, the case management judge shall rule on the merits of the case and on the objection. However, in cases that do not fall within the jurisdiction of the single judge or that are not assigned to him, a party may object. In this case, and as an exception to the provisions of the first paragraph, the case management judge shall refer the case back to the court, if necessary without closing the investigation, so that it may rule on this issue on the merits and on this objection. The court may also order such a referral if it considers it necessary. The decision to refer the case back is a measure of judicial administration.

The case management judge or the panel of judges shall rule on the issue on the merits and on the plea of inadmissibility by separate provisions in the operative part of the order or judgment. The court shall rule on the objection even if it does not consider it necessary to rule on the merits first. If necessary, it refers the case back to the case management judge.

The parties are no longer entitled to raise these inadmissibilities in the course of the same proceedings unless they arise or are revealed after the case management judge has been relieved of jurisdiction. »

Once appointed, the case management judge now has exclusive jurisdiction to rule on the inadmissibilities, including those relating to the merits (as opposed to pure procedural inadmissibilities), unless the parties object in cases that do not fall under the jurisdiction of the single judge or that are not assigned to him.

A distinction has long been made between "pure procedural inadmissibilities" and "inadmissibilities related to the merits":

> - the pure procedural inadmissibilities are "*those which tend to have the claim dismissed because the action was not brought under regular conditions from the point of view of procedure; for example, because of the lack of interest or the expiry of the time limit for bringing the case to court. The law itself is not contested; the substance of the dispute is not discussed*"[3];
>
> - on the contrary, it is said to be an inadmissibility related to the merits "*when it tends to prohibit the assertion of the right that serves as the basis for the claim. Thus, when the defendant avails himself of the authority of a judgment rendered in his favour,* [...] *what is contested is no longer the admissibility of the claim in terms of the procedure, but the right that serves as the basis for the claim. In reality, the grounds of nonadmissibility of this nature are true defences on the merits [...*], *which have been classified as inadmissibilities because they prevent any judicial debate on the merits and oppose the continuation of the proceedings. The distinction, it is true, is not always easy; thus, although standing is a condition of admissibility of the claim, the lack of standing is sanctioned by an inadmissibility related to the merits*[4].

By allowing the case management judge to rule on all the inadmissibilities, the authors of the Decree have gone beyond the recommendations of the report on the simplification and improvement of civil procedure, which proposed limiting the jurisdiction of the case management judge to only those inadmissibilities "*which do not affect the substance of the law*", such as "*the omission of an act from the procedure*", "*the irregularity affecting the act itself, as regards its particulars* [...] *or as regards its developments on the merits: failure to state reasons* [...], *omission of certain mandatory information*", "*irregularity affecting the annexes to the document*", "*irregularity affecting the medium of the document itself (electronic form in matters of mandatory representation)*"[5].

In view of this new article 789, 6° CCP, applicable only to proceedings launched as from 1 January 2020[6], the case management judge will henceforth be able to rule on an aspect of the merits on which the inadmissibility depends. As one author notes, "*this development is not insignificant in that it marks a shift in the prerogatives of the case management judge with respect to the merits of the dispute*"[7].

It should be noted that article 123 CCP has also been modified by the Decree: the principle remains the same, namely that "*the inadmissibilities may be raised in any case*", but the new text reserves the hypothesis of a contrary provision ("*unless it is otherwise provided*"). This addition is to be seen in connection with the last paragraph of the new article 789 CCP, according to which "*the parties are no longer admissible to raise these inadmissibilities during the same proceedings, unless they arise or are revealed after the case management judge has relinquished jurisdiction.* Although there is no obligation to raise *in limine litis* the inadmissibilities[8], the parties are encouraged by these new provisions to raise concomitantly before the case management judge all the defences other than the defences on the merits (i.e. procedural objections, incidents putting an end to the proceedings and inadmissibilities), including when they are related to the merits.

The office of the case management judge is thus considerably strengthened and his powers increased: when he rules on an aspect of the merits on which the inadmissibility depends, the court cannot go back on this aspect and must consider it as ruled on[9].

However, the order of the case management judge ruling on a procedural objection, an incident ending the proceedings or an inadmissibility will be subject to appeal (within fifteen days of its notification), as an exception to the principle according to which the orders of the case management judge "*may only be appealed before the court of appeal or the*

Supreme Court together with the judgment ruling on the merits"[10].

This new regime will have a definite procedural impact on intellectual property litigation.

3) Impact on intellectual property litigation

In intellectual property disputes, the following questions will henceforth in principle be ruled on by the case management judge, whereas they previously fell within the jurisdiction of the first instance civil court:

- disputes over the ownership of intellectual property rights, insofar as they seek to have the adversary declared inadmissible for lack of standing (e.g.: absence of proof of authorship or inventor status, absence of assignment of the disputed rights and/or registration of this assignment for trademarks, patents and designs);

- failure to implicate the coauthors: in this case, it is highly likely that the case management judge will have to rule on questions relating to the merits of the case (e.g. is it a collaborative work?);

- the statute of limitations (e.g.: statute of limitations for an action for infringement, trademark forfeiture, unfair competition/parasitism and/or contractual liability);

- res judicata ;

- failure to respect the principle of concentration of arguments ;

- failure to comply with the rule of noncumulation of liabilities.

The following issues, on the other hand, should continue to be ruled on by the first instance civil court on the merits:

- disputes relating to the validity of industrial property titles (patent, trademark, design): a request for invalidity presented by the defendant in infringement is in principle a defence on the merits;

- challenges relating to the validity of a request for seizure of infringement and/or of a seizure report: French Supreme Court considers that "*the exclusive jurisdiction of the judge who issued the order on request to hear the appeal for cancelation, even if the judge on the merits is seized of the case, does not prevent the latter, when assessing the regularity of the evidence submitted to him, from annulling a seizure report for infringement on grounds relating to the conditions of issuance of the order authorizing the seizure for infringement*"[11]; Moreover, as the seizure for infringement proceedings are distinct from the main proceedings on the merits, French Supreme Court considers that a regularization occurring at the stage of the main proceedings on the merits has no impact on the absence of standing to request a seizure[12]; in other words, the case management judge and the first instance civil court could be led to rule successively on the question of the lack of standing of the claimant (respectively under the infringement proceedings and under the seizure for infringement);

- disputes relating to the originality of a work or software: French Supreme Court considers that "*the originality of works eligible for copyright protection is not a condition of admissibility of the infringement action*"[13]; in the same sense, the Paris Court of Appeal has already had occasion to judge that "*the condition of originality of the software constitutes a substantive prerequisite for the infringement action*", and not a condition of admissibility[14].

The Decree should thus accentuate the splitting of the handling of intellectual property disputes between the case management judge and the first instance civil court, to the detriment of the latter.

[1] F. Agostini and N. Molfessis, Report on Improving and Simplifying Civil Procedure http://www.justice.gouv.fr/publication/chantiers_justice/Chantiers_justice_Livret_03.pdf

[2] *Ibid*, p.21 : *Simplify the management of inadmissibilities and nullities.*

[3] H. Solus and R. Perrot, Droit judiciaire privé, Tome 1, Sirey 1961, n°316, *Distinction between "inadmissibilities related to the merits" and "pure procedural inadmissibilities".*

[4] *Ibid.*

[5] F. Agostini and N. Molfessis, Report on Improving and Simplifying Civil Procedure, p.22.

[6] Decree, s. 55. - – *« I. - This Decree shall enter into force on 1 January 2020. It shall apply to proceedings in progress on that date. II. - Notwithstanding I, the provisions of Articles 3 shall apply to proceedings brought before the courts of first instance as from 1 January 2020. The provisions of Articles 5 to 11, as well as the provisions of Articles 750 to 759 of the Code of Civil Procedure, of Article 789(6) and of Articles 818 and 839, in their wording resulting from the present decree, are applicable to proceedings instituted as from 1 January 2020. III - By way of derogation from II, until September 1, 2020, in proceedings subject, as of December 31, 2019, to the ordinary written procedure, referral by writ to the court and distribution of the case shall remain subject to the provisions of Articles 56, 752, 757 and 758 of the Code of Civil Procedure in their wording prior to the present decree. »*

[7] M. Kebir, *Reform of civil procedure: promotion of conventional pre-trial proceedings and extension of the powers of the case management judge*, Dalloz actualité, 23 Dec. 2019.

[8] Unlike procedural objections (cf. art. 74 al. 1 CCPCCP: "*Objections must, on pain of inadmissibility, be raised simultaneously and before any defence on the merits or objection. This is so even if the rules invoked in support of the exception are of public order.*"

[9] CCPCCP, art. 794: "*The orders of the case management judge do not have the authority of res judicata in the main proceedings, with the exception of those ruling on procedural objections, on inadmissibilities, on incidents putting an end to the proceedings, and on the issues on the merits decided in application of the provisions of article 789, paragraph 6.*

[10] CCPCCP, art. 795: "*The orders of the case management judge are not subject to opposition.*

They can only be appealed before the court of appeal or before the Supreme Court together with the judgment on the merits.

However, they may be appealed in the cases and under the conditions provided for in matters of expert appraisal or stay of proceedings.

They are also, within fifteen days of being served, when:

1° They rule on an incident that puts an end to the proceedings, they have the effect of putting an end to the proceedings or they establish their extinction;

2° They rule on a procedural objection or a plea of inadmissibility;

3° They relate to provisional measures ordered in matters of divorce or legal separation;

4° In the event that the amount of the claim is greater than the final jurisdictional rate, they relate to the provisions that may be granted to the creditor in the event that the existence of the obligation is not seriously disputable. »

[11] Cass. Com. march 17, 2015, No. 13-15862.

[12] Cass. Com. October 31, 2006, No. 05-11149.

[13] Cass. Com. jan. 29, 2013, No. 11-27351.

[14] CA Paris, Pôle 5 ch. 1, March 24, 2015, *Markelys Interactive / Beezik*, www.legalis.net. It should be noted, however, that case management judges sometimes sanction the absence of proof of the originality of a software program with an inadmissibility and that the Supreme Court itself has already admitted this (cf. Cass. Civ. 1st, Nov. 14, 2013, No. 12-20687).