

French Civil Justice during Corona Times

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The coronavirus pandemic has led to the enactment of many exceptional legal provisions relating to French civil justice. A Law Act no 2020-290 of 23 March 2020 '*d'urgence pour faire face à l'épidémie de covid-19*' (emergency law act to deal with the Covid-19 epidemic) allowed the government to declare a state of public health emergency. The government was also given the power to pass *Ordonnances* (ordinances) in matters that are normally handled by Parliament¹.

A few days later, a first ordinance relating to civil justice² was passed (*Ordonnance* no .2020-304 of 25 March 2020³). The same day, a second ordinance was passed to deal with the extension of time limits (*Ordonnance* no 2020-306 of 25 March 2020⁴) A third one was passed three weeks later (*Ordonnance* no 2020-427 of 15 April 2020⁵) which clarifies some issues related to time-limits. All these legal texts create a state of exception; some of their provisions have been challenged before the administrative highest court (*Conseil d'État*) but the claimants did not succeed⁶.

The main adjustments of civil justice are contained in the first ordinance no 2020-304 of 25 March 2020 which shall apply only between 12 March 2020 and the expiration of a one-month deadline from the end of the state of public health emergency declared by the

¹ For the functioning of administrative, criminal and civil courts, see Law Act no 2020-290 of 23 March 2020, art. 11, 2°, c.

² For administrative courts, see *Ordonnance* no 2020-405 of 8 April 2020 *portant diverses adaptations des règles applicables devant les juridictions de l'ordre administratif*. For criminal courts, see *Ordonnance* no 2020-303 of 25 March 2020 *portant adaptation des règles de procédure pénale*, *Journal Officiel* 26 March 2020.

³ *Ordonnance* no 2020-304 of 25 March 2020 *portant adaptation des règles applicables aux juridictions de l'ordre judiciaire statuant en matière non pénale et aux contrats de syndic de copropriété*, *Journal Officiel* 26 March 2020. See also the circular CIV/02/20 of 26 March 2020 of the Minister of Justice presenting and commenting the ordinance (C3/DP/2020030000319/FC, *BOMJ* compl. 27 March 2020). See also Loïc Cadiet, 'Un état d'exception pour la procédure civile à l'épreuve du coronavirus', *JCP G* 14 April 2020, no 471.

⁴ *Ordonnance* no 2020-306 of 25 March 2020 *relative à la prorogation des délais échus pendant la période d'urgence sanitaire et l'adaptation des procédures pendant cette même période*, *Journal Officiel* 26 Marc 2020. This ordinance deals with deadlines that expire within the period of public health emergency and the adjustment of proceedings during this period.

⁵ *Ordonnance* no 2020-427 of 15 April 2020 *portant diverses dispositions en matière de délais pour faire face à l'épidémie de covid-19*, *Journal officiel* 16 April 2020.

⁶ The *Conseil d'État* has received several urgent claims aiming at safeguarding fundamental freedoms, see e.g. CE, ord. réf., 10 avr. 2020, n° 439883 et 439892, *CNB et autres, SAF et autres* (claims brought by several lawyers' associations). See also *Le Monde* 16 April 2020, p. 11.

government⁷. Therefore, the period of application of these derogating measures cannot be set accurately.

It refers⁸ to the second ordinance passed the same day (no 2020-306) with regard to the extension of deadlines that expire during the period of public health emergency (*période d'urgence sanitaire*).

Ordonnance no 2020-304 of 25 March 2020 deals with three main topics: 1) The courts' organisation during the state of emergency; 2) The course of the proceedings; and 3) The court decisions.

The Courts' Organisation

The ministry of justice (for civil courts, the department *direction des affaires civiles et du sceau*) prepared a business continuity plan that focused on the urgent cases that should be dealt with in spite of the pandemic (proceedings for urgent interim relief called *référés*, protection of vulnerable persons and, especially in case of domestic violence, the possibility for the family judge to issue protection orders as soon as possible).

When a court is totally or partially unable to function⁹, *Ordonnance* no 2020-304 allows the president of the court of appeal¹⁰ to assign all or part of the cases to another court of same nature within the jurisdiction of the court of appeal. This allotment of cases lasts only for the duration of the state of emergency and at the end of this period, the cases (also the ones pending) will be sent back to the court that has jurisdiction. Publicity measures¹¹ are required to inform all practitioners and parties.

Within a court, the court panel can also be adjusted to the number of available judges. The first instance civil court (*tribunal judiciaire*) and the court of appeal can give a decision in all matters with a single judge (*juge unique*)¹² even if the normally applicable provisions require a panel of three judges. This adjustment is decided by the president of the court. The single judge must be a fulltime professional judge¹³. Before the commercial court (*tribunal de commerce*), the president of the court may decide that the public hearing will take place before a single judge who belongs to the court panel and who shall report to the panel. For labour courts (*conseils de prud'hommes*), a specific solution applies: instead of four judges (two employees, two employers), the court panel may consist of only two (one employee, one employer). All these changes do not require the parties' consent. However, although the ordinance aims to facilitate the maintaining of judicial activity, it appears that most courts are more or less closed and that most cases except the very urgent ones are not dealt with.

⁷ This period of time is described as a 'legally protected period' (*période juridiquement protégée*) in the circular of the minister of Justice.

⁸ Art. 2 Ord. no 2020-304.

⁹ Because the number of available clerks, of judges is not sufficient.

¹⁰ Before issuing such an order (*ordonnance*) the president must consult the attorney general of the court of appeal as well as the presidents and the registry directors of the courts possibly affected by the measure.

¹¹ See Art. 3 Ord. no 2020-304.

¹² Art. 5 para 1 Ord. no. 2020-3064.

¹³ It cannot be a honorary judge, Art. 5 para 2.

Extension of Deadlines

The extension of deadlines is dealt with in Ordonnance no 2020-306 of 25 March 2020 and in Ordonnance no 2020-427 of 15 April 2020. The legally protected period started on 12 March 2020 and shall end one month after the government has declared the end of the state of emergency.

Ordonnance no 2020-306 of 25 March 2020 states an extension of all deadlines that expire during the period of health emergency (= legally protected period). However, it states some exceptions to this rule in some urgent matters for which specific rules have been enacted:

- For proceedings before the liberty and custody judge and on appeal before the court of appeal: procedural deadlines remain the same if the court's activity goes on (which is not always the case, depending on the court and the available judges and court clerks);
- For proceedings before juvenile courts¹⁴, specific measures have been taken;
- For enforcement proceedings relating to immovables (seizure of immovables), deadlines are suspended¹⁵.

Deadlines that expire during the legally protected period are interrupted and will start again at the end of the state of emergency for a maximum duration of two months. E.g.: 1) The appellant has one month to lodge an appeal from the time of the service of the court decision; if the deadline expires for example on 20 April 2020, he will have again one month from the end of the state of emergency. 2) the appellant must send his pleadings to the court and serve them to the defendant within three months from his statement of appeal. If the 3 months deadline expires during the legally protected period, for example the 16 April, the appellant will have two months from the end of the state of emergency to send and serve his pleadings.

Article 3 of Ordonnance no 2020-306 also states that some measures such as protective, instruction, conciliation, mediation measures that expire during the legally protected period are automatically extended until the expiration of two months from the end of this period¹⁶.

A second ordinance no 2020-427 of 15 April 2020 also related to deadlines and time limits has supplemented the first one in some respect.

¹⁴ Specific provisions are provided in Chapter III of Ord. no 2020-304 for juvenile courts and the cases brought before them.

¹⁵ See Ord. no 2020-304, Art. 2, II., 3°.

¹⁶ According to the last para of Article 3 (as amended by Ord. 2020-427 of 15 April 2020), these provisions do not prevent the court or the competent authority from modifying or putting an end to the measures where this is justified, or from ordering new measures with a deadline set while taking into account the constraints of the state of health emergency.

These exceptional rules are necessary since civil and commercial courts are mostly at a standstill¹⁷. The electronic communication between the lawyers and the courts is blocked, the preparation hearings and main hearings are cancelled¹⁸.

The Course of the Proceedings

The exchange of pleadings and of written evidence between the parties or their lawyers can now be done by “any means” (*tous moyens*), provided the court can ensure that the adversarial process is respected (Article 6 Ord. no 2020-304). What kinds of means can be used? The usual ones (*réseau privé virtuel des avocats*, RPVA, which is the secured network used by lawyers to communicate with courts) if they still function, or a registered letter with acknowledgment of receipt, a normal letter, an email...

However, for some proceedings before the first instance civil court (*tribunal judiciaire*)¹⁹ and before the court of appeal, the circular of the minister of Justice CIV/02/20 of 26 March 2020 indicates that only electronic transmissions are allowed; this is not mentioned in the ordinance and a circular does not have any binding force since it is only supposed to explain and clarify the Law Act. However, in several respects, the circular adds rules to the ordinance, which can be questioned.

The courts may decide to postpone (*renvoyer*) hearings; if so, they have to inform the parties and their lawyers (Article 4 Ord. no 2020-304). The way this information is provided depends on the procedural features of the case. If the parties are assisted or represented by a lawyer or if they have consented to receive the procedural on the state electronic platform called *Portail du justiciable*, they will receive the information from the court registry by any means, mostly electronically. If the parties are not assisted or represented by a lawyer or haven't consented to the use of electronic communication, they will be informed by other means such as a simple letter or a phone call²⁰.

The hearing (*audience*) is also impacted by the pandemic. Therefore, the ordinance no 2020-304 allows the court to deviate from the publicity principle during the emergency period. Several possibilities are mentioned in Articles 6, 7 and 8 of the Ord. no 2020-304: *First*, the president of the court may decide before the beginning of the hearing that publicity will be

¹⁷ See *Le Monde* 15 April 2020, p. 13. For example, on 9 April 2020, only 15 judges were present at the first instance court (*tribunal judiciaire*) Pontoise that has 102 judges. At the *tribunal judiciaire* in Paris, only 20 of the 125 prosecutors were present. In Marseille the family section of the *tribunal judiciaire* has 7 judges and about 15 clerks; only one or two of them were present in the court building.

¹⁸ See Romain Laffly/ Matthieu Boccon-Gibod, 'L'enfer commence avec L', Club des juristes, blog du coronavirus, <https://www.leclubdesjuristes.com/blog-du-coronavirus/categories/coronavirus/>. See also about the functioning of the family sections of the courts, Mélanie Courmont-Jamet, 'Le fonctionnement du pôle famille des juridictions pendant cette période dite juridiquement protégée... et après?', Club des juristes, blog du coronavirus.

¹⁹ These are the ordinary written proceedings and specific proceedings in case of urgency (*procédure à jour fixe*). In these proceedings as well as before the court of appeal, parties must be represented by a lawyer.

²⁰ To protect the defendant who does not appear in court and did not personally receive the summons, the ordinance no 2020-304 states that the judgment shall be given by default even if appeal is admissible, which derogates from the French CPC-rules.

‘restricted’ (Article 6) whatever that means²¹; the hearing shall not be public but take place in the *chambre du conseil* if it proves impossible to guarantee the necessary conditions to protect the health of the persons who are present at the hearing²². *Second*, the judge or the president of the court panel may decide that the hearing shall take place via a videoconference (Article 7 para 1)²³. If such technology is not available (some courts are not yet equipped, or some parties), the court may decide that the parties and their lawyers shall be heard by any electronic means, also by phone (Article 7 para 3). When using such technologies, the judge shall conduct the proceedings and ensures that the rights of the defence and the adversarial character of the proceedings are safeguarded. *Third*, where the parties must be represented by a lawyer or where they are assisted or represented by a lawyer although this is not mandatory, the judge or the president of the court panel may decide that the proceedings shall be exclusively written so that no hearing shall take place. This also applies in family matters although the hearing is especially important in such proceedings. Parties who are informed by ‘any means’ of this decision may object to it within two weeks (Article 8).

The Court Decisions

Article 9 of Ordonnance no 2020-304 of 25 March contains a shocking derogating rule that applies to proceedings for urgent interim relief – *procédures de référé* – in civil cases. The court may dismiss the claim *before the hearing* via a non-adversarial order if the claim is not admissible or if there is no need for urgent interim relief. This is a severe restriction of the access to court and to a trial²⁴.

According to Article 10, parties shall be given notice of court decisions by ‘any means’, which does not exclude, however, the obligation of one of the parties to serve the judgment on the other through a bailiff since only this service triggers the time limits for appeal and makes the judgment enforceable. The notice by ‘any means’ is explained in the minister of justice’s circular: use of the RPVA (private network of the lawyers), of email to the professional address of the lawyer etc. If no lawyers was appointed by the parties, notice of the judgment can be given to them by letter, email or even a phone call from the party.

Conclusion

One could imagine that all these exceptional rules allow the French civil justice to maintain at least a partial but large functioning. This does not seem to be the case. Most hearings are cancelled and postponed. Many deliberations have been postponed. Technical problems prevent some judges from having access to the secured network of the court from their homes; and the registry staff does not have such an access, so that proceedings and

²¹ The president of the court can e.g. restrict the number of persons who can be physically present in the court room.

²² A specific provision is dedicated to the journalists and allows them to attend the hearing even if it takes place *in camera*, under the conditions specified by the president of the court. This of course only applies to cases in which the hearing would normally have been public (not family matters for example).

²³ In that case, the identity of the parties shall be ascertained, the quality of the transmission and the confidentiality shall be ensured.

²⁴ Similar provisions have existed for a long time in administrative proceedings, see Art. L. 522-3 *Code de la justice administrative*.

judgments are delayed²⁵. In almost all the courts, some court sessions are organised for very urgent matters (in Paris for example the continuity for urgent family cases is provided by two morning sessions per week²⁶). After the lifting of the state of emergency, all the courts will be overloaded with pending and new cases. Especially the court's registry will be overloaded with work.

For some of these cases, electronic mediation or conciliation could be an option²⁷. Many mediators can now be seized online, videoconferences are possible. The Paris bar has created a possible mediation by videoconference on its platform²⁸. Other initiatives could also be mentioned. Finally, it could be that this pandemic generates an unexpected consequence: the expansion of ADR as a simple, easily accessible way to settle a case pending before closed courts!

²⁵ See *Le Monde* 15 April 2020, p. 13.

²⁶ See for the functioning of the family sections of the courts, Mélanie Courmont-Jamet, "Le fonctionnement du pôle famille des juridictions pendant cette période dite juridiquement protégée... et après?", Club des juristes, blog du coronavirus, <https://www.leclubdesjuristes.com/blog-du-coronavirus/categories/coronavirus/>.

²⁷ See Natalie Fricero, "Médiation en période de crise sanitaire: maintenir le lien social, résoudre les conflits, envers et contre tout", Club des juristes, blog du coronavirus, <https://www.leclubdesjuristes.com/blog-du-coronavirus/categories/coronavirus/>.

²⁸ For urgent family matters, a lawyer-mediator can organise a first virtual meeting within one or two days from his appointment, see Natalie Fricero, *ibid.*