

Expert reports drawn up in a non-adversarial manner and principle of adversarial proceedings

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Decisions Comment

In a 9 September 2020 decision,⁽¹⁾ the first civil chamber of the Supreme Court held that under Article 16 of the Code of Civil Procedure, a judge cannot refuse to examine expert reports which disfavour a party that was not called on or represented during the expert proceedings.

Decisions

The Supreme Court overturned the Poitiers Court of Appeal's decision which had found the judicial expert's report in question to be unenforceable against a party on the grounds that the latter had neither been called on nor represented at the expert proceedings, insofar as it was brought before the court after the filing of the judicial expert's report.

The Poitiers Court of Appeal specified that in the absence of other sufficiently convincing evidence, the amicable and judicial expert reports should be excluded from the proceedings as:

- the amicable proceedings had been carried out before the judicial proceedings were instituted and, as such, had not taken place in a contradictory manner;
- with regard to the judicial expertise, the judgment noted that the party had been sued after the filing of the expert's report and that it was neither called on nor represented during the expert proceedings.

Thus, for the court, based on the contradictory principle, these facts were sufficient to justify the rejection of the two reports.

The Supreme Court observed that a judge may base their decision on two expert reports, one judicial and one amicable, which are drawn up in a non-adversarial manner but are freely discussed in the course of the proceedings by all parties.

The court also set conditions in order to provide security to parties which are not part of expert proceedings, the conclusions of which are discussed before the court. The reports must have been regularly submitted for debate and subjected to the contradictory discussion of the parties during the course of the judicial proceedings. Then, the court will investigate whether they are corroborated by other evidence. If no evidence corroborates the reports, they will be insufficient to prove the merits of the demand.

Comment

With this decision, the Supreme Court has confirmed a precedent by which expert reports drawn up in disregard of the adversarial principle may retain their probative force.

The court's position may appear questionable as, in practice, it will be difficult for a party which is not part of earlier expert proceedings to challenge the work which has been done and the experts' conclusions. The Supreme Court may modify its ruling in future in order to grant a party which was not part of expert proceedings the right to ask for such proceedings to be reopened so that it can challenge the conclusions of the experts. Such a position will guarantee the strict application of the contradictory principle, which is a crucial element of French procedural rules.

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Endnotes

(1) Supreme Court, Civ 1re, 9 September 2020, F-P+B, n° 19-13.755.

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