'Fixed' matter or matter 'to be fixed': the subtleties of abatement of a suit

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Introduction

Under French law, proceedings may be terminated on several procedural grounds. One of them is the abatement of a suit, which consists of a lapse in the proceedings due to the parties' failure to take steps or actions to advance the proceedings within the two-year limit.

The abatement of a suit may be invoked by either one of the parties or – since a recent modification of the Civil Code – raised *sua sponte* by the judge. When successful, the abatement of a suit results in the termination of the proceedings without considering the merits of the case.

In two decisions issued on December 16 2016, the Supreme Court specified the subtle conditions applicable to the enforcement of such a drastic procedural penalty.

Facts

In the first case,(1) the parties had submitted their written briefs on October 24 2012. On November 21 2012 the pre-trial judge informed the parties that the matter was "to be fixed"– that is, that the closing and hearing dates for the matter still needed to be set. As from that moment, no further diligence was carried out by the parties.

Following a party's motion, the pre-trial judge then declared the suit abated on October 24 2014 (ie, two years after the last brief was submitted). Such ruling was later confirmed by the Court of Appeal.

In the second case,(2) after the parties had last submitted their written pleadings on December 19 2012, the pre-trial judge notified them on February 22 2013 that the closing and hearing dates were set respectively for February and April 2015.

In January 2015, before the case was closed, a party submitted new elements to the court. As a defence, its opponent moved to terminate the proceedings on the grounds of abatement of the suit. The motion was granted by the pre-trial judge, which held that the suit was abated since December 20 2014. This ruling was also confirmed by the Court of Appeal.

Supreme Court decisions

In the first case, the Supreme Court confirmed the Court of Appeal's ruling, pointing out that the phrase "to be fixed" – used by the pre-trial judge in its note to the parties – was only a status update on the case; it did not prevent the parties from taking further steps to advance the proceedings. The parties could have therefore requested the pre-trial judge to set a closing date.

The Supreme Court held that abatement of the suit was validly declared and pursued a legitimate aim

of both sound administration of justice and legal certainty, which does not amount a disproportionate and intolerable interference with the right to a fair trial.

However, in the second case, the Supreme Court overturned the Court of Appeal's ruling on the basis that as of the date that the matter was set for closing and hearing, "the parties no longer had to carry out necessary steps to advance the proceeding, as such the two years expiry period was suspended".

Comment

In its explanatory note released about the first case,(3) the Supreme Court underlined that the notion of abatement of a suit is the necessary consequence of the principle of procedural impulse embodied in Section 2 of the Code of Civil Procedure. According to this principle, it is the parties' responsibility to conduct the proceedings, but only to the extent of what is under their control.

In the light of such principle and previous case law, a general rule seems to appear from the two aforementioned cases:

- When the matter status is 'fixed' (ie, closing and hearing dates have been set), the parties are no longer in control of the proceedings and are not expected to undertake any further steps or actions.
- However, when the matter status is still 'to be fixed', the parties remain bound by Sections 2 and 386 of the Code of Civil Procedure: they are expected to pursue any diligence to advance the matter further and, failing such actions, are at risk of being opposed the abatement of a suit.

In light of this rule, parties should be all the more vigilant throughout the entire proceedings to avoid the termination of their suit. Such vigilance and awareness is even more imperative now that a recent enforcement decree(4) of the French legislation, which seeks to modernise the 21st century justice, has granted judges the right to raise the abatement of the suit on their own motion.(5) This new power grants the French courts with a formidable – or fearsome – tool to help to reduce the accumulation of still cases that accumulate before them.

If the sound and efficient administration of justice is a goal to which all legal professionals aspire, it would now be valuable to obtain additional clarification from the courts regarding the steps or actions that are considered as "necessary to further advance the proceedings" and likely to suspend the abatement's two year time limit. This way, litigants – and their counsels – could avoid unforeseeable and drastic procedural surprises.

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Endnotes

(1) Supreme Court, 2nd Civil Chamber, December 16 2016, 15-27917.

(2) Supreme Court, 2nd Civil Chamber, December 16 2016, 15-26083.

(3) Supreme Court opinion 17002P, January 2017.

(4) Article 3 of Decree 2017-892, dated May 6 2017.

(5) When applying the adversarial principle, judges must invite the parties to submit their observations before declaring the abatement of the suit.
