COUR DE CASSATION

UNIVERSITÉ TOULOUSE 1 CAPITOLE — EUROPEAN SCHOOL OF LAW TOULOUSE

The role of the judge and the principle of oral, public proceedings: rediscovering what it means to have a meaningful debate

A gradual decline in the orality principle in non-criminal cases, as the subject matter of this lecture, was confirmed by members of the judiciary. This trend had been intensified by the restrictions introduced to address the Covid-19 pandemic. And yet, public hearings were a fundamental principle of legal proceedings, with the oral nature of hearings reinforcing this principle, by ensuring that the parties understood how a decision was obtained. Would litigants place their trust in legal proceedings conducted entirely in writing? The main function of the courts was to settle disputes but parties could not be reconciled without an oral hearing. What would happen to this quest to find common ground between the parties in proceedings that become predominately written?

Jean-Paul Jean, Honorary Divisional Presiding Judge at the French Court of Cassation, Secretary General of the AHJUCAF (Association of Supreme Courts of French-Speaking Countries), chaired and organised a panel discussion on these issues on 7 February 2022.

Paul Louis Netter, Presiding Judge of the Paris Commercial Court, noted that proceedings before the Commercial Courts were oral, as a general principle, as specified in Article 860-1 of the French Code of Civil Procedure. However, in reality, they were moving closer and closer to written proceedings. There were many reasons for this: the increasingly widespread use of lawyers for claims worth more than €10,000, the right to file written submissions without any need to plead them orally at the hearing and an increased use of electronic procedures.

However, a culture of oral proceedings still remained. For example, during the pandemic, judges made little use of their right to issue a judgment without holding a hearing provided for in recent legislation and rare were the cases in which a judge accepted such a request from a lawyer. Likewise, judges preferred parties to be present in person rather than via a videoconference, even if this could be useful, by combining the two systems, for parties living far away from Paris. He pointed out that it was practically impossible to reconcile parties who were not physically present.

Simone Kress, Vice-Presiding Judge of the Cologne Regional Court, member of the CEPEJ's working group at the Council of Europe, also noted that, in principle, no judgment could be issued in a civil case without a hearing and oral pleadings, but that this right could be waived by the parties. In practice, there was little interest shown for oral proceedings in small cases where less than €600 was at stake. It was up to judges to determine which circuit was suitable for a case: a short circuit, with exchanges of written submissions, or a longer circuit involving a hearing. However, this meant a lot of preliminary work for judges, at the directions stage and in sorting cases. Presiding judges could not issue instructions in this respect due to the principle of judicial independence, but judges often acted in a similar way for the same type of case. The

extent to which proceedings were conducted orally therefore depended on how the relevant judge usually operated, the type of case, the lawyer and the wishes of the parties.

The Covid-19 pandemic had accelerated the use of e-filing procedures and video hearings. The State of North Rhine-Westphalia was a leader in this field. At the Cologne Regional Court, all courtrooms were now fitted with cameras and screens and video hearings and e-filing procedures were used in all civil divisions. In 2021, more than 3,500 video hearings had been held at the Cologne Court of Appeal and more than 1,000 at the Cologne Regional Court. No video hearings had been held prior to the pandemic.

Fabrice Hourquebie, Professor at the University of Bordeaux, noted the main principles of the common law systems and the judicial culture of common law lawyers, as the key actors of the adversarial system. Oral proceedings were used at all stages: pre-trial conferences, examination of witnesses, during the trial and until a decision was issued, which could be immediately. Judges questioned lawyers, who were required to answer, as part of an interactive oral debate. However, the orality principle was on the decline in common law countries due to an increased use of video hearings and e-filing procedures. The Covid-19 pandemic had confirmed this trend.

The lecture concluded by raising some questions and prospects for the future.

Paul-Louis Netter pointed out a paradoxical situation. Due to the impact of international competition between legal venues, an international chamber of commerce sitting in English had been created at the Paris Court of Appeal, in 2018. The rules of procedure adopted for that chamber involved questioning in person. This had led to a significant rise in the use of oral proceedings, fostering greater dialogue between all those involved: judges, lawyers, parties, experts and witnesses.

Fabrice Hourquebie noted that the main aim of the common law was negotiation. Judges considered cases in consequentialist, pragmatic terms. However, he wondered what would happen to the adversarial process if proceedings were to become over reliant on written procedures.

Simone Kress noted that there was a strong culture of conciliation in Germany. The parties reached a conciliation at the hearing in approximately 20 to 30% of civil cases. Since 2012, disputes could be referred to a different judge, called a “conciliation judge”. That judge safeguarded the confidentiality of all exchanges, assisted the parties in private and had no decision-making power but could help the parties to break deadlock situations and reach an agreement, using specific training and suitable methods.

We simply needed to rediscover what it meant to have a meaningful debate in legal proceedings. Jean Paul Jean concluded that it would clearly be a good idea to trial the use of conciliation judges, with appropriate training, at a few pilot courts in France.