

Participatory procedure, an alternative to judicial expertise

The use of the participatory procedure, an amicable dispute resolution process, to frame and manage technical expertise.

The issues arising from an IT project often led to the need for judicial expertise to clarify the technical deficiencies that are at the heart of the dispute. The parties then lose control over the duration of the judicial expertise, its cost, and potentially its outcome. The participatory procedure constitutes a relevant alternative to judicial expertise by allowing the parties to organize the technical expertise themselves.

Unfortunately, it is all too common for the consequences of a failed IT project to be exacerbated by the uncertainties of judicial expertise:

- The scope of the expert's investigation is guided by the parties but ultimately decided by the judge.
- The expert's remuneration is determined by the judge, based on the expert's estimation and the actual diligences performed.
- The duration of the expertise can extend the proceedings by 2 to 3 years.

Introduced into French law in 2010¹, the legal framework for the participatory procedure has evolved up to the decree of December 11, 2019². This amicable dispute resolution procedure is widely encouraged by the courts, primarily to streamline the process, and serves to mitigate the classic disadvantages of judicial expertise while securing the technical expertise being conducted. The procedure is adversarial, and the resulting agreement may be granted enforceable status. In the absence of an agreement at the conclusion of the participatory procedure, the parties benefit from priority access to the judge.

THE PRINCIPLES OF THE PARTICIPATORY PROCEDURE

¹Law No. 2010-1609 of December 22, 2010, regarding the execution of court decisions, the conditions for exercising certain regulated professions, and judicial experts.

² Decree No. 2019-1333 of December 11, 2019, reforming civil procedure.

A Written Agreement

Firstly, the parties must sufficiently agree to meet and conclude an agreement that establishes the principles of the procedure. Pursuant to Article 2062³ of the Civil Code, the parties commit to resolving the dispute jointly and in good faith.

The participatory procedure agreement must⁴, under penalty of nullity, specify:

- The duration of the participatory procedure,
- The subject matter of the dispute,
- The documents and information necessary for resolving the dispute or for preparing the litigation, along with the modalities for their exchange,
- Where applicable, the acts co-signed by lawyers that the parties agree to establish, under conditions provided by decree in the Council of State.

The description of the subject matter of the dispute submitted to the participatory procedure must be precise, as on the one hand, the parties retain the freedom to initiate an action for disputes not covered in the agreement, and on the other hand, in the event of failure of the participatory procedure, the judge may only rule on matters falling within the scope defined by the agreement.

The agreement must also list the documents and information required (such as the mapping of materials, software, data, test scenarios, representative data, project tracking documents, etc.) and the modalities for exchanges. This obligation contributes to the good faith and loyalty imposed by Article 2062 of the Civil Code. The exchange of documents and information must occur between lawyers⁵. It is advisable to outline, in the agreement, the overall schedule and the deadlines for the communication of documents, as well as the frequency of exchanges. In practice, it is preferable that the

³Article 2062 of the Civil Code: "The participatory procedural agreement is a contract through which the parties to a dispute commit to working together in good faith towards the amicable resolution of their dispute or the preparation of their case for litigation. This agreement is entered into for a specified duration."

⁴ Article 2062 of the Civil Code

⁵Article 1545, paragraph 2 of the Code of Civil Procedure: "The exchange of claims, factual and legal arguments, documents, and information between the parties is carried out through their attorneys, in accordance with the terms set forth in the agreement. The attorneys notify the concerned parties by any appropriate means. A schedule is drawn up when a document is exchanged."

recourse to the participatory procedure is anticipated from the outset in the contract for the execution of the IT project and describes the main principles.

If not, either communication is still possible between the parties, and with the assistance of their counsel, they may converge towards an agreement to establish the participatory procedure, or the difficulties of the project have profoundly damaged the parties' ability to conceive the possibility of an agreement, and they will not create the favourable conditions for the participatory procedure.

Nonetheless, it remains possible to contribute to the establishment of the participatory procedure by relying on the clause for amicable dispute resolution before any judicial action (if such a clause exists in the contract) and to use this time frame to persuade the parties to engage in the participatory procedure (if the resolution of the dispute has not been successful).

Legal counsel and the use of dedicated digital tools

Each party must be assisted by an attorney⁶ to conduct a participatory procedure. This requirement ensures the legal security of the agreements reached during the procedure and prevents them from being challenged later on legal grounds. It is the attorneys' responsibility to ensure the compliance of the actions taken and to maintain a balance between the parties' interests.

In addition to the initial agreement, the participatory procedure may include legal instruments or documents carried out by attorneys⁷. These attorneys may countersign procedural documents within the framework of the participatory process⁸:

- Regarding facts or documents that were not listed in the participatory agreement but on which the parties agree.
- Concerning points of law to which the parties wish to limit the debate, provided they relate to rights over which the parties have full discretion.

⁶Article 2064 of the Civil Code: "Any person, with the assistance of their attorney, may enter into a participatory procedural agreement concerning rights over which they have free disposition, subject to the provisions of Article 2067."

⁷Article 2063, paragraph 4 of the Civil Code: "Where applicable, the documents countersigned by attorneys, which the parties agree to draft, under conditions provided by a decree of the Council of State."

⁸Article 1546-3 of the Code of Civil Procedure

- Agreeing on the methods for communicating their submissions.
- Engaging a technical expert under the provisions of Articles 1547 to 1554 of the Code of Civil Procedure.
- Appointing a justice conciliator or mediator tasked with assisting in resolving the dispute. The document specifies the role of the designated person, and, where applicable, their compensation and payment terms.
- Recording the hearings of the parties, each heard in turn in the presence of their counsel, which include their presentation of the dispute, their claims, the questions from their attorneys, their answers, and any additional observations they wish to present.
- Record the statements of any person agreeing to provide testimony regarding facts they witnessed or personally observed, collected jointly by the attorneys, either voluntarily or in response to their questioning. The document must include the information required under the second paragraph of Article 202 of the Code of Civil Procedure. The witness must precede their signature with the statement required by the third paragraph of the same article.
- Record the findings or opinions given by a technical expert, gathered jointly by the attorneys.

Thus, the parties, through their attorneys, may organize actions themselves without the need to involve a judge (testimonies, technical findings, additional tests, etc.).

Attorney-prepared documents can be recorded and stored on the dedicated space of the e-Barreau platform, which offers secure, timestamped management of the entire process, from the creation of the agreement and attorney-prepared documents to the signing of the agreement and its archiving.

Choosing an attorney experienced in participatory procedures will be an asset in facilitating this process.

When to Implement the Participatory Procedure

The parties may agree to initiate a participatory procedure either before submitting the dispute to a court for resolution, or at any time after the court has been seized, in order to organize the case management.

Before initiating legal action, the parties may find it beneficial to settle all or part of the dispute between themselves, including any technical aspects. The participatory procedure agreement has the advantage of rendering inadmissible any legal action on matters covered by the agreement, except in the following cases: (i) breach of the agreement by one of the parties, and (ii) provisional or protective measures in cases of urgency⁹.

As a result, the subject matter of the agreement determines the scope of the parties' legal actions throughout the duration of the agreement.

When a contentious procedure has already been initiated by one of the parties, they may agree to a participatory case management procedure, for example, to isolate technical expertise from the rest of the dispute. This decision has the following effects:

- Waiving the right to invoke any plea of inadmissibility, procedural exceptions, and the provisions of Article 47 of the Code of Civil Procedure¹⁰, except for those that arise or are revealed after the signing of the agreement¹¹.
- Suspending the ongoing proceedings, with the judge being able to set the date of the hearing for closing arguments and pleading¹².
- The suspension of the proceedings also suspends the time limits for initiating legal proceedings¹³.

⁹Article 2065 of the Civil Code: "As long as it is ongoing, the participatory procedural agreement concluded before the referral to a judge renders any appeal to the judge for a ruling on the dispute inadmissible. However, the non-performance of the agreement by one party allows the other party to bring the matter before the judge for a ruling on the dispute. In cases of urgency, the agreement does not prevent the parties from seeking provisional or conservatory measures."

¹⁰ Article 47 of the Code of Civil Procedure: "When a magistrate or a judicial officer is a party to a dispute that falls within the jurisdiction of a court in the district where they exercise their functions, the plaintiff may bring the case before a court located in a neighbouring district. The defendant or any parties involved in the appeal may request a referral to a court chosen under the same conditions. Under penalty of inadmissibility, the request must be presented as soon as its author becomes aware of the grounds for the referral. In the event of a referral, the procedure shall be conducted as set forth in Article 82."

¹¹Article 1546-1 of the Code of Civil Procedure

¹² Article 369 of the Code of Civil Procedure

¹³ Article 392 of the Code of Civil Procedure

The court will be particularly favourable to this procedure, as it reduces the burden on the judiciary.

THE PARTICIPATORY PROCEDURE: A FRAMEWORK FOR TECHNICAL EXPERTISE

Judicial expertise is intended to assist the judge when there is insufficient information to make a decision. The participatory procedure helps to eliminate the negative aspects of judicial expertise from the parties' perspective, allowing them to take control over the selection of the expert, the scope of their assignment, and the duration of the expertise.

Selection of One or More Experts by the Parties

The participatory procedure enables the parties to appoint an expert and control the assignment given to them.

For example, it would be entirely possible to involve several specialists, each with specific expertise in a given field, rather than leaving it to the court-appointed expert to decide whether or not to seek assistance from another auxiliary expert of their own choosing.

This choice strengthens the legitimacy of the experts and increases the parties' confidence in the conclusions of the expertise.

The expert may only be dismissed with the unanimous agreement of all parties.

Definition of the Expert's Mission by the Parties

The parties also have the option to control the content of the expert's mission and, more importantly, to coordinate the technical issues involved with the chosen expert. This option is provided by Article 1550 of the Code of Civil Procedure, which allows, based on the observations of the appointed expert, for the modification of the assigned mission and the appointment of an additional expert if necessary.

The expert's role can thus be limited to the areas and subjects falling within their technical expertise, and the expert will not be required to interpret the contract terms

or the parties' intentions unless the parties wish them to do so. For instance, in the case of a judicial expertise, the expert must refer the matter back to the judge overseeing the investigative measures if they believe the contractual documents are open to multiple interpretations (a frequent occurrence), and such ambiguity prevents them from fulfilling their mission. In a participatory procedure, this clarification can be organized much more swiftly.

The parties may also have an interest in protecting trade secrets and controlling the scope of the expert's investigation, particularly if other parties involved in the procedure are potential competitors.

Limiting the expert's mission in a court-ordered provisional expertise is not an easy task. In a recent case, service providers failed to restrict the expert's mission, which *"only required the disclosure of documents related to the implementation of the IT solution, a copy of the backup of the software elements delivered as of September 12, 2017, to assess the progress of the system as of the termination date, the expert's performance of tests based on this backup, and finally, the description, observation, and determination by the expert of the causes of delays and non-compliance issues."* The Court of Appeal of Versailles held that *"the mission assigned to the expert by the first judge appears perfectly limited to the subject matter of the dispute and does not seem overly broad or general."*¹⁴

Control of the Duration of the Mission and the Cost of the Expertise¹⁵

The agreement, or supplementary attorney documents, must specify the overall duration of the expert's mission and may organize the stages of the expertise, as well as the exchange of documents and information. A procedural timetable applicable to all parties can be agreed upon, thus ensuring adherence to the duration of the expert's mission, similar to managing an IT project.

The parties agree on the expert's remuneration and its financial allocation among themselves. The expert's compensation is formalized in the contract. In the case of

¹⁴ Court of Appeals Versailles, November 28, 2019 - 18/08730

¹⁵ Articles 1547 and following of the Code of Civil Procedure

judicial expertise, the total invoice for the expertise is entirely beyond the parties' control, and payment may be the responsibility of the defaulting party only¹⁶.

Effect of the Expert Report¹⁷

The written report provided by the expert may be submitted as evidence in court. It constitutes a binding document between the parties. This submission is optional, and it is up to the parties to determine, from the outset in the agreement, the level of confidentiality they wish to assign to the exchanged information and the produced documents.

The confidentiality strategy depends, in particular, on the context of the implementation of the participatory procedure and the possible outcomes of its termination.

For the Record, the Professional Secrecy to Which Lawyers Are Subject Ensures the Confidentiality of Exchanges.

The conduct of the expertise can be framed and controlled by the lawyers, who are the masters of the timeline and the balance of the parties' interests, notably through the use of attorney documents and the dedicated space for the participatory procedure on the e-Barreau platform.

At the conclusion of the participatory procedure, specifically concerning the technical mission, the outcome is documented in an attorney act that formalizes the points of agreement and/or disagreement.

This procedure can thus be viewed as a means of outsourcing judicial expertise from the judicial sphere.

OUTCOMES OF THE PARTICIPATORY PROCEDURE

The participatory procedure terminates the expiration of the term provided for upon¹⁸ in the agreement, early termination in writing by the parties, the conclusion of an

¹⁶ Court of Appeals Grenoble, September 5, 2019, 16/02858

¹⁷ Articles 1553 and 1554 of the Code of Civil Procedure

¹⁸ Article 1555 of the Code of Civil Procedure

agreement fully resolving the dispute or conflict, the establishment of a document noting the persistence of the dispute, the non-performance of the agreement by one of the parties, or the referral to a judge to rule on an issue.

Three scenarios are considered:

Complete Agreement on the Subject of the Agreement

The agreement reached between the parties is formalized in an attorney document, which has probative value.

The parties may request that a judge approve the attorney document to render it enforceable. In this case, the judge must approve the agreement without modification, although they may hear the parties if there is doubt regarding the terms of the agreement.

Once approved, the agreement can be enforced.

In the case of a participatory procedural arrangement, a full agreement on the dispute terminates the initiated proceedings. Thus, the technical expertise may be conducted and validated under the control of the parties, without affecting any potential judicial debate of a purely legal nature, which may, if necessary, continue before the competent court.

In the event of a persistent residual disagreement

If the participatory procedure has resolved only part of the dispute, the parties may return to the judge to have the residual issues adjudicated. In such a case¹⁹, the parties may petition the court to rule on the unresolved matters, either in accordance with the rules governing the applicable procedure before the court or through a joint petition signed by the attorneys who assisted them during the participatory procedure.

The scope of the dispute is limited to the claims stated in the petition, and neither party may raise new arguments except in response to the judge's inquiries.

¹⁹ Article 1560 of the Code of Civil Procedure

All relevant documents must be submitted to the court before the hearing, including the participatory procedural agreement, the exchanged documents²⁰, the expert report(s)²¹, the attorneys' instruments formalizing agreements, and the attorneys' instrument formalizing points of disagreement.

The matter will be scheduled promptly and directly for a judgment hearing.

The use of the participatory procedure will have allowed for the resolution of certain issues, leaving, if possible, only the legal aspects of the case for which the judge has the appropriate competence. The procedure before the judge, freed from purely technical matters, can proceed at a faster pace.

In the event of a total disagreement

The dispute is brought before the competent court without requiring prior conciliation or mediation. The parties may bring the matter before the judge either through a joint petition or a unilateral petition. The petition must be filed within three months following the end of the participatory agreement.

In conclusion, the use of the participatory procedure offers significant advantages and is contingent upon the mutual interest of the parties in seeking an amicable agreement, as well as their goodwill in working towards convergence.

Thus, it is advisable to set a timeframe for reaching agreement on the participatory convention and the many provisions it must contain to be effective. Alongside technical expertise, the participatory procedure can apply to any matter of disagreement between the parties.²²

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²⁰ Except for those covered by the confidentiality agreed upon by the parties

²¹ Unless the parties have decided to protect these documents with confidentiality

²² Except for the exceptions referred to in Article 2067 of the Civil Code

