COUR DE CASSATION

N°2 - June 2024

THE COUR DE CASSATION'S INTERNATIONAL NEWSLETTER

A commented selection of the Court's rulings on issues of shared interest beyond national borders, useful legal and institutional resources, a window onto the French model

A message from Rémy Heitz

Prosecutor General at the French Cour de cassation

Dear readers, from France and beyond,

I am particularly pleased to present the second issue of the International Newsletter of the Cour de cassation. This Newsletter emphasises the role of the Prosecutor General's office. The presence of a Prosecutor General's office within the judicial supreme court is a special feature that needs to be explained. I therefore felt it was important to highlight, in the form of a video made as accessible as possible, the fact that the Prosecutor General's office helps the Court fulfil its functions of interpreting and unifying the law, by proposing, with complete independence, a solution based on the defence of the rule of law and the common good.

It is essential to bear in mind that the advisory opinions of the advocates general not only enlighten the Court, but also enable the lower courts, all the partners of the justice system, and all those that are interested in French law, in France, and abroad, to better understand the case law. This is at the heart of the Cour de cassation's open data policy; it is the reason why these advisory opinions will be published more frequently. This specific office is not unique and France shares it with many other legal systems, particularly within the European Union.

The NADAL network provides an annual meeting place for the prosecutor general's offices of the supreme courts to discuss in very practical terms the major challenges facing Europe's judiciary and to share the analyses made by each national prosecutor's office of the major case law decisions of the Court of Justice of the European Union and the European Court of Human Rights. I had the pleasure of travelling to Luxembourg from the 26th to the 28th of May to meet with about twenty of my esteemed colleagues at the kind invitation of the Luxembourg presidency.

This dialogue between the European judicial authorities is primordial; it continues on a regular basis and the prosecutor general's office plays an integral part in it. At the invitation of the President of the CJEU, Koen Lenaerts, I took part in the event commemorating the twentieth anniversary of the accession of the ten States to the European Union on the 2nd of May, before celebrating the 50th anniversary of the ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms at the conference organised by the Cour de cassation on the 3rd of May. This event provided the opportunity for a cross-cutting reflection on the legal professions in the era of the Convention.

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This joint oversight on European law is all the more essential as it now permeates the whole of our national civil, criminal and commercial law. The European judiciary is based on trust between Member States. This trust concerns the courts that apply European law and ensure the effective free movement of judicial decisions, including its application in the most intimate areas such as family law. The Court recently handed down a judgment interpreting Article 16 of 'The Brussels II bis Regulation' on the sensitive issue of the competent jurisdiction in matters of parental responsibility for the child of a cross-border separated couple. The presentation of this decision is supported by a more general article dealing with international child abduction. Along with others, it links to rulings available in full in English and French. This international Newsletter will give you more extensive access to educational content on our professions and work methods.

I hope you enjoy this newsletter.

Rémy Heitz

Presentation of the Newsletter by Clémence Bourillon, judge and head of the International Relations Department >

The Prosecutor General's office in a few words, pictures and numbers

The Prosecutor General Remy Heitz presents the Prosecutor General's office at the Cour de cassation

- Role of the Prosecutor General's Office
- Role of the Prosecutor General

Watch the video >

The role and missions of the Prosecutor General's Office at the Cour de cassation are specific. Unlike the public prosecutors' offices attached to the courts and courts of appeal, it is not responsible for public prosecutions.

According to article L432-1 of the Judicial Code, the Prosecutor General's Office 'issues advisory opinions in the interest of the law and the common good. It advises the Court on the scope of the decision to be taken'.

In this sense, the Prosecutor General is the defender of the law and must act as an interface between the Court and civil society.

Advisory opinions

Headed by the Prosecutor General, Rémy Heitz, the Prosecutor General's Office of the Cour de cassation comprises 59 magistrates and 21 civil servants.

Each member of the Prosecutor General's Office is assigned to one of the Court's six chambers, ensuring that their profiles and skills match the needs of each chamber.

The Prosecutor General may also speak at hearings in the various chambers when he or she sees fit, particularly at plenary assemblies.

1 Prosecutor General

6 First Advocate Generals

39 Advocate Generals

11 Advocate General referees

1 Secretary General

1 Magistrate Auditor

21 Civil servants

Learn more

Two advocate general referees talk about their function

Watch the video >

Plenary Assembly rulings of the Cour de cassation

What is a Plenary Assembly?

The Plenary Assembly is the most solemn judicial formation of the Cour de cassation. All the chambers of the Court are represented at the Plenary Assembly, also known as a full court. Referral to the plenary assembly is decided when a case raises a question of principle or if a divergence between the lower courts and the Cour de cassation occurs. In particular when a case has been quashed and the court of appeal responsible for retrying the case issues a decision that is again challenged before the Cour de cassation, on the basis of the same legal arguments as those put forward at the time of the first appeal. The decision handed down by the plenary assembly will be binding on the referring court.

Artistic freedom and protection of human dignity

November 17, 2023 – Ruling / Press release / Filmed Hearing

This appeal questioned if safeguarding human dignity, as enshrined in Article 16 of the Civil Code (code civil), could justify restricting freedom of expression, specifically artistic freedom, in a context where the expression in question was not aimed at any particular individual.

Relying on Article 10§.2 of the European Convention on Human Rights, stating that the exercise of these freedoms may be subject to an interference or a restriction prescribed by law and that pursues one or more legitimate aims (necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary), the Cour de cassation ruled that Article 16 of the Civil Code (code civil), which prohibits any violations of personal dignity, is not a sufficient ground to justify restricting artistic creation, and that the dignity of the human person is not, as such, one of the objectives set out in Article 10 §2 of the European Convention on Human Rights.

In so doing, the Plenary Assembly reaffirms the principle set out in one of its previous rulings from the 25th of October 2019 (appeal n°17-86.605), in a case involving public insult against an identified person.

Disloyally obtained evidence and its value before the civil judge

December 22, 2023 – Ruling n°1 / Ruling n°2 / Press release / Filmed hearing

In two rulings, referred by the Social chamber to the Plenary Assembly, the Cour de cassation was called upon to consider the balancing of the right to evidence and the principle of the loyalty of the procedure as a whole.

Until now, the Cour de cassation has ruled, in civil matters, that where evidence obtained or produced unlawfully or disloyally, when it is gathered without a person's knowledge, through a manoeuvre or stratagem, a judge cannot take it into account (Plen. Ass., 7th of January 2011, appeals n°09-14.667, 09-14.316).

In the first case, the Cour de cassation revises its legal analysis and now considers that the illegality or disloyal nature of the acquisition or production of evidence does not necessarily lead to its exclusion from the proceedings and may be presented to a judge provided that such production is essential to the litigant's right of evidence. However,

taking such evidence into account must be weighed up against the disproportionate infringement of the fundamental rights of the opposing party (private life, equality of arms and adversarial proceedings...).

This ruling aligns the Court's position with the European Court of Human Rights case law. This position acknowledges the importance of guaranteeing litigants the ability to substantiate their right, when the only proof available to them requires, in order to obtain it, an infringement of the opposing party's rights.

However, in the second case, the Cour de cassation confirmed the Social chamber case law, according to which an employee's dismissal for misconduct cannot be based on a private conversation via personal messaging where there is no breach by the employee of his professional obligations. In this case, the question of evidence does not arise.

Example of a ruling of the social chamber applying this decision of the plenary assembly

January 17, 2024 – Social chamber – Ruling

La Sociale Le Mag' Podcast

In the present case, the Court of Appeal was legally justified in its decision to exclude from the proceedings a clandestine recording of a meeting of the Health, Safety and Working Conditions Committee (CHSCT) when it noted, firstly, that the occupational physician and the labour inspector had been involved in the investigation conducted by the CHSCT and that the finding made by the CHSCT in its investigation report of the 2nd of June 2017 had been made in the presence of the labour inspector and the occupational physician. The Court of appeal was legally justified in its decision when it noted, secondly, after analysing the other evidence produced by the employee, that this evidence suggested the existence of moral harassment, thus showing that the production of the clandestine recording of the members of the CHSCT was not essential to support the employee's claims.

Post-Brexit application of a rule of UK law adopted in application of a European directive - The Cour de cassation requests a preliminary ruling from the CJEU.

May 3, 2024 – Press release / Ruling / Filmed hearing

This appeal, referred to the plenary assembly by the Social Chamber, invited the Cour de cassation to consider, in the context of a dispute between an employer and an employee who, following a change of duties, had complained of discrimination on the grounds of sex, whether the French courts were obliged to interpret the UK law applicable to the dispute in a manner consistent with the 2006 European Directive on equal opportunities and equal treatment of men and women at work.

In order to rule on this issue, the Cour de cassation primarily decided to request for a preliminary ruling on two questions to the Court of Justice of the European Union.

Firstly, on the status of the British law applicable to the dispute as a result of the United Kingdom's withdrawal from the European Union: as the United Kingdom had left the European Union at the date on which the French court was called upon to rule, the question arises as to the date on which a British law that had been enacted in application of European Union law ceased to be considered a rule of European law. Such a question presupposes an interpretation of the agreement on the United Kingdom's exit from the European Union.

Moreover, it raises the question of the obligations incumbent on the judge of a Member State when he is called upon to apply the laws of another Member State and when these laws have been adopted in application of European directives.

By putting these requests for a preliminary ruling, the Cour de cassation recognises that it will have to change its case law, according to which the interpretation of foreign law is left (barring exceptions) to the sovereign appreciation of the trial judges, if the Court of Justice of the European Union holds that the national judge must assess the conformity of a law with Union law even when it emanates from another Member State.

Watch the latest filmed hearing >

- **May 17, 2024**
  Minor children and civil liability of separated parents
  Can the two separated parents be considered civilly liable for the acts of their minor child simply because they exercise parental authority jointly, without there being any need to consider the child's habitual place of residence?

Previous filmed hearing >

Rulings of the chambers

Brussels II bis Regulation - Interpretation of Article 16 of the Regulation concerning the date at which a court is deemed to be seized

November 22, 2023 – First Civil Chamber – Ruling

A child was born in the French city of Nantes in 2012 to a couple that separated in 2014. From July 2015 to January 2018, she lived with her mother in Germany before returning to Nantes with her mother. In a petition on the 28th of May, the father seized the Family Judge of the Tribunal of First Instance of Nantes to obtain a ruling on the arrangements for exercising parental authority, before the mother and daughter returned to Germany in August 2019. The Nantes court registry summoned the mother in December 2019 to attend the hearing. This summons, sent to the mother's address in Nantes, was returned to the court registry with the note "addressee unknown at this address". In a letter on the 9th of January, the registry asked the father to summon the mother at least 15 days before the hearing which was set for the 24th of March 2020. This hearing was cancelled because of the Covid pandemic and the health crisis. A new date was set for the 8th of December 2020. The 18th of September 2020, the father notified the mother of his petition and assigned her to appear before the court on the 8th of December 2020. The hearing was postponed and held on the 23rd of march 2021 at the parties' request.

Simultaneously, the mother seized the German courts to rule on parental authority.

In a judgement on the 23rd of April 2021, the Family Judge of the Tribunal of First Instance of Nantes declared himself incompetent and referred the parties to the seized German court. In a ruling dated 25 October 2021, the Court of Appeal of Rennes upheld this judgment on the grounds that, the father had committed serious negligence by failing to notify the court registry in a timely manner of the child's mother's new address in Germany and to inform her of the proceedings in progress prior to the summons he had issued her on the 18th of September 2020, date on which the child was no longer a habitual resident in France but in Germany. As a result of this negligence, it is not possible in the light of Article 16 of Regulation (EC) No 2201/2003 of 27 November 2003, known as "Brussels II bis regulation", to consider that the French court was validly seized by the petition that was lodged on the 28th of May 2019.

The father brought an appeal before the Cour de cassation. He particularly contested the Court of Appeal's appreciation of the child's habitual residence at the date of the 18th of September 2020, date on which he notified his petition at the Tribunal

of First Instance of Nantes, instead of assessing the child's habitual residence at the earlier date at which the request was made. He contests the unjustified grounds, in the light of Articles 8 and 16 of the Brussels II bis Regulation, that he had failed to exercise due diligence and had been negligent in the conduct of the proceedings.

The Cour de cassation quashed the ruling of the Court of Appeal.

The First civil chamber begins by stating that, under the terms of Article 8(1) of the Brussels II bis Regulation, the courts of a Member State have jurisdiction in matters of parental authority over a child habitually resident in that Member State at the time that the court is seized, when the case is referred to the court.

Subsequently, the chamber interprets Article 16(1)(a) of that regulation, which provides that a court is deemed to be seized "on the date on which the act instituting proceedings or the equivalent document is lodged with the court, provided that the claimant has not subsequently negligently failed to take the steps required in order to serve or notify the defendant of the act or document". It follows from the latter text that a case shall be deemed to have been referred to a court by the performance of one single act, namely the filing of the document instituting the proceedings, provided that the claimant has proceeded as required vis-à-vis the original document being duly served on the respondent.

As the concept of "negligence" is taken here in the objective sense of "omission", the subjective approach of the Court of Appeal, which held that negligence could result from the claimant's simple lack of diligence in carrying out the measures incumbent upon him, is sanctioned: the appellate judges could not declare that they did not have jurisdiction in favour of a foreign court subsequently seized after having noted that the plaintiff had filed his application with the French court and then duly summoned the defendant.

Proceedings for determining the applicable legislation to a worker pursuing an activity in several Member States of the European Union

November 30, 2023 – Second Civil Chamber – Ruling

A worker who carries out activities in several Member States of the European Union must only be affiliated to one social security scheme. The European legislation on the coordination of social security systems provides for an administrative dialogue procedure between the social security institutions of the Member States, in order to determine the legislation applicable in cases of multiple activities in different States.

As soon as a social security institution is informed that a worker is simultaneously or alternately pursuing a professional activity in two or more Member States, it must implement this dialogue procedure. Where a court finds that a worker is engaged in multiple employments, it cannot order him to pay the contributions due to the French social security system without first implementing this procedure. It is therefore up to the judge to invite the Social Security Funds to do so, and to stay the proceedings pending implementation of this procedure.

Childbirth allowance and surrogacy

November 30, 2023 – Second Civil Chamber – Ruling

The childbirth allowance, which has its origins in the "prime à la natalité" (birth rate allowance) created by the decree-law of the 29th of July 1939, is one of the components of the early childhood benefits introduced by the Law no. 2003-1199 of the 18th of December 2003, which merged five early childhood benefits in order to simplify the system.

The purpose of this allowance, provided for in Article L. 531-2 of the French Social Security Code (code de la sécurité sociale), which is intended to enable the household or individual to meet the expenses associated with the arrival of a child, also pursues a health objective of monitoring and protecting the mother and the unborn child. Article L. 533-1 of the same code makes its payment subject to medical examinations of the mother and child.

The Cour de cassation heard an appeal against a ruling refusing to allocate the childbirth allowance to a claimant who together with her spouse, had welcomed a child born through surrogacy. The Court decided that in order to claim the

allowance, the mother of the unborn child must belong to the household to which the allowance is awarded, which excludes from the scope of the allowance of this benefit, claimants who have had recourse to a surrogacy agreement, regardless of their sex or sexual orientation.

The Cour de cassation therefore ruled that the above provisions did not disregard the best interests of the child within the meaning of Article 3(1) of the Convention on the Rights of the Child, nor did they give rise to any direct or indirect discrimination based on gender or sexual orientation within the meaning of Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of Additional Protocol No. 1 to that Convention.

Cattle farming and nuisance in the neighbourhood

December 7, 2023 – Third Civil Chamber – Ruling

The provisions of Article L. 110-1 of the Environmental Code (Code de l'Environnement), as defined by Law no. 2021-85 of the 29 of January 2021 aimed at defining and protecting the sensory heritage of the French countryside, concern the protection of natural spaces, resources and environments and have neither the purpose nor the effect of exempting farmers from liability when the nuisance generated by their farming activities exceed normal inconveniences of the neighbourhood.

In a sovereign appreciation of the abnormality of the nuisance, a Court of appeal found that the nuisance caused by a farm, after the significant change in the operating conditions resulting from the increase in the number of cattle and the location of new buildings, located in an urban area of the village at a distance of twenty-one to ninety-six metres from twenty-two dwellings, consisting of nauseating odors, animal and machine noise, and the invasive presence of insects, exceeded, by their nature, recurrence and intensity, the normal expected inconveniences of the neighbourhood.

Concept of French positive Law on page 9 « *Abnormal neighbourhood nuisance* »

Freedom of the press and the protection of financial markets

February 14, 2024 – Commercial, Financial and Economic Chamber – Ruling / Press release

A journalist may be condemned for market abuse even where he doesn't derive an advantage or intend to mislead the market, if he has, without complying with the rules or codes governing his profession, disseminated false or misleading information for journalistic purposes.

Two key lessons can be drawn from this decision.

The first is that, for the first time, the Commercial chamber clarifies the scope of Articles 12 and 21 of Regulation (EU) No 596/2014 of the 16th of April 2014 on market abuse, known as the MAR Regulation, and sets out the circumstances in which a journalist may, pursuant to these provisions, be sanctioned for disseminating false or misleading information likely to fix the market price of a security at an abnormal or artificial level.

Based on Article 21 of the MAR Regulation, the Commercial Chamber distinguishes three situations:

- the first, where a journalist, without gaining an advantage or intending to mislead the market, has disseminated false or misleading information for journalistic purposes: he cannot be sanctioned for market abuse if he has complied with the rules or codes relating governing his profession;
- the second, where a journalist, without deriving an advantage or intending to mislead the market, has disseminated false or misleading information for journalistic purposes without complying with the rules or codes of his profession: he can be sanctioned for market abuse where the rules on freedom of the press and freedom of expression permit it. This is possible where the interference constituted by the infringement of his right to freedom of expression is necessary and proportionate to the legitimate aims pursued;

- the third, where a journalist has disseminated false or misleading information in order to gain an advantage or profit or to mislead the market: he or she may be punished for market abuse without there being any need to apply the rules relating to freedom of the press and freedom of expression or the rules or codes relating to his or her profession in order to assess the nature of the breach.

The second lesson drawn from this decision is that the Commercial Chamber reviews the proportionality of sanctions imposed on journalists.

It ruled that the sanction imposed was proportionate, holding that the press agency had not acted in compliance with the rules and codes governing its profession, that the breach, for which it was responsible, had resulted in significant financial losses for investors and had undermined the integrity of the financial markets and investor confidence in those markets, that it did not wish, during the sanction proceedings, to disclose its total turnover for the purposes of implementing the sanction and that it never claimed that this sanction was likely to compromise its existence or the pursuit of its journalistic activities.

Obstruction offences: which employee representative bodies?

October 17, 2023 – Criminal Chamber – Ruling

European law leaves it to the discretion of Member States to determine how to implement the collective rights of employees to be represented in the company and to have their interests defended.

What happens when a company with permanent employees in one of its establishments in France has its head office located in another EU country?

In this case, it is up to the company to set up the representative bodies provided for under French law at its French establishment.

Failure to do so could result in the employer being condemned for an obstruction offence.

A psychiatric expertise by videoconference?

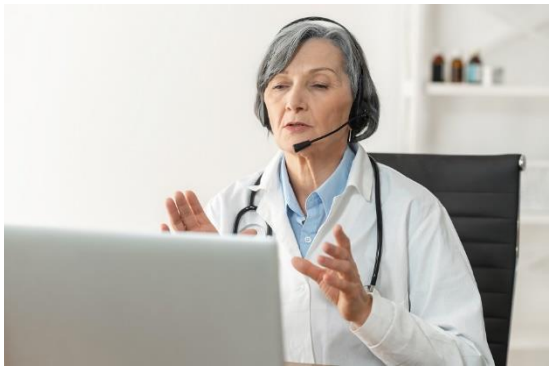
Novembre 22, 2023 – Criminal Chamber – Ruling n°1 / Ruling n°2

In the interests of the proper administration of justice, a judge may decide that certain acts in criminal proceedings, such as hearing a witness or an expert at a hearing, will be conducted by videoconference.

The law specifies the types of acts that can be carried out in these conditions.

This list, which must be considered exhaustive, does not provide for a doctor or psychologist, appointed as an expert, to examine an accused person, an assisted witness or a civil party by videoconference.

According to this ruling, psychiatric assessments carried out under such conditions are necessarily null and void.



Concept of French positive Law on page 10 « *Psychiatric expertise in criminal matters* »

Civil Law

Abnormal neighbourhood nuisance

The Civil Code (code civil) contains a number of provisions for organising neighbourhood relations, essentially from a land or property perspective, but it does not provide for a general principle of liability for neighbourhood nuisance, except for fault-based liability. It was the courts and case law that established the theory of abnormal nuisance (inconveniences) in the neighbourhood, gradually separating it from fault-based liability and abuse of the right of ownership, to make it an objective system of liability, summarised in the formula used from the 1980s onwards, according to which « no person may cause an abnormal neighbourhood nuisance of to another person» (« nul ne doit causer à autrui un trouble anormal de voisinage », 2nd Civ., 19th of November 1986, appeal no. 84-16.379, Bulletin 1986 II no. 172).

The Law n° 2024-346 of 15 April 2024 enshrining the principle of strict liability for abnormal nuisances caused to neighbours, and a new article 1253 of the Civil Code is to be included in the subsection which concerns extra-contractual liability. The Third civil chamber of the Court, which is responsible for property and environmental litigation, was heard by the rapporteurs of the French National Assembly and Senate, and was able to present its views on the necessary balance between peaceful enjoyment and entrepreneurial freedom.

According to the case law of the Cour de cassation, the liability of the perpetrator of the nuisance arises solely from the abnormality of the nuisance: the fact that the activity causing the nuisance is carried out in compliance with the laws and regulations, or the fact that it benefits from an administrative authorisation, does not constitute grounds for exoneration from liability. Conversely, if the damage results from the violation of special rules or contractual commitments, it may be compensated on the basis of fault, without the need to resort to the theory of abnormal neighbourhood nuisance.

Any nuisance may give rise to liability for abnormal neighbourhood nuisance: noises, odours, vibrations, obstruction of view, loss of sunlight, traffic obstruction, etc. However, the nuisance must be characterized as abnormal; this means it must exceed, in terms of its nature, intensity and frequency, the level that would normally be endured for the time (day, night, etc.) and place (urban area, rural area, business park, etc.) in which it occurs. The trial judges are sovereign in the appreciation the existence and abnormality of the inconveniences. The Cour de cassation only reviews the existence of a relevant statement of reasons, without substituting its own appreciation for that of the trial judges.

Case law understands the neighbourhood as a broad concept, since it is not necessary for the land causing the nuisance to be adjoining the land affected. In addition, the creditors and debtors of the obligation are not limited to the owners of the land. They may also include occupants (tenants, untitled occupiers, etc.). Certain temporary occupants, such as building contractors, could also be held liable for the nuisance they caused on the basis of the theory of abnormal neighbourhood nuisances, but the new law, which provides for a closed list of those liable, now excludes these “occasional neighbours”.

The long-standing nature of certain activities may constitute a ground for exoneration from liability. Even before enshrining the principle of liability, the legislator had long provided for certain exemptions, based on the idea that the claimant that has arrived next to a pre-existing nuisance could not complain about such nuisance. Article L. 113-8 of the Code on Construction and Housing (code de la construction et de habitation), thus provided that agricultural, industrial, commercial, tourist, cultural or aeronautical activities and crafts did not give rise to a right to compensation when they existed prior to the arrival of the new neighbour. This exemption was deemed to comply with the Constitution insofar as it did not prevent the perpetrator of the nuisances from being held liable for fault where his or her activity did not comply with the laws and regulations (decision of the Constitutional Council no. 2011-116 QPC of the 8th of April 2011).

The law of 15 April 2024 generalises the exemption to all activities, whatever their nature, provided that they are carried out in accordance with the laws and regulations and that they continue under the same conditions or under new conditions that do not cause an aggravation of the abnormal nuisance.

In response to the concerns of a part of the rural community, the law creates a special exemption for agricultural activities, which is broader in scope but subject to certain conditions.

Example of ruling on page 7 > « *Cattle farming and nuisance in the neighbourhood* »

Psychiatric expertise in criminal matters

The psychiatric expertise is an important element of the personality file in a criminal case. In practice, it will play a decisive role in certain matters, in particular in determining whether the defendant has a mental or neuropsychological disorder that has impaired his or her discernment - leading to criminal irresponsibility - or altered their discernment or control over their actions - leading to a reduction in the penalty incurred (art. 122-1 et seq. of the Criminal Code (code pénal)). At the investigative stage, expert evidence may be mandatory or optional.

It is mandatory for the most serious crimes committed against minors and for sexual offences. In these cases, the expert is also asked about the appropriateness of imposing a medical treatment order (arts. 706-47 and 706-47-1 of the Criminal Procedure Code (code de procédure pénale)). The expert's assessment is also mandatory when the person in question is a protected vulnerable adult (art. 706-115 of the Criminal Procedure Code).

Whether or not the expertise is compulsory, it is governed by article 156 of the Code of Criminal Procedure, which states that any investigating or trial court, where a technical question arises, may order an expert appraisal., either at the request of the public prosecutor, of its own motion, or at the request of the parties. The expert's mission is put in writing and concerns purely technical matters (art. 158 of the Criminal Procedure Code).

The expert is then appointed by the investigating judge (art. 159 of the Criminal Procedure Code). In principle, experts are chosen from a list that is approved and certified by the Cour de cassation at a national level or by the Courts of appeal at a regional level.

Once the expert has delivered his or her conclusions, in accordance with article 167 of the Criminal Procedure Code, these are communicated to the parties' counsel or directly to the parties if they are not assisted by a lawyer. The parties may then make requests for further expert assessments or counter-assessments. However, this request may be rejected by a reasoned decision of the investigating judge.

French law has a number of specific provisions regarding psychiatric expertise. On the one hand, if the first expert's opinion concludes that there has been an abolition of discernment, the request for a second expert opinion cannot be refused by the judge. On the other hand, this second expert opinion is carried out by at least two experts (art. 167-1 of the Criminal Procedure Code).

Furthermore, when the appointed expert must, for the purposes of his mission, examine the person concerned, he may not use videoconferencing. A psychiatric expertise carried out under these conditions is necessarily null and void. (Crim., 22nd of November 2023, appeals no. 22-86.713 and N°22-86.715).

The expert may be required to present his or her conclusions before the investigating judge or before the trial court. The expert opinion is not binding on the judge.

Finally, psychiatric expertise also plays a role in post-sentencing matters. The psychiatric expertise is compulsory for the adjustment of a sentence or for granting the temporary release with socio-judicial supervision if the offender has been sentenced to a term of imprisonment (art. 706-47-1 of the Criminal Procedure Code).

Example of ruling on page 8 > « *A psychiatric expertise by videoconference?* »

The fight against cross-border child abduction

Presentation of the conference held on the 8th of February at the Court, organised by Judge Hugues Fulchiron at the First Civil Chamber:

On the 8th of February 2024, the Cour de cassation hosted a conference on the fight against cross-border child abduction. This was an opportunity for the speakers, trial and supreme court judges, ministry professionals, mediators, lawyers and academics, to review a ten-year study of case law - from 2012 to 2022 - carried out by the First civil chamber.

In situations of conflict within a household, a parent sometimes leaves the country with his or her child and does not return. Such acts are known as unlawful removal and retention of children. To combat this phenomenon, international conventions have been adopted to organise the return of children. The main instruments are the Hague Convention of the 25th of October 1980 (hereinafter 'the Convention'), the Brussels II bis Regulation of 27 November 2003 and the Brussels II ter Regulation of 25 June 2019 adopted by the European Council. All these texts are governed by Article 3 of the 1989 Convention on the Rights of the Child, which enshrines the primacy of the best interests of the child in all cases. These texts are applicable only if the displaced child is under 16 years of age (Article 4 of the Convention).

The principles laid down are the return of the child to his or her country of habitual residence and the maintenance of ties with both parents.

Article 3 of the Convention defines the concept of wrongful removal or retention. It refers to the violation of custody rights, as set out in Article 5 of the Convention, in a State in which a child had his or her habitual residence prior to his or her removal or retention. This right had to be effective. The wrongfulness of the removal is assessed at the date of removal or retention.

Habitual residence is not defined in international texts. The Cour de cassation has therefore clarified this concept by adopting the method developed by the Court of Justice of the European Union, which is based on a body of evidence. This must show that 'in addition to the physical presence of the child in a Member State, other factors must be taken into account which are likely to show that this presence is by no means temporary or occasional and that the child's residence reflects a degree of integration into a social and family environment' (ECJ, ruling C-523/07 of 2 April 2009).

The duration, regularity and conditions of residence, as well as the child's nationality, schooling, language skills, family and social relationships and the parents' intentions are all taken into account by the Cour de cassation.

The procedure must therefore be swift so that the child's return is not ordered after he has integrated the environment he has been moved to. According to Article 12 of the Convention, in the event of wrongful removal or retention, the child's return is immediate if the request for return was made within one year of the removal. Once this period has elapsed, the Convention states that the competent authorities must order the child's return, unless the child is integrated into his or her new environment. An accelerated procedure is, therefore, provided for by the Civil Procedure Code (art. 1210-6 and art.1210-12 of the Civil Procedure Code) (code de procédure civile).

Exceptions to the return of the child are nevertheless allowed. Under Article 13 of the Convention, states are not obliged to order the return 'if there is a serious risk that the return of the child would expose him or her to physical or psychological harm or would otherwise place him or her in an intolerable situation'. The Brussels II bis Regulation restricts this possibility by adding to Article 11(4) that, in order to refuse return, it is necessary to establish that adequate measures have not been taken to protect the child after his or her return.

"Serious risks" are assessed restrictively in order to make the Convention and the regulations effective. The judges of the lower courts are sovereign in establishing the danger, which may stem from the parent with whom the child has his or her habitual residence, or from the child's departure from the country to which he or she has been removed... Finally, the Cour de cassation takes into consideration the best interests of the child.

Watch the conference

Publications

A Guide to Enhanced Reasoning for a Ruling

In the interests of transparency and pedagogy, the Cour de cassation is publishing its new handbook for drafting the enhanced reasoning of a decision resulting from a collective and in-depth reflection undertaken on the topic. Indeed, the reasoning of rulings constitutes a subject of fruitful exchanges with several foreign supreme courts (Supreme Court of Algeria, Supreme Court of Benin, Supreme Court of Spain, Federal Court of Justice of Germany, etc.) and a theme that is central in discussions that take place in the networks to which the Cour de cassation belongs as a member, in particular the Association of High Courts of cassation sharing the use of French (AHJUCAF), a network previously presented in the first international newsletter (January 2024).

Download the guide

The rulings of the Cour de cassation constitute the culmination of the jurisdictional work accomplished within each judgment formation.
For decades these rulings were characterised by their conciseness. This short style could be understood as a factor of authority of the court. The short style would also have been imposed by the cassation technique, based on syllogism, which requires the statement of the rule of law, then the statement of the means and reasons of the trial judges in reaching the conclusion. Over the last twenty years, the question of the evolution of the drafting of its rulings grew to become a major issue for the Cour de cassation.

motivation enrichie

It is important today that judicial decisions be more accessible and intelligible for litigants, but also, beyond the parties, for the entire community of legal practitioners, in order to guarantee more legal certainty, and law that is more predictable.
In a context of globalization of law, these decisions must also be understood by foreign or supranational courts in order to promote a dialogue between judges or at least a dissemination of case law.
The compelling argumentation of the decision contributes to its understanding and authority. As the work of the "2030 Cassation" Commission has shown, it legitimizes the creative power of the judge.

Spearheaded by the first president Bertrand Louvel, the first work of reflection and experimentation on the drafting and enhancement of the reasoning of rulings was carried out from 2014 onwards.
This gave rise to recommendations in the report of the commission on the reform of the Cour de cassation submitted by President Jean-Paul Jean in April 2017.

Report frome the Court's reforms Commission (2017)

First step: abandoning the 'attendu' ('held') and switching to a direct style for clearer and more accessible writing
In 2019, the works of the Commission for the implementation of the reform of the Cour de cassation, chaired by the President Bruno Pireyre, led to the adoption of a guide to the new rules relating to the structure and writing of judgments abandoning the use of the single sentence and the writing in a form that heavily used the term "attendu" ("held"). The decisions of the Cour de cassation are now written in a direct style with an organized outline and numbered paragraphs.

A guide to the new drafting rules for the Court's cases

Step Two: enhanced reasoning for more explanatory decisions
Among the recommendations, published in 2021, of the commission of reflexion "Cour de Cassation 2030" created by the First President Chantal Arens, is the more frequent use of the enhanced reasoning, "by integrating not only the legal dimension of the judgment but also explanations intended to facilitate its understanding by as many people as possible".

Report "Cour de cassation 2030"

It is recommended that decisions contain educational explanations in certain matters to which all citizens are particularly sensitive. It is also recommended that enhanced reasoning be extended to a greater number of cases and that its methodology gives rise to prospective and retrospective reflection.

In September 2022, First President Christophe Soulard entrusted, President Agnès Martinel the mission of pursuing this process with, in particular, the drafting of a practical guide on enhanced reasoning for decisions common to all the chambers of the Cour de cassation.

The guide was constructed from the practice of the different chambers and the Plenary Assembly of the Cour de cassation. Its purpose is to encourage and facilitate the use of enhanced reasoning. It also made it possible to collectively think about certain initiatives taken by the chambers.
However, this guide is not a fixed tool. The practice of enhanced reasoning is intended to continue to progress and this guide is intended to evolve with it.
The publication of the handbook aims to show the evolution and modernization of the working methods of the Cour de cassation, which are part of a process of continuous progress.

International News

ECHR : 50th anniversary of France's ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms

This commemorative event was organised by the Cour de cassation jointly with the supreme court lawyers (Ordre des avocats au Conseil d'État et à la Cour de cassation) and the Conseil national des barreaux on 3 May 2024. The conference was opened by Eric Dupond-Moretti, Minister of Justice.

The first round table retraced the history of the ratification of the Convention and the adoption of Convention law (historical developments and changes in judicial professions and practices), while the second round table focused on the implementation of the Convention in the era of subsidiarity (a shared responsibility in the service of democracy and the rule of law in Europe). Read more...

Singapore : Working seminar with the Supreme Court

On 31 January 2024, a working seminar was remotely held between the Supreme Court of Singapore and the Cour de cassation, on the subject of "new technologies and artificial intelligence (AI): subjects of justice and objects of justice". This working seminar is part of the cooperation programme signed on 12 May 2023 between the two courts.

Chief Justice Sundaresh Menon opened the meeting by praising the dynamic cooperation between the two courts. First President Christophe Soulard then introduced the round tables, recalling the challenges posed by artificial intelligence in the judicial world. He presented AI as both a risk and an opportunity to make justice more accessible and predictable. Read more...

Algeria : 60th anniversary of the Supreme Court

First President Christophe Soulard and Prosecutor-General Rémy Heitz were invited to the Algerian Supreme Court for the celebration of its sixtieth anniversary, on April 27 and 28, 2024, for an international conference on the theme of the electronic Supreme Court.

All the discussions raised awareness of the common issues and challenges facing superior courts and the legal profession as a whole, particularly with regard to the digitization of procedures and the use of instruments. This participation illustrates the close cooperation between the Cour de cassation and the Supreme Court of Algeria. It marks the start of a new cycle of sustained cooperation between the Courts, which is set to continue. Read more...

All international news

Network

In every Newsletter, discover a new network to which the Court belongs.

Network of the Presidents of the Supreme Judicial Courts of the European Union

NETWORK OF THE PRESIDENTS OF THE SUPREME JUDICIAL COURTS OF THE EUROPEAN UNION

RÉSEAU DES PRÉSIDENTS DES COURS SUPRÊMES JUDICIAIRES DE L'UNION EUROPÉENNE

Created in 2004, the Network of the Presidents of the Supreme Judicial Courts of the European Union is made up of the Presidents of the Supreme Courts of the 27 Member States. Additionally, the Presidents of the Supreme Courts of Iceland, Liechtenstein, Norway and the United Kingdom were admitted as associate members, and the Presidents of the Supreme Courts of Albania, Montenegro, Ukraine and Serbia as observers.

The First President Christophe Soulard is a member of the Board of Directors of the Network. As such, in 2024 he is rapporteur for the Network's in-depth work on a central theme: the impact of European law on supreme courts. Judge Dominique Hascher acts as secretary-general.

The Network brings together the Supreme Courts of 35 countries by encouraging discussion and the exchange of ideas. Furthermore, the Network constitutes a forum through which European institutions have the possibility of requesting the opinions of the different Supreme Courts.

Members of the Network meet regularly to discuss issues of common interest. The Presidents of the Court of Justice of the European Union and the European Court of Human Rights are also invited to participate in Network events.

Visit the website >

Network of Prosecutor Generals or equivalent institutions at the Supreme Judicial Courts of the Member States of the European Union – the Nadal Network

The Network of Prosecutor Generals or equivalent institutions at the supreme judicial courts of the Member States of the European Union, headquartered in Paris, was created in 2008 at the initiative of Mr. Jean-Louis Nadal, then Prosecutor General at the Cour de cassation. 24 prosecutor generals' offices signed the statutes of the association during its first meeting in Paris on the 6th of February 2009. The principle of a rotating presidency was adopted.

The purpose of the Network is to forge close links between judicial authorities within the European Union, and for prosecutor generals of supreme courts to exchange in a very practical manner on the major challenges facing the European judiciary and to share the analyses carried out by each national prosecutor's office on the major decisions of the Court of Justice of the European Union and the European Court of Human Rights.

The network meets every year for a conference held in the capital of the presiding prosecutor general's office. The last annual meeting was organized at the end of May 2024 in Luxembourg and dealt in particular with the impact of the ECHR and the CJEU case law in terms of data retention associated with electronic communications and the challenges linked to combating fraud against the financial interests of the European Union.

Translated rulings

Translation
of the Court's rulings

Each quarter, the Cour de cassation publishes a new series of rulings translated into English. These decisions are particularly illustrative of the Court's case law in that they raise a point of law relating to the application of European standards, because they illustrate a change in the role of the judicial judge or because they form the basis of important new case law.

Read translated rulings >

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Social networks

Sport Law

The Cour de cassation is playing the game!

COUR DE CASSATION

The June 2024 issue (n°4) of the Cour de cassation's Newsletter will include a special supplement with a range of content dedicated to Sport Law.

Coming soon >

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