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The French Référé Procedure - A Legal Miracle?

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ARTICLES

THE FRENCH RÉFÉRÉ PROCEDURE — A LEGAL MIRACLE?†

WALLACE R. BAKER* AND PATRICK DE FONTBRESSIN**

Preface by PIERRE DRAI,
Chief Justice of the Cour de Cassation

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PREFACE

UN JUGE POUR ASSURER L'ÉTAT DE DROIT:
LE JUGE DES RÉFÉRÉS

“Quand il s'agira de la liberté de personnes qualifiées ou constituées en charge, de celle des marchands et négociants emprisonnés à la veille de plusieurs fêtes consécutives . . . et si le lieutenant civil le juge ainsi à propos pour le bien de la justice, il pourra ordonner que les parties comparaitront le jour même dans son hôtel, pour y être entendues et être par lui ordonné par provision. . .”

(EDIT DU ROI pour l'Administration de la justice au
CHATELET DE PARIS - JANVIER 1685).

Tel est, en un vénérable document, souvent peu connu des praticiens, l'acte de naissance de ce juge des référés dont chacun pense qu'il peut agir pour le meilleur ou pour le pire, mais dont chacun se convainc qu'il est le personnage - clé de nos institutions judiciaires françaises.

Car le juge des référés plonge profondément ses racines dans nos traditions judiciaires et aucun régime politique ne saurait lui dénier crédibilité et légitimité.

Si le Droit n'est pas une simple technique de fixation et d'interprétation des normes de la vie en société et si le juriste n'est pas l'oracle d'une science juridique neutre et insipide, alors, dans le dur et quotidien combat pour la défense et l'illustration des droits et libertés, c'est un homme ou une femme qu'il nous faut, “à portée de la voix ou de la main”, pour jouer un rôle essentiel dans la cité, pour féconder règles et lois abstraites et insuffler à son action ce supplément d'âme qu'est la Paix par le Droit, la “paix judiciaire”.

Car le juge n'a pas accompli tout son devoir, si sa décision, par son tranchant et sa brutalité, ne permet pas aux adversaires d'hier de se rapprocher demain et, peut-être, de mieux se comprendre, encore plus tard.

Le juge est un homme ou une femme d'action et le jugement un outil pour une action concrète, efficace et humaine.

Vivre dans un “état de droit”, c'est pouvoir, en toutes circonstances, affirmer qu'il y a un juge qui s'implique dans l'action de tous les jours, accessible au dialogue direct et spontané et décidé à fuir les “délices du droit” parce que son devoir est de juger et

trancher.

Le Droit judiciaire français nous propose ce juge : c'est le juge des référés.

Sans aller jusqu'à assimiler ce juge des référés au "referee", arbitre anglais d'un match de football ou de rugby, il convient de voir, dans ce personnage des institutions judiciaires françaises, la vedette à laquelle, de façon systématique, pense le législateur lorsqu'il s'agit d'ouvrir une voie judiciaire moderne ou de faire consacrer des droits nouveaux.

Toujours proche des justiciables et toujours présent à son poste, il est saisi sans forme particulière et c'est sans solennité aucune qu'il tient audience, dans son cabinet, dans une salle d'audience ou même, si nécessaire, sur le terrain où se développe le conflit ou, même encore, à son propre domicile.

A toute heure du jour ou de la nuit, il reçoit les parties antagonistes, seules ou accompagnées de leurs avocats, les entend et les confronte.

Sous la seule exigence de faire respecter un délai suffisant pour assurer au défendeur la possibilité de préparer sa défense, il se prononce par des décisions courtes, sèches comme des ordres ou des injonctions.

Il prend des mesures qui relèvent plus de l'imperium du préteur romain que de la juris- dictio.

Face à l'audacieux ou à l'impudent qui entend, par la ruse ou la voie de fait, imposer sa volonté ou sa vision des choses, il prend toutes les mesures qui s'imposent pour "faire cesser un trouble manifestement illicite ou prévenir un dommage imminent" (article 809 du nouveau Code de procédure civile).

Il lui faut agir et agir vite car - n'est- il pas vrai ? - la justice différée est une justice déniée, selon le mot de GLADSTONE.

Plus qu'un autre, le juge des référés est fondamentalement convaincu que tout procès est un phénomène pathologique, qu'il convient de circonscrire sans tarder, dans ses manifestations et ses effets.

Promu juge de l'évident et de l'incontestable, le juge des référés accorde à la victime les réparations qui s'imposent, fait rétablir les situations illicitement bouleversées, apaise les souffrances provoquées par les atteintes aux convictions et aux croyances, oppose un "non" ferme à l'agression illicite des dispensateurs du

poison raciste ou de l'idéologie discriminatoire.

Certes, dans le feu de l'action, le juge des référés n'agit que "par provision", c'est-à-dire à titre provisoire, mais si sa décision, sage, mesurée et équilibrée, est acceptée par les parties et, mieux, si elle est exécutée, alors chacun pourra dire que l'état de droit n'est pas une formule creuse et un conflit judiciaire long, coûteux et démoralisant aura été évité.

Nul ne saurait alors s'en plaindre.

Qu'il nous soit permis de reprendre ici l'éloge du juge des référés, tel qu'il a été formulé, voici quelques années, par un grand juge des référés: "C'est un magistrat dynamique, qui va toujours jusqu'aux extrêmes limites de ses possibilités. Il crée le droit, sans "jamais le dire, et il imagine des solutions sans cesse nouvelles. "Bref, il sauve l'honneur de la justice" (Pierre BELLET - Préface à l'ouvrage de Philippe BERTIN - LES REFERES DES ANNEES 80 [GAZETTE DU PALAIS]).

WALLACE R. BAKER et PATRICK DE FONTBRESSIN ont entrepris de relever un défi, celui de montrer, à l'adresse du monde juridique anglo-saxon, que, dans la bonne et vieille Europe, le juge français des référés a su servir la règle de droit et lui donner une réelle effectivité en adoptant la seule démarche qui sied à un juge : Aimer écouter, aimer dialoguer et aimer trancher, pour toujours mériter la confiance de ceux qui s'adressent à lui.

Grâces doivent être rendues à ces deux éminents praticiens de l'oeuvre de justice.

PIERRE DRAI
PREMIER PRÉSIDENT DE LA
COUR DE CASSATION
PARIS — NOVEMBRE
1992

PREFACE

A JUDGE TO ENFORCE THE RULE OF LAW
THE REFEREE JUDGE

When it is a question of the liberty of skilled or responsible people, of the merchants or traders imprisoned the day before several consecutive public holidays . . . and if the civil lieutenant sees fit in the interests of justice, he may order the parties to appear the same day before him, to be "heard and issue a provisional order. . . (EDICT of the KING for the Administration of justice at CHATELET in PARIS - JANUARY 1685).

Although it is a little known fact among practitioners, the above ancient document is the *référé* judge's birth certificate; whether he may act for better or worse, he is undoubtedly a key figure within our French judicial institutions.

As the roots of the referee judge lie deep in France's legal traditions, no political regime has ever been able to deny him his credibility and legitimacy.

If the Law is not a simple technique for deciding upon and interpreting norms of life in society and if the jurist is not the oracle of a dull and neutral legal science, then in the difficult daily battle for the defense and enforcement of rights and liberties, we are in need of a man or woman close at hand to play an essential role in society, to translate the abstract laws and rules into real life and infuse his/her action with a human soul—that of Peace through Law, or "judicial peace."

For the judge has not performed his duty, if his decision, by its cutting edge and brutality, does not enable yesterday's adversaries to become tomorrow's friends, to enable them to have a greater understanding of each other in the future.

The judge is a man or woman of action and the judgment is an efficient tool producing a specific and humane action.

To live under the "rule of law", is to be able, in any circumstances, to know that there is a judge who is an actor in everyday life, who is accessible and with whom a free and easy discussion is possible, and who is determined to avoid the "delicious complexities of law" because his job is to judge and to decide.

French Law offers us such a judge: the *référé* judge.

Without going so far as to compare him to an English "refe-

ree" in a game of soccer or rugby, it is fitting to see in this personality one of the French judicial institutions, the star whom the legislator always has in mind when modernizing judicial procedures or protecting new rights.

Always accessible to those seeking justice and always to be found at his post, he can hear cases without special formalities. Whether in his chambers, in a hearing room, or even, if necessary, wherever the dispute is taking place, or sometimes even in his own home.

At any hour of the day or night, he will receive the opposing parties, either unrepresented or accompanied by lawyers, in order to hear each side's arguments and confront them.

He pronounces short, simple decisions similar to orders or injunctions, always paying attention to the one requirement he must comply with, which is to ensure that the defendant has enough time in which to prepare his defense.

He adopts measures which are more comparable to that of an imperial Roman praetor than those of the Roman judge rendering judicial decisions.

Confronted with the audacious or impudent person who intends to impose his own will or view of the dispute by cunning or violent means, the *référé* judge takes any action necessary to "put a stop to disturbances which are manifestly illegal or to prevent imminent damage" (article 809 of the new Civil Procedure Code).

He must therefore act and act quickly, as it is certainly true that "justice delayed is justice denied," in the words of GLADSTONE.

More than any other judge, the *référé* judge is fundamentally convinced that all legal proceedings are somewhat pathological, and that they should be immediately limited in all their manifestations and effects.

As a judge of what is obvious and indisputable, the *référé* judge grants compensation to victims when necessary, restores situations that have been unlawfully disturbed, eases suffering which has been caused by attacks on convictions and beliefs, takes a firm stand against unlawful violence by the preachers of racial hatred or discriminatory ideology.

Certainly, in the heat of the moment, the *référé* judge can only act "provisionally," i.e., on a temporary basis, but if his sensible,

measured and balanced decision is accepted by the parties and better still, if it is then executed, then it can be said that the rule of law exists and is not a meaningless concept, and a long, costly and demoralizing legal battle will have been avoided.

With such a result no one can argue.

May we be allowed to repeat here the praise of the *référé* judge which was articulated some years ago, by a great *référé* judge: "He is a dynamic judge, who always goes to the absolute limits of his potential. He creates law, without ever saying so, and he is forever exploring new solutions. In a word, he saves the honor of the legal system." (Pierre BELLET - Preface to Philippe BERTIN's article LES REFERES DES ANNES 80 [GAZETTE DU PALAIS]).

WALLACE R. BAKER and PATRICK DE FONTBRESSIN have accepted the challenge to demonstrate to the Anglo-Saxon legal world, that in our beloved and ancient Europe, the French *référé* judge has known how to use the rule of law and how to make it truly efficient by doing what pleases a judge: to enjoy listening, discussing and deciding, in order to earn the confidence of those who come to him.

Thanks should be given to these two eminent practitioners for their efforts in the interest of justice.

PIERRE DRAI
Chief Justice of the Cour
de Cassation
(Supreme Court)
PARIS — NOVEMBER
1992

INTRODUCTION

A. *Importance of the Référé Procedure*

Litigants often are not satisfied with the slowness of court cases and the cost of litigation. They sometimes blame the system of justice and the lawyers who seem to serve their own interests rather than serving those seeking justice.

It is important for citizens to have confidence in the judicial system and in the legal professions. To reach this goal, legal professions must listen more carefully and understand the difficulties and concerns of the litigants. They must develop more efficient court procedures or alternative dispute resolution systems. If improvements are not found, the whole legal system is in danger. If disputes are resolved efficiently, respect of the legal system is assured.

The *référé* procedure performs a real legal "miracle" by making a judge immediately available. He or she rapidly makes justice a reality and protects those whose rights are suddenly threatened. It is in this context that the importance of the *référé* procedure should be measured.

The *référé* procedure had its origin primarily in judge-made law more than three centuries ago¹. It was incorporated into an *édit* issued by the king on 22 January 1685 organizing procedural matters at the Chatelet in Paris. It is found in subsequent royal decrees, and it was incorporated into the Code of Civil Procedure in the 19th century.

If Justice is defined as an equation with the following elements: (1) the just settlement of a dispute, (2) rapidity, and (3) reasonable cost, the *référé* procedure can provide an exemplary

1. For the history of the *référé* procedure see: SOLUS ET PERROT, 3 DROIT JUDICIAIRE PRIVE, 1253 SIREY (3 ed. 1991); P. ESTOUP, LA PRATIQUE DES PROCEDURES RAPIDES, 8, (Litec ed. 1990); CH. CEZAR BRU, P. HEBRARD, J. SEIGNOLE, G. ODOUL, JURIDICTION DU PRESIDENT DU TRIBUNAL, DES REFERES, 11-13, (5th ed. rev'd by G. Odoul, 1978) (preface by Chief Justice J. Vassogne).

For a general description and evaluation of the *référé* procedure see: VINCENT ET GUINCHARD, PROCEDURE CIVILE, No. 567 etc. (Dalloz, 22 eme ed. 1991); PH. BERTIN, LES REFERES DES ANNEES 1980, (G.P. ed., 1980); R. Perrot, *L'évolution du référé*, cited in MELANGES PIERRE HEBRAUD (1981) at 645; H. Le Foyer et Costil, *Le vol d'aigle du juge des referes*, cited in ETUDES OFFERTES A PIERRE BELLET (Litec ed., 1991) at 341-378; J.C. WOOG, PRATIQUE PROFESSIONNELLE DE L'AVOCAT, (Litec ed., Gazette du Palais [G.P.], 2eme ed. 1991).

production of Justice primarily because of its speed and reduced legal expenses. One of the leading scholars in France has gone so far as to say that the *référé* procedure has saved the honor of the French judicial system because it has been able to reply to the often unanswered demand for justice by allowing quick recourse to a judge and a decision.²

In 1987 at the time of his becoming Chief Justice of the Tribunal de Grande Instance of Paris, Judge Diet reported that in order to make the judicial system credible it must be rapid and efficient. He noted among other actions taken to reach these objectives that under the leadership of Chief Justice Draï of the Cour de Cassation, there was an increasing use of the *référé* procedure, i.e. 17,764 *référé* decisions during 1986.³ The 1991 report on the same court stated that orders entered by *référé* judges (sometimes referred to in this article as the "reference judges"), although fewer in absolute number, represented almost 38% of the total judgments rendered.⁴ In the same report the former Chief Justice Grandjean of the Tribunal de Commerce of Paris was praised for promoting the ultra rapid *référé* procedure *d'heure à heure*.

Chief Justice Grandjean has provided statistics on the remarkable growth beginning in the 1980's of *référé* procedure in the commercial courts, where judges are businessmen and women.⁵ By 1990 in the commercial courts there were 55,000 *référé* procedures or more than 20% of all decisions not including injunctions relating to payment orders. In the most important commercial courts he describes an "explosion" in the numbers of *référé* judgments since 1980. He estimates the increase to be about 600%. As an example, in the Paris and neighboring commercial courts there were 3,000 *référé* procedures in 1980 and about 20,000 in 1992. In Marseille, Lyon and Toulouse, the growth was the same or even more accelerated.⁶

With regard to the *référé* provision where provisional payments are ordered (see *infra* I.4a), since 1975 when Article 873-1 was introduced into the New Code of Civil Procedure, the utiliza-

2. *Supra* note 1, Preface by Jean Vassogne, Chief Justice of the Cour d'Appel de Paris, at note 1. Ch. Cezar Bru, P. Hebraud, J. Seignole, Guillemette Odul.

3. M. Diet, Speech on the occasion of his installation as Chief Justice of the Trib. gr. inst. du Paris, 1987 G.P., Nos. 86, 87, at 7.

4. See 1992 G.P. Nos. 122, 123, at 25, 31, 37, 47, and 56 (reporting on year 1991).

5. P. Grandjean, "L'Evolution du Référé Commercial," Speech before the Association Droit et Commerce (February 1, 1993), 5 REV. JUR. COMM. 177-189, May 1993.

6. *Id.* at 178.

tion of this procedure developed at a slower pace; but by 1990 more than two thirds of all commercial court *référé* proceedings were *référé* provision procedures. In Paris in 1981 there were only 236 *référé* provisions, which grew to 5,000 in 1985, 8,000 in 1989, and 9,000 and more than 75 percent of the total *référé* procedures in the Paris Commercial Court in 1991. The total *référé* procedures in all commercial courts probably rose to 66 percent.⁷ Georges de Leval, a professor at Liege in Belgium, stated that the "growth—in order to avoid saying explosion—of the powers of the *référé* judge is one of the major phenomena in recent years which characterizes the evolution of the function of judging in the judiciary."⁸

B. Court Organization in France

Before beginning our analysis of the *référé* procedure, it is useful to remember that courts in France are divided into two systems: the judicial and the administrative.⁹ The judicial courts deal with disputes between private persons while administrative courts decide disputes between private persons and the government. The New Code of Civil Procedure sets forth the rules applicable to judicial courts (except for criminal matters which are set forth in a separate Code of Criminal Procedure). This article deals primarily with private law and judicial court systems.

7. *Id.* at 186.

8. G. de Leval, *Le Refere en Droit Judiciaire Prive*, 1992 (ACTUALITES DU DROIT, 1992) at 857.

9. (i) JUDICIAL COURTS ARE:

In Civil matters: Tribunal d'Instance, Tribunal de Grande Instance, Cour d'Appel, Cour de Cassation.

In Commercial cases: Tribunal de Commerce, Cour d'Appel, Cour de Cassation.

In Labor matters: Conseil de Prud'hommes, Cour d'Appel, Cour de Cassation.

In Agricultural matters: Tribunaux Paritaires de Baux Ruraux, Cour d'Appel, Cour de Cassation.

(ii) Administrative Courts are :

Tribunal Administratif, Cours Administratives d'Appel, Conseil d'Etat. The *référé* procedure also exists in the administrative courts.

See Debbasch and Ricci, *Contentieux Administratif*, 1990 D.S. No. 463. See also J. VINCENT, S. GUINCHARD, G. MONTAGNIER AND A. VARINARD, *LA JUSTICE ET SES INSTITUTIONS* (Dalloz, 3eme ed. 1991). R. Perrot, "Institutions Judiciaires (4ème Ed. Montchrestien). For an Introduction to French law, see F. TERRE, *INTRODUCTION GENERALE AU DROIT* (Dalloz 1991) and PH. MALAURIE AND L. AYNES, *INTRODUCTION GENERALE* (Cujas ed., 1991).

C. Judgments on the Merits and Provisional Judgments Entered in Référé Proceedings

In judicial, as well as administrative matters, the *référé* procedure is in theory a special procedure limited to certain types of questions. It is not litigation on the merits where the substantive issues in the case are decided, but, as we will observe, a decision in a *référé* proceeding often conditions the litigation on the merits, and sometimes disposes of the case completely as if there had been a decision on the substantive issues.

With regard to judicial courts, Articles 480 to 497 of the New Code of Civil Procedure¹⁰ make a distinction between four types of judgments:

1. judgments (*jugements*) on the merits (article 480);
2. judgments which are interlocutory in nature rendered by the court before which the case on the merits is being heard. These judgments order further investigation or a provisional measure which does not in theory prejudice the outcome of the litigation (Article 480);
3. ex parte judgments (*les ordonnances sur requête*) which are exceptional provisional decisions made without the defendant being present (Articles 493 to 498);
4. judgments or orders (*ordonnances*) rendered in *référé* proceedings (Articles 484 to 492).

D. Purpose of this Article

The purpose of this article is to describe the different types of *référé* procedures—primarily those related to business—and to describe the situations where they are most common.

Chief Justice Pierre Estoup makes a distinction between general *référé* procedures and special *référé* procedures.¹¹ General *référé* procedures in the different courts are found in articles in the New Code of Civil Procedure relating to the President of the *Tribunal de Grande Instance* (articles 808 and 809), the President of the *Tribunal de Commerce* (articles 872 and 873), and the Presi-

10. In this study, articles cited without other indications are found in the New Code of Civil Procedure (Nouveau Code de Procédure Civile) [C. PR. CIV.].

11. PIERRE ESTOUP, LA PRATIQUE DES PROCÉDURES RAPIDES, RÉFÉRÉS, ORDONNANCES SUR REQUÊTE, PROCÉDURES D'INJONCTION, 57-122 (Ed. Litec, 1990).

dent of the *Tribunal d' Instance* (Articles 848 and 849). These procedures are almost identical. An analysis of the cases of general *référé* procedures reveals the extent of the powers of the reference judge.

The special *référé* procedures describe types of situations for which the legislator has provided special rules in each of the three courts mentioned above, in addition to the rules relating to general *référé* procedures.

This article will be divided into seven parts. The first part will analyze general *référé* procedures (I), followed by special *référé* procedures (II). Then, brief mention will be made of the *référé* procedure in the labor, social security and agricultural courts (III). Competition matters where the *référé* procedure is commonly used will be dealt with in the next part (IV). Consideration will then be given to the *référé* proceedings in the Appellate Court (V), and to the reference judge in the European and international courts (IV). The *référé* judge and EC law (VII) will be discussed prior to the conclusion (VIII).

I. GENERAL RÉFÉRÉ PROCEDURE - A SPECIAL PROCEDURE IN A SPECIAL COURT JURISDICTION

A. General Description

The *référé* procedure is most often used to secure rapid justice, to protect a property right or to secure a court order to stop an illegal action. Such procedures often result in temporary or urgent measures necessary to ensure justice does not arrive too late where the normal court procedures could not produce a decision in a short enough time.

The *référé* judge acts alone, unless he requests a decision by a panel of judges (collegial system). In such a case, there is a discussion (*délibéré*) among the members of the panel. Decisions by a panel of judges is the normal mode of judicial decisions in France.

*L'ordonnance de référé*¹² is defined as a provisional decision entered at the initiative of a party, with the other party present or having been given notice, in cases where the law confers on the

12. Note that the judgment in a *référé* proceeding is referred to as an *ordonnance* rather than a *jugement*, thus implying that it is more like an interlocutory decision than a final judgment.

reference judge, who is not involved in the litigation on the merits, the power to immediately order necessary measures.¹³ Judges with powers to grant such judgments (*ordonnances*) are the Chief Justice of the *Tribunal de Grande Instance*, or a judge delegated to exercise such functions, and the Chief Justice of the Appellate Court. In matrimonial and expropriation cases,¹⁴ specially designated judges exercise the powers of a *référé* judge.

The request is served on the defendant in the form of a complaint (*assignation*) indicating a hearing date which occurs within a few hours to within a week or two. There is no minimum time period.¹⁵ In urgent situations the opposite party may be summoned to a hearing within hours to the judge's residence. The time for the hearing should nevertheless be sufficiently in advance to give the defendant time to prepare a defense. There has been some doubt whether a party to such a proceeding could plead his own case without an attorney (*avocat*) since there is no specific requirement stated in the rules relating to *référé* proceedings. However, a competent *avocat* is in practice considered essential because these matters often move very rapidly in overcrowded courtrooms which can leave the parties with inexperienced lawyers at a great disadvantage.¹⁶

A decision by the reference judge is not *res judicata*¹⁷ and a

13. C. PR. CIV. art 484.

14. After a divorce decree, when a decision is required relating to parental authority or a change in amount of support payments, Article 1084 of the New Code of Civil Procedure authorizes the judge of matrimonial matters to render a decision. Expropriation decisions are governed by Articles R 13-39 of the Expropriation Code.

15. However, Article 486, like the provisions in Article 6 of the European Human Rights Convention, requires that the judge insure that enough time has passed between the delivery of the summons and the time of the hearing to provide sufficient time for defendant to prepare his defense. See Versailles, 23 Jan. 1991, REV. TRIM. DRT. CIV. 597, (1991) (obs. Perrot) and 1991 D.S. II, Inf. Rap. at 143. See also 18 Feb. 1987 G.P. 487 (obs. Guinchard and Moussa).

16. See R. Perrot, *L'évolution du référé*, cited in MELANGES PIERRE HEBRAUD (1981), *supra* note 1, at 663. The author, concerned about complex cases being decided in a *référé* proceeding, states: "When one sees the complexity of certain cases which are brought before a *référé* judge in the *brouhaha* of an overcrowded hearing room one experiences a certain vertigo."

A *référé* judge decided in 1991 that an *avocat* was necessary to bring a *référé* procedure. Judgment of 30 January 1991, G.P. I, Nos. 127, 128 at 2-4. The accompanying note in this case, by Ph. Bertin, cites another *référé* judgment of 8 April 1987, G.P. I, at 223, which also required an *avocat*, and he sets forth the conflicting views of scholars on this issue. See also M. Eymard and M. Doucede, *Référé Tribunal de Grande Instance*, 1990 G.P., Nos. 117, 118, at 2.

17. C. PR. CIV. art. 488.

judge deciding the case on the merits may change or modify the reference judge's decision. Nevertheless, another reference judge should not modify a decision unless the circumstances have changed.¹⁸ The reference judge's decision is subject to immediate execution although execution may be conditioned upon the plaintiff supplying a bond.¹⁹

The reference judge has the power to provide for money penalties (*astreinte*) the amount of which he can provisionally set at the hearing if his order is not executed.²⁰ An appeal, unlike in an ordinary proceeding, does not suspend execution. Thus, not only is the *référé* decision rapid but it is subject to immediate execution.²¹

In addition, in conformity with Article 53 of the New Code of Civil Procedure which provides that a complaint and summons (*assignation*) interrupts the statute of limitations, the complaint and summons in a *référé* proceeding requesting a provisional payment also interrupts the statute of limitations²² and, consistent with the accelerated pace of the *référé* procedure, an appeal must be filed within 15 days from receipt of official notice (*signification*), an unusually short period for appeal.²³

The above rules appear in the first chapter of the New Code of Civil Procedure, which apply to the *Tribunal de Grande Instance*, *Tribunal d'Instance*, and the *Tribunal de Commerce*. The rules relating to the Labor Court are found in special rules applying to this court in the Labor Code.²⁴

In addition to the procedural aspects of the *référé* procedure, the *référé* judge is like a separate court jurisdiction within the framework of the usual court system of which he or she is a part.²⁵

B. The Scope of General *Référé* Procedures

Articles 808, 809; 872, 873; 848; and 849 of the New Code of

18. See Judgment of 20 November 1985, 2ème Ch. Civ. Cour de Cassation, 1986 G.P. II somm., 334 (obs. Guinchard and Moussa).

19. C. PR. CIV. art. 489.

20. C. PR. CIV. art. 491.

21. C. PR. CIV. art. 489.

22. See Judgment of 6 July 1988, 1ère Chambre C., 1989 J.C.P. ed., G, I at 21194 (note Tainse). See also Judgment of 12 Feb. 1991, Cass. civ. 1re, Bull. Civ. I, No. 61, at 38.

23. C. PR. CIV. art. 490.

24. Articles R 516-30 to R 516-35.

25. P. Estoup, *supra* note 11, at 7, and Chapter II "La Compétence en Matière de Référé," at 25-33.

Civil Procedure provide four major areas of general *référé* procedures, in which the reference judge is authorized to take action:

1. Urgent matters
2. Conserving situations and conserving and investigating facts
3. Disturbances of public order
4. Obligations not subject to serious dispute

1. Urgent matters

Urgency was traditionally the most common reason for a *référé* proceeding and continues as the basis for most general *référé* cases. However, this requirement is not necessary in *référé provision* cases where the claim cannot be seriously contested and provisional payment is requested²⁶ (see sub-paragraph 4. *infra*).

If there is to be a *référé* proceeding based on urgency, the judge should find that there is urgency or that urgency is clearly demonstrated by the facts noted by the judge. This finding is a matter of fact to be determined by the lower court judge and is not subject to review.²⁷ Chief Justice Estoup gives numerous examples of urgent situations which are based upon Article 808 in the Tribunal de Grande Instance or upon Article 873 in the Tribunal de Commerce.²⁸

26. Judgment of 4 November 1976, 1977 G.P., at 352.

27. For review by the Supreme Court in *référé* matters see Judgment of 19 January 1988, Cass. Com. 1988 GP I, at 95. See A. Perdriau *Le Contrôle de la Cour de Cassation en matière de référé*, 1988 J.C.P. ed., G, I, Doct., No. 365. For a remarkable book on the meaning of "urgency" in civil law, see P. JESTAZ, *L'URGENCE ET LES PRINCIPES CLASSIQUES DU DROIT CIVIL* (LGDJ, Paris 1968).

28. In P. Estoup, *supra* note 9, at 59, Chief Justice Estoup gives the following examples of urgent situations:

- (i) A request by a shareholder to appoint temporary management (*administrateur provisoire*) for a commercial company whose management has been paralyzed and its existence is jeopardized by disputes between its directors. Judgment of 22 May 1965, Cour d'Appel de Paris, 1965 J.C.P., ed. G II, 65, 14274 bis.
- (ii) A request authorizing the purchase from other suppliers by a company bound by an exclusive supply contract which has not received sufficient deliveries from its exclusive supplier. Judgment of 11 July 1974, Cass. civ. 2e, 1974 Bull. Civ. II, No. 229, at 191.
- (iii) A request to prohibit a public meeting on company premises when it would be likely to cause serious trouble which could spread to other factories of the same company not far from the meeting place. Judgment of 14 December 1976, Cour d'Appel de Paris, 1977 G.P. I, sommaire, at 125.
- (iv) A request to expel a former lessee illegally remaining in the premises who pays no rent. Judgment of 10 December 1958, Cass. civ. 2e, 1959 Bull. Civ. II, No. 823.

In Article 808 of the New Code of Civil Procedure, which relates to the powers of the Chief Justice in the *Tribunal de Grande Instance* it is stated that in case of urgent matters, the Chief Justice may order measures on issues where there is no real dispute (*aucune contestation sérieuse*) or substantive question at issue (*l'existence d'un différend*). Determining urgency is a matter left to the judge; usually it involves imminent danger. The first paragraph in Article 809 states that the Chief Justice may utilize his powers as a reference judge to order conservatory measures or require action to restore a prior situation (*remise en état*) in order to prevent imminent damage or to stop a disturbance which is clearly illegal.

2. Conserving Situations and Conserving and Investigating Facts

(a) Measures to conserve situations

A court may require delivery of disputed property to a depository or to an escrow agent or it may appoint a person (*administrateur provisoire*) to manage a company.²⁹

(b) Conserving and investigating facts

The reference judge may issue an order insuring conservation of evidence, particularly where such evidence might disappear if the judge does not take appropriate urgent measures. He may also order an investigation of facts by a court appointed expert or other person.³⁰

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- (v) A request to stop construction which does not conform to national urbanization laws. Judgment of 19 November 1982, Cour d'Appel de Colmar, 1983 J.C.P. I, Jurisp. (II) 20118, note Liet-Veaux.

29. See a particularly important case relating to a newspaper company, Judgment of 10 May 1988, Cour d'Appel D'Aix-en-Provence, 1989 G.P. I, No. 4, Jurisp., 5, at 3-9, note Patrick de Fontbressin. In another important case involving a U.S. majority-owned French company (Fruehauf) a French court ordered a temporary administrator to take over management in order to honor a sale of trailers to China contrary to US export control rules. Judgment of 22 May 1965, 1965 G.P., 2ème Sem., at 86. See also M.J.C. de Boisdeffre, *Le Rôle du Juge des Référé et le Transfert de Contrôle des Entreprises*, 1987 G.P., 2ème sem., at 606-608 (relating to acquisitions of companies). Cf. Y. CHARTIER, J. MESTRE, *LES GRANDES DECISIONS DE LA JURISPRUDENCE: LES SOCIÉTÉS* (Ed. PUF 1988); J. Mestre, *Reflexions sur les Pouvoirs du Juge dans la Vie des Sociétés*, 1985 REV. JURIS. COM. 81-92; Y. Guyon, *Les Missions des Administrateurs Provisoires de Sociétés*, *MELANGES EN L'HONNEUR DE DANIEL BASTIAN*, 103-115 (1974); E. du Pontavice et J. Dupichot, *TRAITE DES SOCIÉTÉS COMMERCIALES*, vol. 2, No. 710, at 402.

30. C. PR. CIV. art. 145 applies when the order is requested prior to litigation. See also

Although the requirements of Articles 808 and 809 of the new Code of Civil Procedure are different,³¹ either can be the basis for conservatory measures.

Orders for factual investigation include:

1. requests for information,
2. requests for the preparation of official statements of facts (*constats*) by specially authorized bailiffs or experts with both parties present,
3. the nomination of an expert who prepares a report with the participation of both parties who are invited to make written criticisms, comments, or provide other information (*dires*).³²

In addition to cases where an investigatory measure can be ordered on the basis of Article 808 and 872 of the New Code of Civil Procedure, Article 145 of this Code provides an efficient, unique, original and important procedure. During this procedure the most significant fact finding occurs. More often than not, the judge's opinion is based upon a report filed by an expert who is responsible for the fact finding.

The terms of Article 145 of the New Code of Civil Procedure provide:

"If before litigation on the merits there exists a legitimate reason to conserve or establish facts upon which a solution of a dispute may depend, investigatory measures which are legally admissible can be ordered at the request of any interested party in

C. PR. CIV. art. 232.

31. C. PR. CIV. art. 808 provides: "In all cases of urgency, the Chief Justice (*President*) of the Tribunal of Grande Instance, as a *référé* judge, can order measures which do not interfere with any real contested issue or which are justified by the dispute." (Fr.)

C. PR. CIV. art. 809 provides: "The Chief Justice can always order a *référé* proceeding (Decree No. 87-434 of 17 June 1987) even in the presence of a serious disagreement, conservatory measures or reestablishment of a previous situation where necessary in order to prevent an imminent damage or to stop an obvious public disturbance. Where there is no serious doubt that an obligation exists, the court can order a provisional payment for the creditor (Decree No. 85-1330 of 17 December 1985) or order the execution of the obligation even if it is to be executed in kind (*obligation de faire*)."

32. The role of the reference judge is particularly important relating to ordering an expert's report on the management of a company; Article 226 of the Law of 24 July 1966. See Judgment of 14 Feb. 1990, Trib. com. Paris, 1990 J.C.P., No. 15826, at 480, note Viander; See Judgment of 9 June 1989, Trib. com. Paris, 1989 G.P. II, at 812. Also on the subject of naming of an expert by a *référé* judge to determine the value of the shares for sale, see article 275 of the law of 24 July 1966; See Judgment of 4 Nov. 1987, Cass. com., 1988 J.C.P. II, 21050, obs. Viander.

an ex- parte (*requête*) or a *référé* proceeding”.

Urgency is not a requirement for the application of this article nor does subparagraph 2 of Article 146 of the New Code of Civil Procedure apply, which limits investigation by order of the court once there is a case filed on the merits if its effect is to correct a lack of proof by one of the parties.³³ If a case on the merits has been filed in a court, any expert investigation of the facts should be ordered by the procedural judge charged with preparing the case (*juge de mise en état*).

In order to have standing to file a complaint in a *référé* proceeding, a plaintiff must have a legally protected interest in the matter.³⁴ In this respect, it has been held that the probability of litigation involving the party requesting a *référé* proceeding was a sufficient interest to justify filing a complaint.³⁵

The investigative measures requested in the *référé* proceedings (sometimes referred to as expertise measures in the future) must be legally admissible; they must not violate rights of privacy, dignity or respect of human life.³⁶ For example, the *Tribunal de Grande Instance d'Arras* refused a *référé* proceeding by a husband seeking to obtain proof relating to the sanity of his wife for the purpose of attempting to annul a marriage.³⁷

Article 145 of the New Code of Civil Procedure may facilitate securing documents from an adversary and third parties before litigation on the merits. This is not a direct equivalent to the United States discovery procedure since it is the expert, not the parties, who requests documents he or she believes to be relevant.

Chief Justice Estoup notes the importance of basing a petition on Article 145 rather than on Article 808 when the urgency requirements of this latter article are not present. Such a mistake

33. See REV. TRIM. DRT. CIV., at 786 (1982), obs. Perrot; REV. TRIM. DRT. CIV., at 185 (1983). The last case reaffirms the rule that Article 150 of the New Code of Civil Procedure, which denies the possibility of an appeal of an investigatory measure except where specified by law, does not apply to a *référé* decision under Article 145. Accordingly, an appeal is always possible. See generally W.R. Baker, *French Judgments Subject to Immediate Appeal*, 47 Law and Contemp. Probs. 3, 17-34 (1984).

34. J. Normand, § A, *Sources*, in *Jurisprudence Française en Matière de Droit Judiciaire Prive*, 1983 REV. TRIM. DRT. CIV., at 184, 186.

35. R. Perrot, *supra* note 33, at 787 (referring to the notion of “hypothetical litigiousness”).

36. Judgment of 14 November 1985, Cour d'Appel de Paris, 1986 J.C.P. II 20643 (comment by Lindon). See also Perrot, *supra* note 33, at 787.

37. Judgment of 9 October 1981, Trib. gr. inst., 1982 J.C.P. II, 19852, note G. Raymond.

can result in rejection of the complaint.³⁸

3. Disturbances of Public Order and Other Situations Where a *Référé* Proceeding Has Been Used

The provisions of the first subparagraph of Article 809 of the New Code of Civil Procedure provide that "even in the presence of a real contested issue" (which usually would make a *référé* proceeding inapplicable), the reference judge may order:

- measures re-establishing a previously existing situation
- measures to prevent damages which are imminent
- measures to stop a disturbance which is clearly illegal - sometimes referred to as a *voie de fait*.

Examples of cases falling into the above categories are:

- a) *Voie de fait*, or flagrantly abusive administrative action.³⁹

38. P. Estoup, *supra* note 1, at 79. On this question in general, see J.C. Peyre, *Le Référé Probatoire de l'Article 145 du Nouveau Code de Procédure Civile*, 1984 J.C.P. I, at 3158; Jeantin, *Les Mesures d'Instruction in Futurum*, 1980 D.S., (1980) 27° Cahier-Chron., I, 205; M. Peisse, *Le Référé Préventif en Matière de Construction Immobilière*, 1987 G.P. II, 657. For an example of conservation of proof in the area of audio-visual products, see Judgment of 21 April 1989, Cour d'Appel de St. Denis de la Réunion, 1991 G.P. I, at 40, note E. Putnam.

39. Judgment of 4 March 1991, Trib. gr. Inst. de Marseille, 1991 G.P. II, 536. In this case, the court held that the sudden transfer for no reason by the Ministry of Interior of an officer of the Judicial Police who was working closely with the public prosecutor's office and the investigating magistrate *juge d'instruction* would create a disequilibrium between the respective powers of Justice (the courts) and those of the Ministry of Interior (the Police). This transfer would constitute a punishment in disguise and an obvious violation of Article 6, sections I, II, and III, of the European Convention on Human Rights and would violate the fundamental rights of a citizen.

Such a claim is within the competence of the judicial courts, i.e. the *référé* judge when there is a *voie de fait* (urgency and illegal public disturbance) rather than the administrative courts which normally have jurisdiction when there is a claim against the government.

Another case of allegedly arbitrary action by the French Ministry of Interior in expelling residents of the Cape Verdi Islands, was brought before the Tribunal de Grande Instance of Paris. The court held it was too late for a *référé* proceeding because the individuals had already been deported, therefore only an action for damages could be sustained. Judgment of 9 Feb. 1988, Trib. gran. inst. de Paris *Référés*, 1988 G.P. I, 343-4, note Ph. Bertin.

With reference to detaining a foreigner in a hotel room by the Ministry of the Interior pending clarification of his immigration status, a court decided that no detention is possible by administrative authorities except when subject to judicial control in accordance with the Ordinance of 1945. As a result, the *référé* judge held the ministry's action illegally interfered with the freedom of the individual confined to the hotel room (*voie de fait*) and such action should be stopped. Judgment of 31 March 1992, Trib. gr. inst. de Créteil, 1992 G.P. I, 1992 Jurisp., at 441.

See also Judgment of 22 March 1983, 1983 Bull. Civ. III, No. 83, Cass. civ. 3ème (holding

A *voie de fait* can be created by the French administration if it acts illegally, in which case the administrative courts' jurisdiction gives way to the judicial court which is called upon to control abusive power exercised by the government.

b) Labor conflicts and the re-instatement of a wrongfully terminated protected employee.⁴⁰

c) Press, TV or audiovisual communication publications or television or other audio-visual communication or subject matter when it is shocking to certain segments of the population.⁴¹

the piercing of a hole in a wall automatically constituted a *voie de fait* because it violated a property right and caused a manifestly illegal disturbance.

40. In the case of *SNOMAC* (Air Navigators Union vs. Pilots' Union), Air France, and Air Inter, 1984 J.C.P. CI, 14346, at 557, notice of a strike called by the unions of employees of Air France, Air Inter and UTA contesting a decision of the Ministry of Transportation to stop requiring a third man (a navigator-engineer) in the cockpit was declared illegal by a panel of *référé* judges in Creteil on 20 June 1988, because it was held to be abusive. The court ruled it was competent based on the first sub-paragraph of Article 809. The unions believed that an authorization delivered by the Ministry of Transportation to Eurolair Internationale approving a two pilot crew without a navigator on the Boeing 737-200 was a first step which would be given to others even though Air France, Air Inter and UTA denied having the intention of using crews of less than three members. The court found that where there is a labor dispute, strikes are normally justified. In this case the claims were excessive and abusive. In order to avoid a public disturbance that was clearly illegal and interfered with the use of the public service, the court found that the purpose of the strike was to force the Ministry of Transportation to reverse its decision relating to Eurolair Internationale or defer it until the Administrative Court ruled on the matter. The unions' request to the airlines to promise not to allow a two-man crew for twenty years was unreasonable because many foreign airlines had adopted a two-man crew without compromising security. These demands were held to be unrealistic.

In another case, a court ordered reinstatement of a protected employee (employee representative) after failure to secure approval from the administration to terminate the employee and the application of the same work conditions which were changed by the employer. The Supreme Court reversed an appellate court decision refusing such reintegration because the employer's action generated an illegal disturbance (*trouble illicite*). Judgment of 10 July 1991, Cass. soc., 1991 G.P. II, 1025, at 331.

41. A *référé* judge's order prohibited the public display of posters relating to a movie called *Ave Maria* which showed the crucifixion of a woman with bare breasts. The advertisement was visible from a public street where persons with religious convictions were certain to be shocked. Judgment of 23 Oct. 1984, Trib. gr. inst. de Paris, 1984 G.P. II, 727.

Another film, *Je Vous Salue, Marie*, told the story of a young woman gas station attendant who became pregnant, although she resisted the advances of a taxi driver named Joseph. The Supreme Court reversed the lower court and the appellate court's decisions which had ordered that the film not be shown on the grounds that there was insufficient reason to interfere with the right of free speech. Judgment of 28 January 1985, Cour de Cassation, 1985 G.P. I, No. 132, at 92.

The same rule applied to another film, *The Last Temptation of Christ*, produced by Martin Scorsese, based on the novel of Nikos Kazantzakis, which portrayed Christ as "completely human." The appeals court required a warning on the advertising relating to the film to the effect that it "was not an adaptation of the Bible." Judgment of 27 September 1988, Cour d'Appel de Paris, 1988 G.P. II, 735, note Bertin.

Publication of macabre pictures, showing a cut up body of a young woman in a maga-

4. Obligations not Subject to Serious Dispute

This sub-section is divided into three parts:

- (a) Ordering provisional payments (*référé provision*), based on subparagraph 2 of Article 809 of the New Code of Civil Procedure.
- (b) The *référé* procedure authorized by Article 5- 1 of the Code of Penal Procedure.
- (c) *Référé* injunction.

(a) Ordering Provisional Payments (*Référé Provision*)

In 1980, Professor Perrot characterized the *référé* provision, because of its growing popularity, as the star of the show in French civil procedure.⁴² Cases of intervention by the *référé* judge based on Article 809 (subparagraph 2) constituted a real revolution in civil *référé* proceedings which improved credibility in securing rapid justice.⁴³

The terms of second paragraph in Article 809 (or 873) of the New Code of Civil Procedure provide:

In cases where the existence of the obligation is not subject to serious disagreement, the judge can grant a provisional payment (*provision*) to the person to whom the obligation is owed (Decree No. 85- 1330 of 17 December 1985) or order the execution of the obligation even if it is an obligation to do [so].⁴⁴

zine entitled *Photo*, was prohibited at the request of her parents on the grounds that it created a public disturbance. A preliminary payment of damages of 50,000 Francs was ordered with a penalty (*astreinte*) of 10 Francs a copy for additional copies distributed. Judgment of 30 November 1983, Trib. gran. inst. de Paris, 1984 G.P. I, 7.

In an interesting Belgian case, the *référé* judge refused to enjoin the posting of election posters which referred to several political organizations as "*racistes*" and "*fascistes*." *Référé* decision No. 35.015/9, Repertoire No. 10289, President of the Tribunal de Première Instance (Liège), (1991).

42. R. Perrot, *Introduction - Les Incidents de Provision*, 1980 G.P. I, 314.

43. Honorary Chief Justice of the Cour de Cassation Bellet, in his preface to P. Bertin, *Les Référés des Années 1980*, 1980 G.P., comments that it is not widely known how much the *référé provision* is the creation of Chief Justice Drai.

Although the development of the *référé provision* in civil and commercial matters is of recent origin, there is some mention of provisional payments in criminal cases in the 18th Century where the complainant suffered bodily harm, and the judges entered a provisional judgment to provide food and medicine consistent with the social position of the person and his injuries. M. LANGE, *NOUVELLE PRATIQUE CIVILE CRIMINELLE ET BENEFICIALE OU LE NOUVEAU PRATICIEN FRANCOIS*, vol. 2, Ch. IX, 156-158 (chez Jean de Nully Librairie Grande Salle 1741) (Private Collection of W.R. Baker).

44. Amendment effective 1 January 1986. Note that this obligation is distinguished from the obligation to pay money.

The provisional payment authorized by the latter sub paragraph in Article 809 can be the total amount of the claim,⁴⁵ provided there is no serious basis for disagreement relating to the claim, and even if there is no urgency.⁴⁶

This procedure is rapid because it results in an executory judgment for the plaintiff who may immediately proceed to attach the property of the defendant. With such a judgment in hand, the plaintiff's chances of negotiating a rapid settlement are greatly enhanced.

As mentioned above in Section A of the Introduction, in the Paris Commercial Court nearly three- fourths of the *référé* proceedings were *référé* provisions. In all French commercial courts combined nearly two- thirds of the *référé* proceedings were *référé provisions*.⁴⁷

Avocat Général Le Foyer de Costil notes:

The rush of plaintiffs toward the *référé provision* especially in the field of construction disputes where the litigation, rightly or wrongly, is considered to be slow, costly, and inaccessible for many, has speeded up considerably. It has also been extended into all areas of the law and in particular to the law of contracts and torts. The only obstacle it finds in its way is the existence of a serious disagreement.⁴⁸

Urgency is not a condition for ordering a provisional payment (*provision*).⁴⁹ A counterclaim and a request for a set- off may be taken into account by the court in deciding whether there is a real dispute which would defeat a request for an advance payment of

45. Judgment of 20 January 1981, 1981 G.P. I, 332, note Bertin; *Jurisprudence Française in Matière de Droit Judiciaire Prive*, REV. TRIM. DR. CIV. (1981), note Normand, at 679, (discussing theory of provisional payment). With regard to the provisional nature of the decision in accordance with article 484. Cf. Judgment 2 March 1992, Cour d' Appel de Chambéry, 1992 G.P., note Alexis Mourre in regarding Article 24 of the Brussels Convention.

46. Judgment of 4 Nov. 1976, 1977 G.P., 352; *Jurisprudence Française en Matière de Droit Judiciaire Prive*, REV. TRIM. DR. CIV., at 36 (1977), obs. Normand on the lack of urgency.

47. P. Grandjean, *supra* note 5, at 187.

48. Huguette le Foyer de Costil, *Le Vol d'Aigle du Juge des Referes*, in ETUDES OFFERTES A PIERRE BELLET, at 351. Cf. Vincent, *Les Pouvoirs du Juge en Matière de Provision*, ETUDES KAISER, at 417 (1979).

49. Judgment of 4 November 1976, 1977 G.P., 352, Cass. 1re. REV. TRIM. DR. CIV. at 36, Normand.

damages.⁵⁰

The Supreme Court reversed a judgment in the lower court granting a provision to Locafrance, which leased equipment to Coupet. The latter's rights were assigned to Guebinian who failed to pay rent and cancelled the contract. Locafrance attached and sold the equipment, and he requested a provisional payment representing part of the rent due under the terms of the contract. Upon appeal, the court reversed the decision of the lower court on the grounds that Guebinian had contested the validity of the liquidated damages provision in the contract, which, he argued, cast a serious doubt on the outcome of the case. The lower court, in condemning the defendant to pay 40,000 FF, took a position on the reduction of amounts due under the liquidated damages clause in the contract. The Supreme Court reversed the Appellate Court *référé* judge's decision because it did not state the elements of the dispute which caused serious doubt.

The Court held that a *référé* judge must state his reasons for refusing to order a preliminary payment (*provision*) so that the Supreme Court can review the decision to insure the proper rule of law is applied.⁵¹ Recently the ordering of a provisional payment has most often occurred in construction and personal injury matters, although it has also appeared in contract and other cases.

The primary use of such a provisional payment is to overcome delaying tactics by defendants who have no serious defense. But, in making a preliminary decision on whether there is serious doubt as to a claim, there is a higher risk of error by the judge, especially in complex cases, since he makes a rapid decision.

The defendant is confronted with additional potential problems in ordering a provisional payment which does not require a guaranty to the defendant. The plaintiff who receives a provisional payment may not have sufficient assets to repay the provision if the defendant can prove in litigation on the merits that he is not responsible. Thus, a provisional payment can be the best or worst outcome of a dispute even though it generally accelerates the process of justice.⁵²

50. Judgment of 22 November 1978, Cass. ch. 3e., 1978 Bull. Civ. III, No. 357, at 274.

51. Judgment of 1 March 1983, Cass. Com., 1983 G.P. II, Nos. 275-77, 533.

52. Report by Professor R. Perrot, *Journées d'Etudes des Avoués, Limoges*, 1979 G.P. II, at 598-601. For a critical view of the institution see G. Cochez, in *Le Référé Provision Mesure ou Démonstration*, in *MÉLANGES OFFERTS À PIERRE RAYNAUD*, 161 (Daloz 1985).

Examples of *référé* cases in the fields of construction, automobile accidents and contract cases are described below.

(i) Construction Disputes

Contractors, engineers, architects and insurance companies were ordered to make a provisional payment of 50,000 Francs to owners of apartments in the Chambord 22 Tower in the 13th arrondissement in Paris to permit repair of defects in copper and iron water pipes which became corroded because they were installed one against the other.

The *référé* proceeding occurred after the plaintiff secured a court order appointing an expert. The court relied on the expert's report as proof of the fact that there was no serious doubt about the amount due (*caractère non sérieusement contestable de la créance*) or the liability of the promoter or others because the purchasers of the apartments under French law are not required to prove fault—merely that defects in the apartments existed.⁵³

The court also ordered the provisional payment to include 20,000 Francs for the cost of a special expert's report to determine the reason for the corrosion in the defective pipes.

(ii) Automobile Accident Cases

Judges often order a provisional payment in automobile accident cases. For example in the case where a plaintiff was riding a bicycle, ran off the curb onto the street and was struck from the rear by an automobile, the judge found that the defendant was travelling at a speed in excess of the limit and that the plaintiff's negligence was not sufficient to prevent ordering an advance payment in the reasonable amount of 25,000 FF. In order to bar a provisional judgment, the plaintiff's fault must be inexcusable as provided in Article 3 of the law of 5 July 1985, which improved the situation for accident victims. The judge granted a *provision* after deciding the plaintiff's negligence was not the exclusive cause of the accident. The court also awarded the plaintiff an advance of 1,500 FF to be paid to the medical expert appointed by the court to evaluate the extent of the injuries, pain and suffering, and the

53. Judgment of 21 June 1976, Cour d'Appel de Paris (14ème chambre) 1976 G.P. II, 629-632. See P. Lebatteux, *La Protection de L'Acquereur Immobilier Par la Pratique du Refere Provision*, 1976 G.P. II, Doctrine, 584-586.

chances of recovery. The judge declined to rule on the counter-claim which was contrary to the law cited above.⁵⁴

A provisional payment was not ordered in another case where the defendant, a motorist, alleged that the plaintiff, a pedestrian, committed an inexcusable fault barring recovery by crossing the Avenue of New York in Paris close to a pedestrian underpass. There were barriers along the edge of the sidewalk designed to prevent pedestrian crossing. No crosswalk was marked on the street inviting pedestrians to cross at that place. The reference judge held that there was a serious difference of opinion as to liability so no allocation of a provisional payment could be ordered.⁵⁵

(iii) Contract Cases

A bankrupt contractor built on a lot adjacent to the plaintiff's real estate thereby damaging it. The Supreme Court held in 1979 that a direct cause of action against an insurer in this case was possible and that a provisional payment be ordered even though the amount of the liability of the principal debtor had not been determined by the bankruptcy court.⁵⁶

A provisional payment was also ordered where a building manager became bankrupt after receiving advances from apartment owners to cover common expenses of the building (i.e. electricity bills, etc.). He was bonded by the defendant company. In this case, it was relatively easy to determine the amounts owed, i.e. the amounts advanced less expenditures made for common services, so a provisional payment was ordered.⁵⁷

In another contract case, there was an exchange of letters between lawyers (*avocats*) which appeared to evidence an agreement to sell shares. The *référé* judge refused to order a provisional payment because a serious question existed as to whether one of the lawyers was the agent of his client with authority to enter into such agreement. The lawyer for the defendant admitted that he had no authority to sign the agreement for his client. In this case, the judge ruled that a serious doubt existed as to whether or not

54. Judgment of 4 October 1985, Trib. gr. inst. de Colmar, 1986 G.P. I, 22.

55. Judgment of 21 October 1985, Trib. gr. inst. de Paris, 1985 G.P. II, 729.

56. Judgment of 24 October 1979, Cass. civ. 1re, 1980 G.P. Panorama, at 49.

57. See P. Bertin, *Le Refere-Provision Introduit Par Voie D'Action Directe Contre Une Caisse De Garantie En Cas De Faillite Du Debituer Agent Immobilier*, 1982 G.P. Doctrine, 497-499.

there was an obligation to purchase and sell the shares and, therefore, the issue was one which should be determined by the judge before whom the case would be decided on the merits.⁵⁸

The Supreme Court has held that the amount of provisional damages could be the amount of liquidated damages specified in the contract between the parties.⁵⁹ However, a Court of Appeal has held that a provisional payment could not be ordered where there was a dispute as to the validity of the liquidated damages clause. Ordering a provisional payment was considered in such case to be interference with the prerogatives of the judge deciding the merits of the case who could modify the amount of liquidated damages if he believed the amount specified in the contract was unreasonable.⁶⁰

In a case involving a lease/purchase contract (*crédit-bail*) for a computer, the unpaid lessor secured a court order authorizing the attachment and sale of the equipment. Thereafter, the lower court refused to order a provisional payment based on the liquidated damages clause in the contract on the grounds that the defendant contested the validity of the liquidated damages clause.⁶¹ In a 1984 case, the Supreme Court reversed a Court of Appeal decision allowing a provisional payment in excess of the amount of liquidated damages provided for in the contract.⁶²

(b) The *Référé* Procedure of Article 5-1 of the Code of Penal Procedure

The French government, duly impressed with the efficiency of *référé* proceedings, introduced Article 5-1 of the Code of Criminal Procedure into the Law of 3 July 1983. This article states the following:

Even if the plaintiff becomes a civil party in a criminal action, he can nevertheless file a *référé* procedure in a civil court which retains its jurisdiction to order any provisional measures relating to facts which are the subject of the criminal action so long as

58. Judgment of 16 December 1983, Trib. gr. inst. de Caen, 1984 G.P. I, at 148, note A. Damien.

59. Judgment of 20 January 1981, Cass. com., 1981 G.P., I, Nos. 147, 148, obs. Bertin; 1981 REV. TRIM. DR. CIV. 679, obs. Normand; A. Benabent and J.C. Dubarry, *Tribunaux de Commerce et Arbitrage*, 1981 REV. TRIM. DR. COM. 729, obs. Dubarry et Bénébent.

60. Judgment of 1 March 1983, Cass. com., 2-4 October 1983 G.P. II, at 533.

61. *Id.*

62. Judgment of 29 June 1983, Cass. civ. 3e., 1984 G.P. I, at 12.

the existence of the obligation is not subject to serious doubt.

This new provision has proven most useful in automobile accident cases. It often allows the victim of an accident to avoid waiting for the outcome of a criminal action brought against the defendant before receiving an urgently needed provisional payment.

In a Supreme Court case a father and three minor children were injured and in a *référé* proceeding they secured provisional payments. The defendant argued that since there was a criminal investigation underway and he benefitted from a presumption of innocence, the Supreme Court should reverse the lower court's decision. The Supreme Court refused on the basis that the lower court had discretion to weigh the factual elements and held that in any case since such a decision did not have a binding effect (*étant dépourvu au principal de l'autorité de la chose jugée*), it is not a decision on the merits.⁶³

In a second case, it was held that the *référé* judge retained jurisdiction regardless of how far the criminal procedure progressed, even though the judge sitting in the criminal matter had ordered an expert's opinion on the state of health of the victim and ordered an initial provisional payment. Thus no other conditions limiting the *référé* judge's power were imposed by the Supreme Court.⁶⁴

(c) *Référé* Injunction

In the same spirit as in the case of an obligation of a party which is not subject to serious doubt, the second sub-paragraph of Article 809 of the New Code of Civil Procedure provides that a *référé* judge "can order the execution of an obligation even if it requires specific performance" (*obligation de faire*). Failure to abide by the court judgment ordering the execution of an obligation may result in a monetary penalty (*astreinte*) as provided in Article 491 of the New Code of Civil Procedure.

A specific rule relating to injunctions is found in Decree No. 89- 209 of 4 March 1988 relating to procedure before the Tribunal d'Instance where disputes for small claims are resolved (which is discussed in II 4 below). This is an important power given to the

63. Judgment of 17 January 1990, Cass. civ. 2e, No. 12, at 6-7.

64. Judgment of 16 May 1990, Cass. civ. 2e, No. 106, at 54.

référé judge because he may irreversibly order execution of an obligation.

II. SPECIAL REFERE PROCEEDINGS

In addition to the general *référé* procedures examined in Section I above, the legislator has expressly provided in various laws for the intervention of the *référé* judge in specific types of cases. Such cases have included difficulties in executing judgments where the President of the *Tribunal de Grande Instance* was authorized to act in accordance with Article 811; where he is authorized to order the retraction of ex parte orders (*ordonnances sur requêtes*) under the second sub-paragraph in Article 496 and Article 497; or the cancellation of a contract where reference in the contract explicitly authorizes the *référé* judge to order cancellation under certain circumstances. In this case, the *référé* judge is given jurisdiction to decide the dispute by agreement of the parties to the contract (*clause résolutoire*).

Other texts provide for the intervention of the *référé* judge in domains as varied as intellectual property, sales of going businesses (*vente de fonds de commerce*), organizing arbitration procedures or even in case of individual labor law conflicts.

After discussing a certain number of examples of special *référé* procedures which are common in business,⁶⁵ we shall give particular attention to competition law because of the great importance of the *référé* judge's role in this area.

A. *Tribunal de Grande Instance - Difficulties in Executing Judgments - The Enforcement Judge*

The term *référé* originated in the context of problems of execution of judgments; problems in executing judgments were "referred to" (*référé à*) the *référé* judge.

The judge of the *Tribunal de Grande Instance* had the power, under Article 811, to grant orders enabling parties to overcome difficulties in executing any court judgments whether its own judgments or those of another court. Under this Article the judge was

65. In addition to problems that arise in business, the matrimonial affairs judge, who intervenes in divorces and separations, is given the function of a *référé* judge by Article 1074 of the New Code of Civil Procedure.

also given the power to resolve difficulties encountered with administrative or other executory documents (*titres exécutoires*) signed before a notary having an executory effect like judgments. In cases falling under this Article, even if there was no urgency and a substantive question involved, the reference judge had the power to issue an order relating to the enforcement of a judgment. The most common use of the powers granted in Article 811 was to allow more time (*délai de grace*, authorized by Article 1244 of the Civil Code) prior to enforcement of a judgment.

The law of 9 July 1991 and the Decree No. 92- 755 of 31 July 1992 reforming the rules relating to the enforcement of judgments abrogated Article 811 and gave this power of the *référé* judge to a new judge — the “enforcement judge” (*juge d'exécution*) — who is the President of the *Tribunal de Grande Instance* or his delegate. These changes became effective as of January 1, 1993.⁶⁶

Thus, the legislator has taken the powers of a *référé* judge and transferred them to another more specialized judge. A description of these new rules is beyond the scope of this study but it is significant to note that the enforcement judge acts like a special *référé* judge in facilitating the enforcement of judgments by issuing court orders, in reviewing situations prior to action being taken, and in making enforcement more efficient while at the same time moderating the excessive zeal of creditors in executing their judgments.

B. Retraction of Ex Parte Orders (Ordonnances sur Requête)

A party to an *ex parte* proceeding, without notice to the defendant, can have a bailiff designated:

- to record certain facts when there is concern that documents will be destroyed,
- to investigate certain conduct such as adulterous conduct in a divorce proceeding.

A judge may also issue an *ex- parte* order by:

- appointing an escrow agent for property likely to disappear,
- appointing an administrator for a company when an *ex parte* proceeding will avoid prejudicial action by the other party.

66. See Boitelle Coussau, *The Reform of Civil Execution Procedures*, 1992 G.P. Doctrine 5; H. Croze, 1992 J.C.P. I, 3585.

Under Article 496, the judge ordering such measures on an *ex parte* basis with no notice to the defendant may be requested to review such order by any interested party. This review takes the form of a *référé* procedure. At the time of such review, both parties are present to argue the questions involved.

C. Verification of Government Contracts, Termination of Contracts and Enforcement of Remedies

Another even more striking example of the tendency to refer matters to a *référé* judge can be seen in the authorization given to parties to a contract to have the administrative judge examine the circumstances of acceptance of a bid on a public contract to insure that the publicity and competitive aspect is fair and not corrupt. One author has referred to this new procedure as a "pre-contractual *référé*."⁶⁷

In leases or other periodic contracts (*contrats successifs*), a clause is often included allowing termination upon notice of failure to pay the rent and a decision by a reference judge that the termination clause should take effect. This is consistent with the general rule in French law that a French court should rule on whether there is a breach of contract before the complaining party can terminate the contract unilaterally.⁶⁸

Article 25 of the Decree of 30 September 1953 relating to commercial leases is the subject of many judicial decisions. This law provides that any provision in a lease relating to automatic termination after a failure to perform an obligation in the lease is effective one month after service of notice by a *huissier* (*commandement*) if the failure of performance has not been remedied. After the one month notice period, the lessor claiming termination of the lease may apply to the *référé* judge to make a judicial decision that termination is justified. The *référé* judge can approve the termination under such a clause and order expulsion of the lessee.⁶⁹

67. Article 50, Chapter VI Dispositions Relating to Public Service and Government Contracts, Law No. 93-122 January 29, 1993 relating to the Prevention of Corruption and Transparence in Business and Public Procedures, J.O. 30 January 1993, at 1593; J. Hugo-Martin, Corruption et Discrimination, *La Lettre des Juristes d'Affaires*, 15 February 1993, No. 157.

68. C. CIV. art. 1184.

69. On this issue see P.H. Brault and J.D. Barbier, *Le Nouveau Statut des Baux Commerciaux*, Jan. 1992 G.P. See also the authoritative book written by J.L. AUBERT, *GESTION DE L'IMMEUBLE*, (Dalloz, 1992).

In a lease purchase contract or one providing for payments on the installment plan where payments have not been made as agreed, the reference judge may order the restitution of the property to the lessor (seller).

D. Tribunal d'Instance - Injunctions for the Protection of Consumers

Articles 848 and 849 of the New Code of Civil Procedure, which set forth the jurisdiction of the *référé* judge in the *Tribunal d'Instance*, do not require further comment because the rules set forth are almost identical to those applicable to the *Tribunal de Grande Instance* and the Commercial Court.

However, Article 8 of the Law 78- 22 of 10 January 1978⁷⁰ relating to information and the protection of the consumer involving certain credit operations ("Scrivner Laws") provides that:

The execution of a contract obligation may be suspended by order of the *référé* judge in accordance with the conditions provided in Article 1244 of the Civil Code, particularly where an employment contract has recently been terminated.

This competence of the *référé* judge is based upon his exclusive jurisdiction over disputes between consumers and lenders provided for in the Law 78- 22 of 10 January 1978.

The Decree 88- 209 of 4 March 1988 (Articles 1425- 1 to 1425- 5 of the New Code of Civil Procedure) introduced into the law an injunction procedure in the *Tribunal d'Instance* in the district of the residence of the defendant or where an obligation is to be performed to require the specific performance of contractual obligations (*obligation de faire*). This court has jurisdiction if the dispute relates to a contract signed between two persons who are not both businessmen (*commerçants*) if the value of the performance does not exceed 30,000 FF, the limit of the jurisdiction of the *Tribunal d'Instance*. If the value of the claim is 13,000 FF or less no appeal is allowed.⁷¹

70. Since amended by Article 13, Law No. 89-1010 of 31 December 1989, Code de Commerce [C. COM], at 1483 (Dalloz 1992).

71. Article R 321-1 Code d'Organisation Judiciaire, at 738 (Dalloz 1992).

*E. Other Référé Proceedings***1. Examples of Legal Texts Specifically Delegating Matters to the Référé Judge**

Examples of specific delegation of matters to the *référé* judge include Articles L 332-2 and L 776 relating to trademarks and Articles L 615.3 and L 716.6 relating to patents of the Code of Intellectual Property Law. The latter text authorizes the judge to stop action which constitutes infringement or to condition the continuation of such action upon posting a bond. However, this action may only be brought if the action on the merits appears to be well-founded (*sérieuse*) and begins shortly after the allegedly infringing action started. *Ex parte* orders to seize infringing products can be set aside by a *référé* judge, and he may authorize continuance of a public performance which is alleged to violate the copyright laws.⁷²

Another example occurs in sales of businesses under Article 19 of the Law of 29 June 1935⁷³ which provides that the third party holding the acquisition price should distribute it within three months from the date of the sales contract between the purchaser of the business and the creditors. In case of dispute, either party may petition the *référé* judge (the President of the *Tribunal de Commerce*) who may appoint a special escrow agent (*séquestre répartiteur*) to divide the proceeds.

The law of 31 December 1975 relating to undivided property rights in decedent estates (*indivision*) provides, in accordance with the terms of Article 815- 6 of the Civil Code, that the *référé* judge may prescribe or authorize any urgent measures required in favor of persons in indivision as a matter of common interest.⁷⁴ Also, in case of urgency, the President of the *Tribunal de Grande Instance*, acting as a *référé* judge, may proceed in accordance with Articles 1873- 5 and 1873- 10 of the Civil Code. He may place a manager of the undivided property appointed by the co-property owners when the rights of the co-owners are placed in peril. In all cases, even without an agreement, the *référé* judge has the power to determine his remuneration.⁷⁵

72. P. Estoup, *supra* note 1, at 119. Code Propriété Intellectuelle, arts. L 332-2, L 615-3 and L 716-6 (Cedat ed., 1993).

73. C. COM. at 759.

74. C. CIV. art. 815-6.

75. C. PR. CIV. arts. 1873-75, 1873-10.

2. Mediation and Conciliation and the *Référé* Judge

The *référé* judge also plays a role in conciliation and mediation. According to Article 21 of the New Code of Civil Procedure it is the mission of the judge to conciliate the parties. In several cases brought before a *référé* judge, he has referred them to a mediator to help solve a dispute. The appellate court approved the designation of a mediator to facilitate an agreement between representatives of movie houses and a television company. In a dispute between a solitary sailor of the oceans and his sponsor who was to finance the trip, the court imposed negotiation between the parties via the mediator appointed by the judge.⁷⁶

3. Arbitration and the *référé* judge

In recent years arbitration has been utilized frequently for dispute resolution by international businesses. The 1981 reform of the New Code of Civil Procedure (Articles 1442 to 1491 and 1492 to 1507 relating to French and international arbitration rules) grant the *référé* judge an important supporting role in facilitating French and international arbitration proceedings. When the *référé* judge is called upon as an "auxiliary" to an arbitration proceeding he renders a decision which is not provisional as in the usual *référé* procedure. Such judgments are often made in the following areas: the appointment of arbitrators (*challenges*) (Article 1444- 1463), the designation of a third arbitrator (Article 1445) or extending the time limits for the appointment of arbitrators (Sub- paragraph 2 of Article 1456). If the arbitration clause is found to be manifestly null and void, the *référé* judge can so rule.⁷⁷

(a) Provisional Measures

A *référé* judge in a contractual dispute subject to an ICC arbitration clause may order provisional measures or appoint an expert as provided in Article 145 in order to conserve proof, even after the

76. Judgment of 17 Dec. 1978, Cour d' Appel, 1988 G.P. I, at 21; Judgment of 17 Nov. 1987, Trib. gr. inst. de Paris, 1988 D. Jur. 225-226; Judgment of 16 Nov. 1988 Trib. gran. inst. 1989 G.P. at 14-16, note Fourgeau.

77. This section is based upon X. Tandeu de Marsac, *Le référé français et l'arbitrage international*, 1984 G.P. II Doct., 375. See also Ph. Bertin, *Le Juge des Référés et le Nouvel Arbitrage*, 1980 G.P. Doctrine, 520; M. DE BOISSESON, P. BELLET, *LE DROIT FRANCAIS DE L' ARBITRAGE* (1990); J. Robert *Arbitrage Civil et Commercial* (Dalloz, 5th ed., 1983).

arbitration has begun.⁷⁸ The only exception to this rule based on Article 14 and 15 of the Civil Code is when an expertise procedure relates to real estate located abroad.⁷⁹ The expert's mission should not include "giving his opinion on liability" nor calculating damages which interferes with the functions of the arbitrator.

In addition, the arbitrator may not consider himself bound by the facts found by the expert since the arbitrator did not name the expert and may feel the expert is usurping his own fact finding powers.⁸⁰ There is also the problem in an international arbitration, that the intervention of a French court may seem improper, where one of the parties is French, because it could be seen as giving unfair advantage to the French party. The party requesting the intervention of a French court may also be motivated by dilatory purposes. For one or more of these reasons, the arbitrator may rule that the result of the expertise is not binding upon the objecting party. A French *référé* judge, particularly in an international arbitration, should take the above considerations into account.

(b) Urgency

The existence of urgency is an additional justification for a *référé* proceeding where there is an arbitration clause, but for the reasons expressed above, the *référé* judge should be careful not to upset the equilibrium of the arbitration, particularly where the arbitrator may be authorized to name an expert.

(c) Imminent Risk of Damage

In cases where there is an imminent risk of damage, the *référé* judge may act in accordance with Article 809 of the New Code of Civil Procedure if the circumstances are clear. This occurred in a case in 1982 where the *référé* judge found fraudulent and abusive a request by the Bank of Tehran to pay a counter guaranty based on instructions by the Iranian Navy. In another case where fraud was not obvious, courts refused to enjoin payment by the counter guaranteeing bank or order other remedies.⁸¹

78. ICC Arbitration Rules 8-5.

79. See Tandeau de Marsac Page 376, citing Judgment of 6 January 1841, Siret 1941.1.24 (Cour de Cassation). Judgment of 19 April 1859 (Siret 1959.1.411).

80. See Tandeau de Marsac, *supra* note 77, at 378.

81. Judgment of 12 February 1982, Trib. com de Paris, No. 16 unpublished; *But see* Judgment of 5 May 1982, Cour d' Appel de Paris, 1982 D.S. Jur. I, 497; Judgment of 25

(d) Provisional Payments

The case law is divided on the issue of whether a provisional payment should be granted in a contract case where there is an arbitration clause. In a 1979 Supreme Court case, such action by the *référé* judge was approved while in a later case in 1984 it was refused. One commentator thought that the result in the first case would have been different if the arbitration procedure had already begun.⁸² Professor Fouchard approves the Supreme Court's requiring urgency in the 1979 case even though urgency is not usually required for a *référé* provision where an arbitration clause has not been agreed to by the parties. However, he agrees with the result in the 1984 case where there was an international arbitration and the Supreme Court ruled that where the arbitration procedure was in progress, even if there was urgency, it would be contrary to the intention of the parties who wished to resolve their disputes by arbitration to allow a *référé* provision—a more serious matter than the usual provisional—or conservatory measure envisaged by the ICC rules.⁸³

To order a preliminary payment, the *référé* judge should find that the obligation is not seriously contested. This is a considerable intrusion into the domain of the arbitrator. X. Tandeau de Marsac noted that if the arbitration clause provides for the possibility of provisional remedies by the arbitrator (and excluding interference by a judge), this should eliminate any risk of interference by the *référé* judge.⁸⁴ Nevertheless, one should note that the arbitrator's *référé* procedure measures are less effective since they are not subject to immediate execution like a *référé* judgment of a French court.

February 1982, Cour d'Appel de Paris, 1984 D.S. Jur., 204.

82. See Tandeau de Marsac *supra* note 77, at 378; Judgments of 7 June and 9 July 1979, Cass. civ., 1980 Rev. Arbitrage, No. 1, at 78, note Courteault. Judgment of 13 Feb. 1990, Cass. civ. 1re, 43 D.S. Jur., 593-596. Georges Peyrard, in a note to this case, comments that if an arbitrator has taken jurisdiction, a *référé* judge could not order an attachment, unless it is conservatory or a provisional payment. *Contra* Judgment of 3 July 1979, Cour d'Appel de Paris, 1980 J.C.P. II, No. 19389. Compare Judgment of 14 March 1984, Cass. civ. 1re, 1984 J.C.P. 84 (conclusions by Gulphe), note Synvet; Judgment of 14 Mar. 1984, J.C.P. 20205, Cass. civ. 1re, note Robert; Rev. Trim. Dr. Civ. 208, 1985, Comment by Normand. G. Couchez, *Référé et arbitrage, Essai de Bilan provisoire*, 1986 REV. ARBITRAGE, 155. J. Robert, *Traité d'Arbitrage*, No. 128, (5th ed. Dalloz 1983).

83. See P. Fouchard, *La Coopération du Président du Tribunal de Grande Instance à l'Arbitrage*, 1 REV. ARBITRAGE 5 (1985) on the general subject of cooperation of the arbitrators and the court.

84. See Tandeau de Marsac, *supra* note 77, at 378.

Professor Jarrosson notes that the International Chamber of Commerce recognizes that "certain operations in international commerce require urgent measures which must be taken during the performance of a contract". The Chamber is presently studying a system of *référé* in arbitration which would permit a third party to resolve a dispute in an impartial but provisional manner. Although many arbitrations arise due to failure to resolve technical difficulties in time, Professor Jarrosson believes a judicial *référé* judge rather than an arbitral *référé* is necessarily better equipped to provide a solution.⁸⁵

A contrary view has been expressed with regard to ICSID arbitration on the basis that the arbitration tribunal must have exclusive jurisdiction in order to avoid harmful intervention by a national court in the arbitration proceeding.⁸⁶

(e) Exequatur

Finally, a *référé* judge is sometimes called upon under numerous bilateral agreements which France has with other countries to rule on the exequatur proceedings for enforcement of foreign arbitration awards. His decision is only subject to review by the Supreme Court. He reviews the award to be sure it fulfills the conditions set forth in the applicable treaty.⁸⁷

III. RÉFÉRÉ PROCEDURES IN LABOR, SOCIAL SECURITY, AND AGRICULTURAL COURTS

This section is a short summary of the role of the *référé* judge in labor law matters and other courts.

In cases of collective labor conflicts such as illegal strikes and unlawful occupation of factories, the provisions of Article 808 and 809 of the New Code of Civil Procedure apply to stop manifestly illegal action. Such cases have been held to be within the competence of the President of the *Tribunal de Grande Instance*.⁸⁸ The Law 79-44 of 18 January 1979 and the Decree of 23 November

85. C. JARROSSON, *LA NOTION D'ARBITRAGE*, at 139 (Librairie Générale de Droit et de Jurisprudence, 4e ed. 1987).

86. C. Brower and R. Goodman, *Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity Against Municipal Proceedings*, 6 ICSID REV. No. 2, 431, at 460-61 (Fall 1991) (International Centre for Settlement of Investment Disputes).

87. P. Estoup, *supra* note 1; J. Cl. Dr. International Fasc. 598.

88. Judgment of 6 June 1984, Cour d'Appel de Versailles, 1988 J.C.P. I 14346, at 557.

1979, created a *référé* procedure in the labor court which has exclusive jurisdiction over disputes with individual employees. The provisions of Articles L 515- 1 and R 516- 30 to R 513- 35 of the Labor Code dealing with the Labor Court's *référé* procedures give the *référé* judges in the Labor Courts the same powers that Articles 808 and 809 give to the *référé* judges in the *Tribunal de Grande Instance*.⁸⁹

Special *référé* procedures in the Labor Court differ because the power to make *référé* decisions is given not to a single judge but to the full labor court, i.e. a labor representative and an employer representative. Contrary to the usual *référé* decision, the *bureau de conciliation* or the labor court's provisional decision is a binding decision and should not be reconsidered.

Other rules generally applicable in the New Code of Civil Procedure apply to *référé* judgments in the labor court including provisional execution.⁹⁰

Examples listed by Chief Justice Estoup⁹¹ of types of cases decided in labor court *référé* procedures include:

- reintegrating a wrongfully terminated employee who has special protection as an employee representative if there is no serious question that the termination was illegal and if it is a practical solution and would not lead to violence, a strike, or greatly jeopardize the company in any way;
- requiring an employer to deliver work certificates, pay slips, copies of termination letters and other certificates to which the employee is entitled.
- orders confirming employees' rights against successors in interest of former employers (Article L 122- 12 of the Labor Code);
- decisions relating to disciplinary sanctions;
- disputes relating to housing furnished by employers.

Article R 142- 21- 1 of the Social Security Code provides access to a *référé* judge to resolve Social Security disputes. There is a similar possibility in the rural lease courts (*Tribunaux Paritaires des Baux Ruraux*) in the agricultural sphere of activity.

89. Codes et Lois Editions Techniques, C. Trav. ch. VI, Procédure devant les Conseils de Prud'hommes (1990).

90. *Id.* at art. R 516-33.

91. P. Estoup, *supra* note 1, at 154-158.

IV. THE REFERENCE JUDGE AND UNFAIR COMPETITION

Rapid action is especially necessary in unfair competition matters. Article 1382 of the Civil Code (general tort liability), and the Ordinance No. 86- 1243 of 1 December 1986⁹² relating to free pricing and competition⁹³ are the basic legal texts which guaranty free competition. This latter text in Article 2 establishes a Competition Council (Conseil de la Concurrence) made up of seven judges or former judges, four persons chosen as a result of their competence in business, competition, or consumer protection. This council can order conservatory and other provisional measures which are subject to appeal to the 1st chamber of the Paris Court of Appeals, which specializes in competition matters.⁹⁴

Article 1382 of the Civil Code has been interpreted to prohibit acts of unfair competition such as:

- taking clients from a competing company by denigrating the competitor's products,
- creating confusion between the products, or
- unfairly disorganizing the competing company by a massive hiring of a competitor's employees.⁹⁵

Refusal to sell or to provide services are restrictive practices prohibited by the Ordinance of 1 December 1986 which are not necessarily unfair competition.⁹⁶ In addition, the Conseil de la Concurrence breaks up illegal *ententes* (agreements or understandings) between companies, and it sanctions abusive market domination.⁹⁷

In unfair competition matters, different types of *référé* procedures should be distinguished:

- the *référé* procedures based upon Article 1382,
- *référé* procedures based upon Article 12 of the Ordinance of 1 December 1986,
- *référé concurrence* based on Article 36 of the Ordinance of December 1, 1986.

92. Judgment of 9 December 1986, 1993 Lamy Droit Economique, No. 900, at 270.

93. See DECOCQ ET PEDAMON, L'ORDONNANCE DU 1^{er} DECEMBRE 1986 RELATIVE A LA LIBERTE DES PRIX ET A LA CONCURRENCE (Litec ed., 1987); HOUIN ET PEDAMON, DROIT COMMERCIAL, No. 422-55 (9th ed.).

94. Ordinance of December 1, 1986, art. 2.

95. See Distribution, MEMENTO PRATIQUE FRANCIS LEFEBVRE, No. 700, at 183 (1992-1993) (describing various acts of unfair competition).

96. Ordinance of 1 Dec. 1986, art. 8. See also *supra* note 92.

97. Ordinance of 1 Dec. 1986, art. 8.

A. *The Référé Proceeding to Stop Unfair Competition — Article 1382 of the Civil Code*

Denigrating a competitors' products, trying to pass off products for those of a competitor, or disorganizing a competitor's business by hiring away numerous employees often take on the aspect of a manifestly illegal disturbance (*trouble manifestement illicite*) which should be enjoined immediately, where damage is imminent and can be prevented. The *référé* judge in the Commercial Court is authorized to act under such circumstances.⁹⁸

Recourse to the *juge des référés* can result in an immediate order, sometimes within hours, prohibiting publicity which violates trademark rights of a competitor.⁹⁹ A plaintiff can obtain an injunction prohibiting the sale of products by a competitive business where such sales are contrary to a non-competition agreement. The *référé* judge can order removal of billboard advertising or a presentation of a product which obviously creates confusion in the mind of the public. The judge may also accompany his order by providing for liquidated damages (*astreinte*) for each violation that occurs in the future.¹⁰⁰

Nevertheless, one should note that the *juge des référés* remains, above all, the "judge of the obvious", and will order the above described measures only where there is no serious legal problem which requires the more careful consideration by the judge on the merits.

Even in cases where there is a serious legal problem, which is not within the competence of the *référé* judge, the parties may nevertheless secure an early hearing date to argue the matter in order to secure a rapid decision. This way of proceeding is called the *passerelle* (passage) to an early date for a decision on the merits when the matter is urgent but where a serious dispute exists.¹⁰¹

98. See *supra* note 95, at 199.

99. Judgment of 23 September 1991, 1991 G.P. II, Nos. 293-95, at 576, note J.G.M. (TGI Paris *Référés*).

100. See *supra* note 95, at 194-199 (providing examples of unfair competition).

101. J. VINCENT, S. GUINCHARD, *PROCEDURE CIVILE*, No. 653, at 474 (Dalloz, 22nd ed. 1991).

B. Similar Measures Ordered by the Conseil de la Concurrence in Accordance with Article 12 of the Ordinance of December 1, 1986

The Ordinance of 1 December 1986 abrogated Ordinance No. 45- 1483 of 30 June 1945 which authorized the government to control prices.¹⁰² Articles 7 and 8 of this Ordinance deal with the following anti- competitive practices:

- illegal undertakings (*ententes*)
- abuse of dominant positions
- abuse of a state of economic dependance

The *Conseil de la Concurrence*, an institution created by the Ordinance of 1 December 1986¹⁰³ plays the same role as a *référé* judge in this subject matter. Article 12 of the Ordinance provides:

"The *Conseil de la Concurrence* may, after hearing interested parties, order provisional measures which are requested by the Minister of Economy, by the persons mentioned in the 2nd subparagraph of Article 5 or by companies."

Paragraphs 2 and 3 provide that conservatory measures, may consist in ordering the suspension of anti- competitive measures as well as re- establishing the prior situation when the practice in question "gravely and immediately affects the general economy, the sector concerned, the interests of consumers, or the plaintiff company."

The conservatory measures set forth in the Article 12 of the Ordinance of 1 December 1986 appear to continue to attempt to reach the same objectives as those assigned to the *référé* judge, although the conditions for ordering conservatory measures are more restrictive than the normal rules applicable to *référé* judges.

As the *Avocat Général* J.P. Marchi states in his book on business law in France and Europe:¹⁰⁴

Article 12 subjects protective measures to the courts's finding

102. A. DECOCQ & M. PEDAMON, L'ORDONNANCE DU 1ER DECEMBRE 1986 RELATIVE A LA LIBERTE DES PRIX ET DE LA CONCURRENCE, (Litec ed., 1987).

103. See Idot, *L'Activité du Conseil de la Concurrence en 1990*, 1991 D.S. Chron. 42, at 290.

104. J.P. MARCHI, LE DROIT DES AFFAIRES EN FRANCE ET EN EUROPE, No. 66 (Economica ed., 1992). On this point, compare the 5th Report of Activity of the Conseil de la Concurrence for 1991.

facts which constitute an illegal disturbance (*trouble manifestement illicite*) which should be terminated without delay and which is likely to result in certain and imminent damage which should be prevented awaiting a decision on the merits.¹⁰⁵ The application of the notion of an 'illegal disturbance' by the Paris Court underlines the fact that in this subject matter both the Conseil de la Concurrence and the *référé* judge have the power to stop an illegal disturbance.¹⁰⁶

An example of this situation is a case where S.P.G. (a Bahlsen company) cancelled an exclusive supply contract with Société Flodor SA for potato chips sold under the trademark Top d'Or.¹⁰⁷ The reasons given for the cancellation were that the Flodor company's shareholders had changed and the S.P.G. decided to undertake its own distribution under the trademark "Stackers." The Flodor company filed a complaint with the Conseil de la Concurrence claiming it was a victim of anti-competitive practices. Based on Article 12 of the Ordinance of 1 December 1986, the Flodor company requested conservatory measures, i.e. ordering suspension of the cancellation of the distribution contract and enjoining SPG to continue supplying it with potato ships until the case on the merits was decided.

The Conseil de la Concurrence denied relief in absence of proof that the cancellation of the contract constituted serious damage to the economy, to the business sector involved, to consumers' interests or to the plaintiff. The plaintiff failed to show facts which were clearly illegal nor did it demonstrate that the defendant's actions constituted practices prohibited by Articles 7 and 8 of the Ordinance which should be enjoined without delay to avoid serious and certain damage. The court found potential damages less serious than those the plaintiff alleged because the potato chips constituted only a part of its sales. The court said such measures should be strictly limited with regard to their purpose and duration to what is necessary to remedy an obvious and intolerable interference with free competition.¹⁰⁸

105. Judgment of 19 October 1987, Cour d' Appel de Paris, 1981 G.P. II, at 733, note J.C. Fourgoux. Judgment of 19 May 1988, Cour d' Appel de Paris, 1988 G.P. II, at 583, note J.P. Marchi.

106. Judgment of 30 October 1986, Cour d'Appel de Grenoble, 1987 G.P. II, 738, note J.C. Fourgoux.

107. Judgment of 23 October 1991, Cour d'Appel de Paris, 1992 G.P. I, 62, concl. M. Jobard, note J.P. Marchi.

108. The plaintiffs did not file a case on the merits with the Conseil de la Concurrence.

A different result was reached when a French distributor sued the Scotch Whisky producer Glenlivet after the latter failed to renew its reciprocally exclusive distribution contract and signed a new contract with a competitor of its former agent.¹⁰⁹ Although the court found there was no abusive exploitation of a dependent position because the former French agent could have found another Scotch Whisky to distribute and the market share was only 5% of the pure malt Scotch Whisky market, the reciprocally exclusive agreement allowed the distributor exclusive territorial protection which was an illegal *entente* (undertaking). Therefore, the court held that Glenlivet had an obligation to pay damages it caused to its former distributor.

C. The Référé Procedure Relating to Competition Matters (référé-concurrence) Provided for in Article 36

Article 36 of the Ordinance of 1 December 1986¹¹⁰ permits companies and individuals who are the victims of discriminatory practices to recover damages suffered before the courts of general jurisdiction (usually the *Tribunal de Commerce*). Discriminatory practices include refusal to sell, or the obligation imposed by the

The Cour d'Appel de Paris confirmed the decision of the Conseil de la Concurrence.

109. Judgment of 30 March 1992, 186 No. 564 *Panorama de l'Actualité*, Semaine Juridique No. 19, 7 May 1992. 1992 *Panorama de l'Actualité* 564, at 186, 1992 J.C.P., No. 19.

110. Article 36: "Any manufacturer, distributor (*commerçant*), industrialist, or *artisan* is liable and is required to pay damages when he:

1. With regard to an economic partner grants or obtains special prices, payment terms, conditions of sale or methods of sale or purchase which are discriminatory or in exchange for reciprocal advantages granted by the other party in creating as a result for his partner a competitive disadvantage or advantage.
2. To refuse to satisfy buyers' orders for products or for services when these orders do not have an abnormal character, are made in good faith when the refusal is not justified by the terms of Article 10 (agreements that insure technical progress benefitting consumers).
3. To condition the sale of a product or service on a purchase at the same time of other products or the purchase of a quantity of products or on the acceptance of another service. The action is filed before the civil or commercial court competent by any person having a legal interest, by the District Attorney (*Parquet*), by the Minister of Economy or by the President of the Conseil de Concurrence, when the violation mentioned above relates to a matter within its competence. The Chief Justice of the Court in which the action is filed may, acting as a *référé* judge, enjoin the action in question or order any other provisional measure."

In summary, these violations are:

- discriminatory practices (Article 36 para. 1)
- refusal to sell (Article 36 para. 2)
- sales of one product conditioned upon the sale of another (Article 36 para. 3).

seller on the buyer to accept the purchase of another product in order to secure the product it wishes to purchase. The last subparagraph in this text expressly provides that the *référé* judge has authority to enjoin such violations of the law or to order any other provisional measures.

Until the Supreme Court case of 17 July 1990¹¹¹ the possibility for the *référé* judge to intervene was subject to question as to the time the *référé* judge was competent and when the judge on the merits should take a decision. As a result of the way the Ordinance was drafted, it was uncertain whether intervention of the judge on the merits was necessary before a *référé* procedure could be instituted.

In this case, the Supreme Court decided a *référé* procedure could be instituted before the case on the merits had been filed. This permits the use of this text not only under the conditions of the general law in Articles 872 and 873 of the New Code of Civil Procedure in commercial matters in case of limitations on competition described in Article 36, but also to allow intervention of the *juge des référés* on the basis of this special jurisdiction after the judge on the merits has been requested to rule on the matter. This result is contrary to the usual rule expressed in Article 771 of the New Code of Civil Procedure in which the preparatory judge (*juge de la mise en état*) is substituted for the *référé* judge for the purpose of ordering a provisional payment or other provisional matters, or investigation of the facts. Not only a private party may file a complaint with the *référé* judge but also the District Attorney (*Ministère Public*) or the President of the Conseil de la Concurrence.¹¹²

D. Major Types of Cases

Aside from the usual cases of unfair competition, the most striking instances of *référé* judges' decisions in competition matters appear in the area of selective distribution and refusal to sell,

111. Judgment of 17 July 1990, Cass. com., 1991 D.S. Jur. 33e Cahier, 471, note P. Reynès; 1992 G.P. I, 1060, at 156, note S. Guinchard and T. Moussa.

112. In this regard Judge Canivet notes that this *référé* proceeding is unusual because it can be brought by the government prosecutor without the participation of the party alleged to have been damaged provided there has been an action on the merits filed previously. G. Canivet *L'appréciation Judiciaire de la Distribution Sélective*, CAHIERS DROIT DE L'ENTREPRISE, No. 1, at 6 (1991); But see M. Malaurie, *Le Référé Concurrence*, 1993 J.C.P. I 3637, Doctrine.

as well as certain practices which interfere with exclusive distribution contracts.

1. Selective Distribution

Professor Georges Bonet, in an authoritative article on selective distribution of perfumes stated that "the intervention of the *référé* judge constitutes the *sine qua non* of an effective defense of a distribution system of luxury products".¹¹³ Many decisions, particularly those relating to the sale of perfume where manufacturers have fought unauthorized distributors on the basis of Article 873 of the New Code of Civil Procedure, authorized the *référé* judge to prescribe conservatory measures or order the re-establishment of a prior situation necessary to prevent imminent damage or to stop a manifestly illegal disturbance (*trouble manifestement illicite*).¹¹⁴

One must nevertheless note the difficulty resulting from the conditions required by the Commercial Chamber of the Supreme Court, which, since 1988, has required that the *référé* judge verify that the plaintiff has fulfilled all the conditions necessary to be legally protectable before ordering a conservatory measure against an unauthorized distributor.¹¹⁵

2. Refusal to Sell

The reverse situation occurs when an unauthorized distributor files a lawsuit based upon a manufacturer's unjustified refusal to sell. Judge Guy Canivet of the First Chamber of the Appellate Court of Paris, which deals with competition matters, writes:

According to the special mechanism of the *référé* procedure, the claimant must in practice show that the refusal to sell (or any other restrictive practice which causes damage resulting from provisions in a selective distribution system) creates a dangerous situation or an obviously illegal disturbance (*trouble manifeste-*

113. Bonet, *Distribution Sélective des parfums: Les arrêts de renvoi après Cassation*, 1991 D.S. Jur., 2e Cahier, Ch. 3 at 9; Meeting of 22 May, 1991 *Les Enjeux Economiques, Culturels et Juridiques de la Distribution Sélective*, 1992 G.P. I, doct., at 582.

114. See the case law cited by Professor Bonet in the article cited in *supra* note 113, and, in particular, note the *Estee Lauder* case.

115. *Id.* Compare the commentary of Professor Bonet, the Cour de Cassation case of 16 February 1988 in his article cited *supra* note 113. G. Bonet and J.M. Mousseron, *Donner et Retenir ne Vaut*, Cahiers de Drt. Entr., No. 2, at 12.

ment *illicite*), or one that causes fear of imminent damage.¹¹⁶

3. Exclusive Distribution

In the same way that case law illustrates the intervention of the *référé* judge in selective distribution matters, there have been many important cases concerning exclusive distribution.

An exclusive *concessionnaire* for undertaking services for a municipality in application of Article L.362- 1 and following articles of the Municipal Code (*Code des Communes*) sought to secure an injunction from the *référé* judge prohibiting others from offering services to inhabitants of the town. The government lawyer (*Avocat Général*) Jeol, in his pleadings, provided an excellent analysis of the issues relating to seven such cases before the full assembly of the *Cour de Cassation*.¹¹⁷ In his brief he pointed out that the *référé* judge can order certain measures necessary to protect a "victim of a manifestly illicit disturbance (*trouble*)."

However, finding that the action is illicit is, according to *Avocat Général* Jeol, a major dilemma for the judge, who must decide the issue without delay. This is an extremely difficult situation because if the judge becomes obsessed by the complexity of the case and refuses jurisdiction on this basis, he may be violating the law by refusing to judge a matter submitted to him (*déni de justice*). On the other hand, if he rapidly decides the case with insufficient deliberation, he runs the risk of making an error in applying the law. Finally, if he goes into the matter deeply enough to get elements necessary to make a proper decision, he is moving out of his primary role and acting like a judge deciding the merits of the case.

After reminding the court of the solutions reached in the selective distribution cases, *Avocat Général* Jeol emphasized in his brief that the transposition of the case law in the selective distribution area results in requiring the exclusive distributor to prove to the *référé* judge that his exclusive rights are being violated and that such exclusivity is legally protected.

116. Canivet *supra* note 112. See Reynes, *Référé Commercial et Refus de Vente*, 1991 D.S. 33e Cahier, at 471.

117. Judgment of 25 April 1990, Cour d'Appel de Paris, 1990 G.P. II, at 500, conclusion by M. Jeol, at 503.

V. RÉFÉRÉ PROCEDURES IN THE APPELLATE COURT

A. *General Powers of a Référé Judge in the Appellate Court*

Article 956 of the New Code of Civil Procedure provides that the Chief Justice may act as a *référé* judge in case of urgency in an appellate case and order all necessary measures where there is no serious dispute.

B. *Appellate Court Reversal of a Lower Court's Decision Relating to Immediate Execution*

In accordance with Article 524 of the New Code of Civil Procedure, the Chief Justice of the Appellate Court may reverse a lower court decision relating to immediate execution where it is prohibited by law or where the consequences of immediate execution are obviously excessive. In such case, execution will await a judgment on the merits.

In commercial litigation, lower courts often enter judgments subject to immediate execution even if an appeal is made. In particular, this occurs when the judge wishes to overcome the resistance of a defendant who, in the judge's view, is acting in bad faith and utilizing dilatory court procedures to defer the day he will be forced to fulfill his legal obligations.

The Chief Justice and any *référé* judge often have great difficulty in the use of their discretion because it is not their responsibility to analyze the merits of the case. Chief Justice Estoup furnishes some examples of excessive consequences of immediate execution which justify reversal as follows:¹¹⁸

- where the damage appears out of proportion to the nature and purpose of the litigation. (Such a case might occur where the court allowed attachment and sale of equipment of the company, thus causing the company's bankruptcy when the company had been operating profitably),
- where the immediate payment to a lessee seemed excessive because there were no guarantees that he could repay the amount if the judgment were reversed.

The Chief Justice may also modify the lower court's decision

118. P. Estoup, *supra* note 1, at 178, citing Judgment of 28 May 1976, Cour d'Appel de Douai, 1976 J.C.P., G. IV, 6648, obs. J.A.

and require a guaranty without reversing its decision ordering immediate execution.¹¹⁹

C. Ordering Immediate Execution Where it was Refused by the Lower Court

The New Code of Civil Procedure also authorizes the Chief Justice of the Court of Appeals to order immediate execution, provided there is urgency, and even if it was not specifically requested in, the lower court or if it was requested but refused by, the lower court.¹²⁰

With regard to competition law, in accordance with the terms of the third sub-paragraph of Article 15 of the Ordinance of 1 December 1986, appeals from the Conseil de la Concurrence are subject to immediate execution. Notwithstanding the above, the Chief Justice of the Court of Appeals of Paris, who has exclusive jurisdiction, can nevertheless order a suspension of execution if there are manifestly excessive consequences or if an exceptionally serious situation arises after notification of execution.¹²¹ This restricted possibility of appeal subordinates the suspension of execution to the manifestly excessive character of the measure ordered. This is similar to Article 524, which requires particularly grave facts.

D. Suspension of Immediate Execution of a Decision of the Conseil des Bourses de Valeurs

The Chief Justice of the Appellate Court sitting as a *référé* judge has decided disputes arising from stock market operations.¹²²

Article 5 of the law of 22 January 1988 deals with appeals from decisions of the Conseil des Bourses de Valeurs (CBV), an administrative body which makes decisions on stock market issues.

119. C. PR. CIV. art. 517.

120. C. PR. CIV. art. 525.

121. Judgment of 6 April 1990, Cour d'Appel de Paris, 1990 G.P. II, at 412; C. PR. CIV. art. 957.

122. On this question see J.P. Marchi, *La Compétence de la Cour d'Appel de Paris en Matière de Droit Boursier*, 1991 G.P. II, doctrine, at 786-90; J. Revuz & P. de Fontbressin, *Réflexions sur l'Affaire des Galeries Lafayette: Principes de droit boursier et principes fondamentaux du procès et du droit des obligations*, 1991 G.P., doctrine, at 791-795. See special 15, 17 Dec. 1991 edition of the Gazette du Palais, *Actualités et Perspectives Financières*. See also Ordinance of first President of the Appellate Court of Paris in the Perrier case, Judgment of 26 Feb. 1992, 1992 G.P. II.

Under this provision the Chief Justice of the Court of Appeals may order a suspension of execution of a decision of the CBV when such execution will result in manifestly excessive consequences or if there are new facts presented after the notification of the judgment of exceptional gravity.

The delegate of the Chief Justice of the Appellate Court, Justice Canivet, refused to suspend the execution of such a decision in the case of *Devanlay SA vs. Galeries Lafayette and others*.¹²³ In this case, the CBV ordered the Galeries Lafayette to make a public offer for two thirds of the shares of Nouvelles Galeries Réunies after the CBV refused its request for an exemption. Devanlay who owned over 40% of the shares of NGR and would not have all its shares purchased as it would if the simplified procedure were utilized, brought a *référé* proceeding to suspend the above decision by the CBV. An additional time period was given before the public offer was closed, allowing the minority shareholders to intervene after considering the terms of the court decision on the merits. The court ruled that Devanlay's arguments were without merit and that the CBV decision, which was appealed, did not have clearly excessive consequences.

VI. THE REFERENCE JUDGE IN THE EUROPEAN COURTS AND INTERNATIONAL COURTS

A. Introduction

In other countries of the European Community like in France, the speed with which international business is carried on requires rapid solutions to urgent problems. Professors Christian Philip and Jean-Yves de Capa distinguish universal courts (International Court of Justice) from regional courts (EEC courts and the European Court of Human Rights).¹²⁴ Among the regional courts existing in the world, the European Court of Justice in Luxemburg

123. Judgment of 21 May 1991, 1991 J.C.P., No. 44, at 263, note Forschbach. See J. Revuz et P. de Fontbressin, *supra* note 122; July 1991, Bull. Joly, § 258, at 715, note Viandier.

124. C. PHILIP ET J.Y. DE CARA, LA JURIDICTION INTERNATIONALE PERMANENTE, 13-14 (Pedone ed. 1986), For principles of European law, see J. SCHAPIRA, G. LE TALEC, ET J.B. BLAISE, DROIT EUROPEEN DES AFFAIRES, (Themis ed., 1992); CH. GAVALDA & G. PARLEANI, DROIT COMMUNAUTAIRE DES AFFAIRES, (Litec ed., 1988). For a general description of the Strasbourg Court and European Human Rights, see J. COHEN JONATHAN, LA CONVENTION EUROPEENNE DU DROIT DE L'HOMME (Economica ed., 1989).

(established by the Treaty of Rome), as well as the European Court of Human Rights in Strasburg (established by the European Convention on Human Rights), have made major contributions to the rule of law due to the importance of their decisions. The first court deals primarily with commercial or industrial matters, and the second court deals specifically with human rights and fundamental liberties in the signatory states.

The European Court of Human Rights has very modest specific powers relating to provisional measures by virtue of Article 36 of the internal rules of procedure of the Human Right's Commission and the Court, which provides that "the Commission, or if it is not in session, the President, can propose to the parties any provisional measures which appear desirable in the interest of the parties or the normal continuation of the procedure."¹²⁵

The Court included the following provision in its Article 34 to its rules of procedure:

Until the Court Chamber is constituted, the President of the Court may, at the request of a party, the Commission, the appellant, or any other interested person, propose to the parties the provisional measures which it recommends be adopted. The same possibility exists for the Court Chamber once it is constituted. If it is not in session its President may act.¹²⁶

Although the above texts seem to grant limited powers to the Court, Judge Pescatore, a former Judge of the European Court of Justice, believes the door remains open to further developments relating to provisional measures which the court may order.¹²⁷

The *référé* procedure in the European Commission and the European Court of Human Rights is not identical to the procedure in the French courts because the European Court of Human Rights has jurisdiction over a dispute only after remedies in national courts have been exhausted or when there is no remedy. Although Articles 185 and 186 of the Rome Treaty do not mention "*référé* procedure" the European Court of Justice grants similar powers. According to Judge Pescatore, 150 provisional measures were or-

125. P. Pescatore, *Les Mesures Conservatoires et les Référés*, cited in C. PHILIP et J.Y. DE CARA, *LA JURIDICTION INTERNATIONALE PERMANENTE*, 315, at 321-22 (Pedone Ed. 1986).

126. *Id.* at 321-322.

127. *Id.* at 322.

dered by the European Court of Justice. He predicted the number of such judgments would increase rapidly. Provisional measures usually occurred in cases of international commerce, price regulation, production quotas and competition. Such measures were often related to disputes between commercial companies or with the European administration (the Commission and sometimes the Council). At times, such measures were taken to nullify the action of a member state where that member state has violated the rules.¹²⁸

B. The European Court of Justice and the International Court of Justice

According to Article 185 of the Treaty of Rome an appeal of a decision of the European Court of Justice does not suspend execution. However, under appropriate circumstances, the Court of Justice can order suspension of the execution of a community decision pending the appeal. Furthermore, Article 186 of the Rome Treaty provides, "In matters brought before it, the European Court of Justice may provide for necessary provisional measures."

Article 36 of the Regulation of the Court grants authority to the President of the Court to rule on pleadings which request a suspension of execution provided by Article 186 or to order provisional measures by virtue of Article 186. If a matter is very important, it may be referred to the full court in accordance with Article 85 of the rules of procedure. The judge may order the production of documents or other investigative measures.¹²⁹ Provisional measures will not be ordered by the Court unless a party requests them.¹³⁰

Although the right of defense (*principe contradictoire*) must be respected, the judge need not hear oral arguments. In a case of urgency, the judge may render a decision without having received oral arguments or written pleadings (*conclusions*) of the defense

128. *Id.*, at 318. See also R. Joliet (with the help of V. Bertrand and P. Nihoul), *Protection Juridictionnelle Provisoire et Droit Communautaire*, lecture at the University of Liege, Belgium, on the occasion of a colloquium on "Urgent Procedures," 38 p.p. (14 Mar. 1992); B. Pastor and E.V. Ginderachter, *La Procedure en Référé*, REV. TRIM. DR. EUR., at 561-621 (Oct.-Dec. 1989); G. Borchardt, *The Award of Interim Measures by the European Court of Justice*, 22 COMMON MKT. L. REV. 203, 203-205 (1985).

129. R. Joliet, *supra* note 128, at 6 (referring to the case *Droits Européens*, Case 221/86 Rec. P. 296).

130. Pescatore, *supra* note 125, at 328.

and the decision may be rendered orally.¹³¹ Other rules relating to the *référé* procedure are found in Articles 83 to 90 of the Regulations governing procedure of the European Court of Justice.

We will not deal in this study with the powers of the Commission of the European Communities with regard to provisional measures, because this article focuses primarily on the *référé* judge. The Commission of the European Communities is not a judicial court although it is invested with broad powers, particularly in the field of competition law, to issue directives that promote Community objectives. It is, nevertheless, instructive to analyze the important decision of the European Court of Justice in the *Camera Care* case,¹³² which Mr. Pescatore refers to in his article on conservatory and *référé* measures, because of the Courts' interesting observations regarding the nature of the provisional measures ordered by the Commission.

In that case, the European Court ruled that under Regulation 17 the Commission must ensure that the competition rules are applied. Although provisional measures are not expressly mentioned in the text, such measures have proved necessary before the Commission is in a position to take a decision. The Court commented on this problem by saying the decision of the Commission can be "articulated in successive phases" so that the final decision "can be preceded by all preliminary means which appear necessary".¹³³ However, paragraph 1 of Article 83 of the Regulation of the European Court provides that "provisional measures are not acceptable to the Court unless they arise from litigation before the Court and must refer to this litigation."¹³⁴

With respect to the International Court of Justice, Article 41 of the Statute of the International Court of Justice provides that "The Court has the power to indicate if it believes that circumstances require provisional conservatory measures."¹³⁵

131. *Id.* at 329.

132. Case 792/79R, *Camera Care*, 1980 E.C.R. 119, Common Mkt. Rep. (CCH) 8645, at 7638 (1981).

133. *Id.* at 7644; Pescatore, *supra* note 125, at 324.

134. Two cases have refused a *référé* proceeding for this reason. Judgment of 30 January 1959 *Niederrheinische Hütte* and Judgment of 16 July 1963, *Leroy*, cited in Pescatore, *supra* note 125, at 325.

135. *See supra* note 125, at 319.

C. Common Characteristics of Référés in the EEC Courts and the International Court of Justice

In his article, former President Pierre Pescatore of the European Court of Justice, after having explained the requirement of *subsidiarité* (subsidiary nature) of the *référé* procedure with regard to the dispositions of Article 73 of the regulations of the International Court of Justice, and paragraph 1 Article 83 of the Regulations of the European Court of Justice,¹³⁶ notes that all court decisions rendered by these courts deal with four elements:

- a) Urgency
- b) Imminent Damage
- c) Prima Facie Justification
- d) Balancing the Interests of the parties. Judges often balance the interests of the plaintiff in ordering the measure and the negative effect the measure could have on the interests of the defendant or the public.¹³⁷

1. Urgency

In his discussion of urgency, Judge Pescatore notes that urgency is intimately linked to "damage" which is "imminent", "serious", "irreversible" and "repairable with difficulty".

2. Imminent Damage

He also goes on to criticize the use of the word "damage" which evokes the idea of material damage susceptible of being repaired by payment of a sum of money which would not result in urgency.¹³⁸ He explains that what is really meant was described by the International Court in the Aegean Sea decision as an irreparable damage to the rights which are being litigated, such as an attack on the life or integrity of persons, an expulsion, expropriation, bankruptcy of a business, or modification of national borders. Thus, the key element is whether there is an irreversible prejudice which cannot be adequately compensated by money damages. In other words: can the *status quo ante* be re-established or will a

136. *Id.* at 325.

137. *Id.* at 337.

138. *Id.* at 339.

restitutio in integrum remain possible?¹³⁹

3. *Prima Facie* Justification

The *prima facie* element is found in all the decisions. Therefore, it is important to analyze its meaning and purpose. According to Judge Pescatore, the regulation of the procedure of the European Court characterizes exactly what is meant when it requires that the parties must prove to the judge that the measure sought is justified.¹⁴⁰ This is more satisfactory than trying to guess the outcome of the litigation on the merits—an effort often necessary to determine whether a *prima facie* case has been made. Thus, the Court determines what measures are necessary to keep open the possible solutions which may be reached in the judgment on the merits. Professor Joliet disagrees and states that the legal arguments should be considered well-founded before a provisional measure is ordered.¹⁴¹

4. Balancing the Interests of the Parties

Case law of the European Court of Justice illustrates this procedure, which is inspired by the “proportionality principle”. For example, where a *référé* judge recognized the urgent need to build a dam in Ethiopia, the Court refused to block funds of the European Development Fund, despite doubts about the regularity of the contract awarded. Blocking funds would have caused serious consequences to all parties concerned, and it would have been out of proportion to the doubts raised by the plaintiffs about the awarding of contracts.¹⁴²

D. Types of Provisional Decisions

International Courts, including the European Court of Justice, have ordered interim measures through various means:

139. *Id.*, citing Christine Gray, *Interim Measures of Protection in the European Court*, 1979 EUR L. REV. at 80.

140. Pescatore, *Supra* note 125, at 339-340.

141. R. Joliet, *supra* 128, at 20, citing R. CHAPUS, *DROIT DU CONTENTIEUX ADMINISTRATIF*, 808-09 (Montchristien, 2ème ed., Paris 1990).

142. Pescatore, *supra* note 125, at 341. See Case 118/83R, *CMC Cooperativa Muratori e Cementisti and Others v. Commission of the European Communities*, 1983 E.C.R. 2583.

1. Injunctions

Injunctions in the European Court of Justice are limited to enjoining violations of member states who have been ordered to cease certain actions.¹⁴³

2. Suspension of Execution of Judgments

Suspensions of decisions authorized by Article 185 of the Rome Treaty have been taken with respect to business enterprises. For example, in the *GEMA* case, a requirement to modify a company's articles of incorporation and by-laws (*statuts*) was suspended.¹⁴⁴

3. Action by Agreement of the Parties

Sometimes the *référé* judge encourages the parties to reach an agreement which then takes the form of a court decree. In this respect, the *référé* judge acts as a mediator in using his power to make decisions. In the *GEMA* case cited above, the *référé* judge incorporated agreements of the parties and ruled on the one issue where no agreement was reached.

4. Guaranties and Agreements

To balance the interests of the parties, guaranties or agreements are obtained from the beneficiary of a provisional measure. In this respect, Article 85 paragraph 2 of the rules of procedure of the European Court authorizes the Court to require a guaranty. The Court may also require certain agreements from the party entitled to benefit from sanctions (provided in an agreement *entente*) if the court grants provisional relief relating to the *entente*.

143. Pescatore, *supra* note 125, at 344.

144. Case 45/71 R, *GEMA v. Commission*, 18 August 1971, 1971 E.C.R. 791. Other decisions are: Case 113/77R and 113/77R-Int., *NTN Toyo Bearing v. Council*, 1977 E.C.R. 1721 (suspension of anti-dumping tax); Case 218/78, *Van Landewyck* 1978 E.C.R. 211 (risk of elimination of certain operators in the market if immediate execution occurred); Case 260/82R, *Sigaren-Winkeliers v. Commission*, 1982 E.C.R. 4371 (irreversible effect of a decision on the structure of a market).

5. Effectiveness of Provisional Orders in Various International Jurisdictions

The effect of orders in the European Court is binding. For the International Court of Justice, the English version of Article 41 of the *Statut* of the Court "ought to be taken" is less imperative than the French version. This has led to some debate over the binding nature of conservatory measures taken by the ICJ. In practice, none of the *référé* judges' rulings were respected by the nations involved in International Court of Justice proceedings (with the possible exception of the border litigation between Burkino- Faso and Mali). This stems from the fact that many nations refuse to appear in litigation. They claim the Court lacks jurisdiction, as well as power to enforce its judgments.¹⁴⁵

In the International Court of Human Rights, provisional measures are suggestions of the court and are not binding on the parties.¹⁴⁶ Two cases in the European Court of Justice, with respect to a prejudicial question under Article 177 of the Treaty of Rome, have held that the national court rather than the European court has the power and duty to enter provisional orders.¹⁴⁷

The first case, *Factortame*, dealt with a U.K. vessel registration law which effectively prohibited Spanish companies from purchasing U.K. vessels in order to gain British fishing quotas. The European Court held that the national court has the power to order provisional measures prior to the European Court's determination of questions of community law submitted to it under with Article 177 of the Treaty of Rome.¹⁴⁸

In a second case, *Zuckerfabrik*, a community regulation which had been incorporated into a German administrative act was attacked. The European Court referred the case to the German court for a provisional decision with four conditions laid down by the European court.¹⁴⁹

145. See *supra* note 125, at 351.

146. *Id.*, at 350.

147. R. Joliet, *supra* note 128, at 27-38.

148. Case 213/89, ex parte *Factortame Ltd.*, 1990 E.C.R. 2433, at 2473-74, 3 Common Mkt. Rep., 29 (1989).

149. Cases 143/88, 92/89 *Zuckerfabrik Suderdithmarschen AG v. Hauptzollamt Itzehoe*, et al, 1991 E.C.R. 534.

VII. THE RÉFÉRÉ JUDGE AND EUROPEAN COMMUNITY LAW

In section VI of this article, we examined the European Court of Justice's power to order provisional measures authorized by Article 185 of the Treaty of Rome, or to suspend execution of a decision which is subject to appeal (in accordance with Article 186) when a decision of the Commission creates a risk of serious and irreparable damage. This section will examine the application of Community law by the French *référé* judge.

As with any French Court, the *référé* judge must respect the supremacy of Community law and submit to the "direct effect" rule, which was enunciated by the Court of Justice in 1963 in the important *Van Gend en Loos* decision.¹⁵⁰ Under this rule, and taking in account the supremacy of Community law, reaffirmed by the European Court in the case of *Costa* of 15 July 1964,¹⁵¹ the Court stated:

The incorporation of provisions which come from community sources into the law of each member country and more generally the spirit of the Treaty have as a corollary the impossibility for the member states to enact subsequent unilateral measures which would be invalid; the executory force of Community law shall not vary from state to state in accordance with the later state law.¹⁵²

The supremacy of Community law over French laws subsequent to the Treaty of Rome was recognized by the Cour de Cassation in its decision, *Jacques Vabre* of 24 May 1975,¹⁵³ and more recently by important decisions of the Conseil d'Etat.¹⁵⁴ *Référé* judges are required to follow these rules. The difficulty, however, is that the *référé* judge must determine whether the European law being invoked is applicable, if it has a direct effect, and whether there is a manifestly illicit disturbance (*trouble manifestement illicite*) of European law.

If he is not sufficiently certain that a European law applies to

150. Case 26/62, *Van Gend en Loos v. Nederlandse Administratie*, 1963 E.C.R. 1; See also J. BOULOIS ET R.M. CHEVALLIER, *GRANDS ARRETS DE LA COUR DE JUSTICE DES COMMUNAUTES EUROPEENNES* (Dalloz, 1re Tome, 3rd ed, 1983).

151. Case 6/64 *Costa v. ENEL*, 1964 E.C.J. 585, J. Boulois and R.M. Chevallier, *supra* note 150, at 168.

152. *Id.* at 169.

153. Judgment of 24 May 1975, Cass. ch. mix., 1975 D.S. Jur. 497.

154. Judgment of 3 Feb. 1989, Conseil d'Etat, 1989 REV. TRIM. DRT. EUR. at 509. Judgment of 20 Oct. 1989, Conseil d'Etat, 771 REV. TRIM. DRT. EUR., note Isaac (1989).

the case, the *référé* judge may apply Article 177 of the Treaty of Rome in order to present a prejudicial question to the European court. Article 177 provides that the reference of a question is based on cooperation between the Community judge and the national judge for the purpose of ensuring unity in interpretation and application of Community law in all the member states. It is left to the national judges to use this procedure when questions are presented. Solutions may be conditioned on the interpretation of Community directives or regulations.

Although the parties are not authorized to request an interpretation from the European Court of Justice, they can request the national judge to take advantage of the Article 177 procedure. The following cases demonstrate how the French *référé* judges have reacted to this possibility.

A *référé* judge in Fontainebleau was asked to enforce French minimum price regulations relating to gasoline sold by a station and to order Sodivar, a supermarket chain (Leclerc), to stop selling at lower prices or be subject to penalties (*astreinte*) 3,000 FF per day.¹⁵⁵ The *référé* judge held that he was competent to deal with the matter; nonetheless, since Sodivar claimed the French regulation violated Article 85 of the Treaty of Rome, he referred the matter to the European Court of Justice in accordance with Article 177 of the Treaty of Rome.¹⁵⁶

The Appellate Court reversed the lower court's decision. Although it stated that the *référé* judge could in principle follow EEC rules and ignore contrary French rules, a *référé* judge was not competent if the matter needed to be referred to the European Court of Justice for clarification in accordance with Article 177 of the Treaty of Rome. The Appellate Court held that this question should be decided by the judge hearing the matter on the merits.¹⁵⁷ However, the court ruled that there was no proof that the French rules were clearly contrary to EEC rules, and it ordered Sodivar to refrain from selling at prices lower than those prescribed by French minimum price legislation. Furthermore, the Appellate Court stated that, unless it was shown that French rules were

155. Judgment of 11 July 1983, Trib. gr. inst. de Fontainebleau, 1984 G.P. I, at 47. See also Ph. Bertin, *Le Juge des Référés et le Droit Communautaire*, 1984 G.P. I, doct. at 48. See also Judgment of 12 July 1983, Cour d'Appel de Paris, 1983 G.P. II, sommaire at 343.

156. Judgment of 11 July 1983, *supra* note 155, at 48.

157. Judgment of 2 November 1983, Cour d'Appel de Paris (14ème Ch.), 1984 G.P. I, Nos. 25, 26, sommaire at 47.

against EEC rules, the *référé* judge has authority to stop an obviously illegal disturbance of a competitor failing to abide by French legislation.¹⁵⁸

The Court of Appeals of Paris reached a different result in the case where Continent Supermarket was concerned.¹⁵⁹ In this case, the court ruled that it was not manifestly illicit to sell at a price lower than that prescribed by French rules because the EEC question had arisen with respect to Article 177 in a number of cases, and therefore a *référé* procedure was inappropriate. This result left the supermarket free to sell at lower prices.

Such contradictory decisions in other French courts continued until the French government changed the minimum price rules. Another case involved video cassettes which were distributed contrary to French law at the same time the films were appearing at movie theaters.¹⁶⁰ Again, it was alleged that the French law was contrary to EEC rules. In this case, however, the *référé* judge refused to rule on the matter. He reasoned that although a *référé* judge has the duty to apply EEC rules directly in case of conflict, such conflict should be resolved by judges dealing with the merits of the case. In the interim, until the trial on the merits, the *référé* judge should order provisional measures necessary to prevent imminent damage or illegal conduct (*voie de fait*).¹⁶¹ The judge decided to order the matter to be heard on the merits at an early date (this procedure is known as the "*Passerelle*" System) to ensure an early decision was secured.¹⁶²

In some cases where the compatibility of French law with Community law is questioned, the *référé* judges have ordered conservative measures without presenting a prejudicial question on the theory that French law remains applicable when Community law is not clearly applicable.¹⁶³ On the other hand, some courts declared themselves incompetent to rule on such a matter based on the theory that there is no clearly illegal trouble when there is doubt about a law relating to which the trouble arises when it re-

158. *Id.* at 49.

159. Judgment of 4 July 1984, Cour d'Appel de Paris (1ère Chambre), 1984 G.P. II, Nos. 298, 299, at 658.

160. Judgment of 15 November 1983, Trib. gr. inst., 1984 G.P. I, Jurisp. at 49.

161. *Id.* at 50.

162. *Id.* at 51.

163. See *supra*, note 157, Judgment of 31 January 1986, 1986 G.P. I, II somm. at 445; Judgment of 5 January 1989, Trib. gr. inst. de Nantes, 1989 BDRA, at 7.

lates to Community law.¹⁶⁴

Professor Parleani has described the difficulties of the *référé* judge as follows:

The invocation of Community law renders more difficult the task of the *référé* judge. He must in such a case, with the speed which is expected of him, make a decision based on rules which may not be familiar to him. He is nevertheless a Community judge as is any national court judge and should give full effect to Community law in exercising his powers.¹⁶⁵

VIII. CONCLUSION

This article has presented a panorama of the major areas where the *référé* procedure has been used in French courts, the types of interim measures sought and the reasons adopted by the Court in entering *référé* judgments. It has outlined similar proceedings in the European Court and other international courts for comparative purposes. The reasoning in support of European decisions is enlightening because it is often different, or at least expressed in different terms, than that used in the French courts. In this respect, consider the detailed and highly developed provisions in the French New Code of Civil Procedure relating to the *référé* procedure in Articles 484- 499, 808 and 809, and compare them to the reasoning in the *Camera Care* case, which justified the broadest power to enact interim or provisional measures even when none were specifically provided.¹⁶⁶ The Court reasoned in *Camera* that the final decision "can be preceded by all preliminary means which appear necessary." This general theory could be said to underly all *référé* judgments; the judgments are necessary to safeguard a final decision or, in many instances, to avoid the necessity of a final decision.

164. Judgment of 12 July 1983, Trib. gr. inst. de Valence, 1983 G.P. II, at 342.; Judgment of 2 August 1983, Trib. gr. inst. de Tours, 1983 G.P. II, sommaire at 342; Judgment of 4 August 1983, Trib. gr. inst. de Sain-Quentin, 1983 G.P. at 480.

165. G. Parleani, *Le Juge des Référés face au Droit Communautaire*, Dalloz 1990 D.S. Jur. Chron. XII (11e Cahier), at 65. On this same question, compare Orsini, *Le Juge des Référés et l'Application des Normes Communautaires*, 1985 G.P. II, doctrine, at 395; Ph. Bertin, *Le Juge des Référés et le Droit Communautaire*, 1984 G.P. I, Nos. 25, 26, doctrine, 48; Laurent, *La Fonction Communautaire du Juge Judiciaire Français des Référés*, 1984 G.P. II, Doct. at 544; Ph. Laurent, *Le Juge National Juge Communautaire des Référés*, 1992 G.P. II, Doct. at 227.

166. See *supra* note 135.

The development of the *référé* procedure evidences the vitality of the French judiciary and its ability to intervene in enforcing the rule of law in France. Historically, the executive and administrative branch of the government dominated, particularly since the Constitution of 1958, as well as during periods of the French Monarchy. The increased use of the *référé* procedure tends to reinforce the power of the French judiciary, which is not considered to be an independent branch of the government but part of the administration—an “authority” under the protection of the President.¹⁶⁷ Thus, the development of the *référé* procedure is consistent with the growing acceptance that the nation should be subject to the rule of law (*Etat de Droit*) enforced by the judiciary rather than by the executive or administrative branch of the government.

A. Substantial Growth in the 1980's and 90's of the Référé Procedure

The first conclusion to be drawn is that the use of the *référé* procedure has increased in France and in the European Court during the last twenty years in an impressive fashion. The French reform which occurred in the seventies set the stage for this development by adding *référé* procedure provisions to the New Code of Civil Procedure, which were further reinforced by Decrees 85- 1330 of 17 December 1985 (provisional payments) and 87- 434 of 17 June 1987, authorizing *référé* decisions even where there was a “serious dispute.”

The growth of this procedure and the reinforcement through legislative texts can also be explained by the fact that crowded courts motivate plaintiffs who need quick relief to turn toward the *référé* procedure in order to secure provisional or interim relief. Although in theory this relief is only provisional, in many cases it leads more quickly to settlement by indicating which way the wind is blowing. As Judge Pescatore noted, it sends a “signal” to the parties relating to the likely outcome of the litigation on the merits.¹⁶⁸ In addition, once there is a provisional decision, a lawsuit on the merits is seldom filed. Thus, in practice, the *référé* procedure is often a short cut to a definitive solution of a dispute.

167. For a study of the relationship of law and lawyers both in France and the U.S., see L. COHEN-TANUGI, *LE DROIT SANS L'ETAT, SUR LA DEMOCRATIE EN FRANCE ET EN AMERIQUE* (PUF ed., 1985).

168. Pescatore, *supra* note 128, at 326.

Not only has the legislature enacted new laws law that refer more dispute settlements to the *référé* judge, but at times it has substituted other institutions in place of the *référé* judge to apply rules like those used by the *référé* judge in certain areas of the law, e.g., the Enforcement Judge (See II.1 above), the *Conseil de la Concurrence* (See IV above) and more recently, the administrative courts which have used the so-called "pre-contractual" procedure to ensure honesty in awarding public contracts.¹⁶⁹ These developments evidence that the procedure has secured the support of both public opinion and the legislators in lieu of traditional litigation.

B. Special Areas of Growth

The second conclusion is that the largest volume of *référé* proceedings in French Courts occurs in real estate disputes where a party seeks to secure investigatory expertise proceedings under Article 145 of the New Code of Civil Procedure. In addition, many automobile tort cases are referred where responsibility is clear enough to order provisional damages for the victim so as to avoid waiting years for recovery.

As we have seen, legislation has increased the number of cases referred to *référé* judges. It has served to perfect and detail the general *référé* procedures through recent articles added to the New Code of Civil Procedure, as well as through special legal provisions which refer matters to *référé* judges or those assuming his powers and responsibilities. In areas such as competition law, matrimonial matters, and other matters cited above, the *référé* judge is called upon to make a rapid decision, sometimes on the merits of the case. Such a development is powerful evidence that the legislator prefers the *référé* procedure to the usual costly and slower court proceedings. The domain of the *référé* procedure continues to expand.

C. Significance of the Increasing Use of the Référé Procedure

What do the above developments mean? Do they mean that the *référé* procedure is gradually replacing the normal but slower

169. J. Hugon-Martin, *Corruption et Discrimination*, La Lettre des Juristes d'Affaires, No. 157, 15 Feb. 1993; Law No. 93-122, of 29 Jan. 1983, art. 50.; J.O. 30 Jan. 1993, 1588, at 1593.

proceedings on the merits, even though the original purpose of the *référé* procedure was to complement the procedure on the merits? In 1981, Professor Perrot decried the excessive use of the *référé* procedure for being too rapid and unreliable, and he indicated it would be a mistake to deform it by excessive use in circumstances for which it was not designed.¹⁷⁰ However, it may be that necessity is the mother of invention—that the desperate need for rapid, efficient and inexpensive justice is forcing the extension of the *référé* procedure beyond the limits originally intended.

It is certainly a fact that the “preliminary measures” ordered in a *référé* proceeding often prejudice the substance of the case to a greater or lesser extent. In this respect, a *référé* judgment is not consistent with the theory that a *référé* proceeding is not a judgment on the merits.

According to Philippe Grandjean, who served as judge on the Tribunal de Commerce in Paris for fifteen years (four of which he served as Chief Justice), he never heard of a *référé provision* decision which in reality was “provisional” and which was later referred to the court for a decision on the merits.¹⁷¹ Grandjean speculates whether there is a real judicial revolution and move towards efficiency in civil procedure.¹⁷² He further suggests that in approximately one third of all cases the answer is obvious and a quick *référé provision* decision can be made by an experienced judge.¹⁷³ However, the present system suffers from the “provisional” nature of the decision which tends to undermine the security and effect of the judgment.¹⁷⁴

Fortunately, the new law relating to execution of judgments allows improved enforcement of such judgments through the use of the simplified attachment of debts owed to a debtor (*saisie attribution*) or attachment of personal property (*saisie-vente mobilière*). Execution of such a provisional judgment, however, is still not possible against real property.¹⁷⁵

170. R. Perrot, *L'Evolution du Référé*, Mélanges Hebraud, at 663, (1 Toulouse Univ. of Soc. Sci 663, 1981.)

171. P. Grandjean, speech on “L'Evolution du Référé Commercial”, before the Association Droit et Commerce (1 February 1993), 5 *Revue de Jurisprudence Commerciale*, at 187-88 (May 1993).

172. *Id.* at 188.

173. *Id.*

174. *Id.*

175. *Id.*

Still, the insecurity of the execution of such a provisional *référé* judgment remains in the fact that, until the statute of limitation period has elapsed, the defendant or his heirs can file suit on the merits. This makes the execution based on the provisional *référé* judgment precarious and subject to reversal in theory, if not in fact.¹⁷⁶

An eminent judge has suggested that a *référé* decision be considered definitive only after an appropriate time period has elapsed.¹⁷⁷ Honorary Chief Justice Grandjean suggests the institution of a new rapid provisional payment procedure on the merits, based on the the form of a *référé provision* procedure, to be utilized in cases where there is no serious dispute. Such a decision would be considered final, similar to a decision on the merits.¹⁷⁸ In such case, execution of the judgement would be subject to reversal or modification by the Chief Justice of the Appellate Court.¹⁷⁹

The definitive nature of provisional measures has also been addressed in the European Court of Justice, where an interim measure was ordered to enjoin the United Kingdom from applying a disputed aid measure to pig farmers.¹⁸⁰ The UK complied with this injunction, thus, there never was a final decision on the merits. The same result occurred where France was ordered to discontinue its aid to the textile industry.¹⁸¹ This is progress to the extent that a quick "preliminary" decision properly disposes of the issues on the merits.

Since the efficiency and the justice of a rapid *référé* decision often depends on the experience, intelligence, and initiative of the *référé* judge, recourse to this procedure would be enhanced if additional, well-trained judges were available. Professor Perrot has characterized the *référé* procedure as a "personal" type of procedure, highly dependent upon the character and experience of the judge, and particularly upon whether or not he or she feels confident in granting *référé* orders. A highly qualified group of experienced judges in France who are not afraid to exercise judicial power has helped to increase the use of the *référé* procedure. They

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 189.

180. P. Pescatore, *supra* note 125, at 351.

181. Cases 31/77 and 53/77 R, *Commission v. United Kingdom*, 1977 C.M.L.R. 1, 921-37; Case 171/83 R *Commission v. France*, 1983 E.C.R. 2621. *See op. cite, supra* note 2, at 225.

have created confidence among members of the bar, the business community and more particularly, in the busy courts of the city of Paris, where speed in decision-making has a salutary effect on the business community.

A third element favors the development of *référé* procedures. In previous centuries, litigation often related to real property and inheritance issues which did not necessarily require rapid decisions. Today with the increased speed in which business is carried on, along with the growth of litigation, there is often a high premium placed on speed.

If the above analysis is correct, we can look forward to a continually expanding role for *référé* procedures, not only due to the increased use by practitioners, but also because legislation increasingly authorizes *référé* judges, or specialized judges chosen to take over their responsibilities in certain specific cases, to make rapid decisions.

D. *Universality of the Référé Procedure*

The growth of the activity of the *référé* judge—the judge who is close to and available to the parties, ready to intervene when the most fundamental rights of an individual or a business are in danger—leads us to comment on the universality of the *référé* procedure. The universality of this procedure is defined in Article 810 of the New Code of Civil Procedure, which states that for matters within the competence of the *Tribunal de Grande Instance*, “[t]he powers of the President of the *Tribunal de Grande Instance* provided in the two previous articles extend to all subject matters where there is no specific *référé* procedure applicable.” The *référé* procedure has been utilized not only in civil and commercial matters, but in criminal, administrative and constitutional law, as well. According to Professor Malaurie’s “Law is Life” (*Le Droit Est La Vie*), the *référé* judge constantly ensures the protection of rights, reminding citizens that when he is tempted to doubt the efficiency of law and turn to violence or vigilantism, the *référé* judge is always available.

In this regard, one cannot better conclude this article than by reference to a speech of Chief Justice Pierre Drai of the French Supreme Court (*Cour de Cassation*) made in Strasburg in the spring 1992, when he spoke of the *référé* judge as the “protector of human rights.” Chief Justice Drai said he is confident that in light

of the rapid changes which have transpired over the last twenty years, that this *référé* judge will not disappoint the hopes of those who treasure the respect of "democratic values and fundamental human rights."¹⁸²

In a world where democratic principles are constantly threatened, there is still some hope that economic progress will insure the well-being of the peoples of the world. The judge is available to ensure fairness in business transactions, the dignity of men and women and the fulfillment of the essence of the universal mission of the law.

Does the *référé* procedure have a role beyond the national boundaries of France and other countries where it has developed to reinforce the rule of law? Only time will tell whether this judge-made procedure, developed by the leading French and international judges, reinforced by the legislators, and supported by legal scholars, will have as important a role in other countries as it presently has in France in making the rule of law a reality.

182. Chief Justice Pierre Drat, "Problems of Human Rights in an Enlarged Europe," address in Strasbourg before the Conference of National European sections of the International Commission of Jurists, 1992 G.P. II, 12, at 15.