France and the concept of *amicus curiae*: What lies ahead?

The concept of *amicus curiae* first appeared in England during the 17th century and became, over the years, a common practice in common law countries and before certain international courts like the European Court of Human Rights. This concept, however, is not so common in France. Defined by Gérard Cornu in his legal dictionary *Vocabulaire juridique* as "*the status of extraordinary consultant and voluntary informer pursuant to which the court invites a personality to attend the hearing in order to provide, in the presence of all interested parties, all the observations that may enlighten the court*", it enables a third party to the proceedings to provide observations before the court hearing a case.

France as *amicus curiae*

France, as well as French academics and organisations, have already acted as "friend of the court" in various proceedings.

For instance, France intervened in re *Robert Morrison, et al. v. National Australia Bank Ltd., et al.*, in which US courts had to rule on the application of a US Federal Law, the Securities Exchange Act, to claims raised by non-US citizens, concerning the purchase of shares of a non-US company on foreign stock markets. France, among numerous other intervening parties, filed an *amicus brief* on 26 February 2010 before the United States Court of Appeals for the Second Circuit to defend the position according to which US courts have to limit the application of US law in matters relating to securities fraud. Since then, the US Supreme Court refused to extraterritorially apply the Securities Exchange Act, thus excluding from its scope of application all actions with elements exclusively located outside the United States.

France's interest in intervening and declaring itself in favour of limiting the application of the Securities Exchange Act is clearly understandable. Indeed, French companies could be sued in the United States for similar facts while the connection with the US forum appears to be rather weak. This could notably have been the case in re *Rosenbaum Partners, et al. v. Vivendi Universal, S.A., et al.*, in which the United States District Court for the Southern District of New York relied, on 22 February 2011 and 27 January 2012, on the *Morrison* decision of 24 June 2010 to limit the definition of the persons allowed to be parties to the class action against Vivendi (see *Judicial victory for Vivendi following Morrison case law*, by Christelle Coslin and Delphine Lapillonne, Paris International Litigation Bulletin, July 2011).

The *amicus curiae* in France

The influence of this British concept in France is not limited to a few interventions before foreign courts. Indeed, French courts have already used it and it is slowly becoming part of the French procedural system.

The Paris Court of Appeal resorted to the concept of *amicus curiae* for the first time in 1988. When requested to rule on an issue relating to the application of rules governing the profession of lawyer, the Court asked the President of the Paris Bar, "*as* amicus curiae", to "*provide, in the presence of all interested parties, all the observations that may enlighten the court in its process of solving the dispute*" (Paris Court of Appeal, 21 June and 6 July 1988, Gaz. Pal. 1988, 2, 700, Note Laurin). On this occasion, the Court provided a negative definition of the role of *amicus curiae* by specifying that the *amicus curiae* is neither a witness nor an expert and is not subject to the rules of the French Code of Civil Procedure relating to objections to members of the court (*récusation*).

Even though the definition of the Paris Court of Appeal remains incomplete, it enables to slightly understand the concept of *amicus curiae* under French law, which is not subject to any specific rules. Indeed, the "friend of the court" must be distinguished from the witness, who certifies the existence of facts, and from the expert, who provides a technical opinion to the court, as his/her role is not to enlighten the court on a factual issue specific to the dispute at stake. Indeed, the *amicus curiae* gives his/her opinion and shares his/her knowledge with the court on a general topic that may impact several disputes and that often relates to a subject giving rise to debates within the society. Lastly, the *amicus curiae* must not be mistaken for a party to the trial, notably a voluntary or forced intervenor, as, within the meaning of the French Code of Civil Procedure, he/she does not have any interest in acting.

French civil courts then used the services of certain personalities as *amici curiae* in fields as diverse as surrogate mother agreements (French Supreme Court, Plenary Assembly, 31 May 1991, *Pourvoi* no. 90-20.105), the compensation granted to an HIV patient by the French Compensation Fund for transfused and haemophilic patients infected with HIV (Paris Court of Appeal, 27 November 1992, D. 1993, p. 172), the non-extension of the accusation of manslaughter to the embryo or the foetus (French Supreme Court, Plenary Assembly, 29 June 2001, *Pourvoi* no. 99-85.973) and the characterisation of investment contracts or insurance savings agreements combining mechanisms falling within the scope of life insurance and investment savings (French Supreme Court, Mixed Chamber, 23 November 2004, *Pourvois* no. 02-17.507, 03-13.673, 02-11.352 and 01-13.592).

The concept of *amicus curiae* also recently made its appearance in administrative proceedings following Decree no. 2010-164 of 22 February 2010. This Decree created, in Article R. 625-3 of the French Code of Administrative Justice, the possibility for the bench in charge of the investigation to invite any person, whose skills or knowledge may usefully enlighten it regarding the solution of the dispute, to provide general observations on the issues which it chooses. This legal instrument also enables any person to be invited to present oral observations to the bench in charge of the

investigation or the bench in charge of deciding the case, provided that the parties have been duly convened.

Similarly, pursuant to Article L. 621-20 of the French Monetary and Financial Code, all civil, criminal and administrative courts are entitled to invite the President of the French Financial Markets Authority (*Autorité des Marchés Financiers*) or the latter's representative to file submissions and to orally present them during the hearing.

Furthermore, European law also provides for the possibility for certain institutions to voluntarily intervene in proceedings relating to the areas concerning them. EC Regulation no. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty establishing the European Community created a procedure enabling various institutions to intervene on their own initiative before the courts of the Member States. Thus, Article 15-3 of the Regulation provides that the competition authorities of the Member States may submit written observations to the courts of their Member State on issues relating to the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union (formerly Articles 81 and 82 of the Treaty establishing the European Community).

Similarly, the European Commission can, in such disputes, submit written or oral observations when it obtains the consent of the national court in question. It is on this basis that the European Commission intervened before the Paris Court of the Appeal in re *Pierre Fabre*, in which it was notably requested to rule on the possibility for suppliers to prohibit the online sale of their products by the authorised distributors in the scope of selective distribution networks (Paris Court of Appeal, 29 October 2009, Docket no. 2008/23812). Nevertheless, after having underlined the non-binding nature of the observations of the European Commission as *amicus curiae*, the appellate judges preferred to bring a referral question before the Court of Justice of the European Union concerning the interpretation of European law. This case thus recalls that the *amicus curiae* is simply meant to enlighten the court and that the latter's opinion is not binding on it.

Towards a more frequent use of the concept of *amicus curiae* in France?

Despite these developments, the *amicus curiae* does not have the same importance in France as in Anglo-Saxon countries. Indeed, in most cases, apart from the possibilities arising from European law, the court must request the opinion of the *amicus curiae* and the latter cannot decide to get involved on its own initiative. Yet, the French courts do not often resort to it. Its use thus remains, for the time being, theoretical or very limited in practice, in particular in civil and commercial matters where there are only a few examples.

And yet, the intervention of an *amicus curiae* generally has the advantage of drawing the attention of the court to various general issues resulting from the decision to be handed down which exceed the mere scope of the dispute opposing the parties. The cases where these "special consultants" were used in France show that they can bring a significant social or economic perspective. Both abroad and before international courts, this practice is also one of the means used to take into account a variety of opinions like, for instance, the positions of foreign States on the possible effects of a decision in their own country or the taking into account of a broader interest within the European Union.

Nevertheless, for the parties to a dispute, the influence of the *amicus curiae* that would adopt an unfavourable position compared with their own might be difficult to challenge depending on the personality acting as *amicus curiae*. This is all the more the case due to the fact that there are currently no specific procedural rules governing these interventions and ensuring the full compliance with the adversarial principle and the principle of equality of arms.

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