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France
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2019

Law and Practice

Contributed by Kiejman & Marembert

Contents

Kiejman & Marembert was founded in 2000 and has 11 lawyers. The firm specialises in complex litigation involving major strategic and economic interests, especially in white-collar criminal defence, corporate and finance litigation, and media and entertainment litigation. Most of its clients are listed French and international companies, major industry groups, international or cultural institutions, private equity or family office vehicles, film and TV producers, and media outlets, as well as heads of state, corporate executives and personalities in arts, culture, literature, fashion and sport. The firm's key practice areas are white-collar crime litigation (namely international corruption, tax fraud, money laundering, banking and market rates and indices manipulation, insider trading or complex fraud), corporate, private equity and finance law litigation, and media, entertainment and art litigation.

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1. General

1.1 General Characteristics of Legal System

France has a legal system based on civil law. French law is based on statutes (issued either by the Parliament or by the Government in some instances).

The courts may construe the laws but have no right to create law through general rulings. Nor has any court decision the authority of a precedent: no court is bound to follow the position of a superior court in a different case.

Although criminal investigations and administrative disputes follow an inquisitorial approach, criminal trials and all other disputes are based on an adversarial model.

Proceedings generally consist of a combination of written submissions and oral arguments.

1.2 Structure of Country's Court System

The French court system has a double pyramid structure. There are two separate orders: administrative (for most disputes involving the State, local communities and the entities linked to them); and judicial (for all other disputes, including civil, commercial and criminal).

Both orders have a three-level structure: from bottom up, first-level courts, then appeal courts, which review a second time the full merits of the dispute (ie, law and facts), and then supreme courts (*Cour de cassation* for the judicial order and *Conseil d'Etat* for the administrative one), which only review the legal arguments at stake.

Within the administrative order, courts are organised on a territorial basis (with more first-degree courts than appeal courts); within the judicial order, organisation is purely territorial for appeal courts but there is a combination of territorial and subject matter structure for the first level: *Tribunaux de grande instance* have jurisdiction over most matters (including criminal, family, real estate and IP) but not over commercial and labour matters (which go respectively to the *Tribunaux de commerce* and *Conseils de prud'hommes*).

While the *Tribunaux de commerce* are composed of judges elected among businesspeople, and among businesspeople and employeesfor the *Conseils de prud'hommes*, the other courts are composed of professional judges.

Courts of appeal adjudicate the disputes rendered by first-degree courts of their jurisdiction; the court of appeal of Paris has, in addition, jurisdiction over decisions of the French antitrust authority (*Autorité de la concurrence*) and the financial markets authority (*Autorité des marchés financiers*).

Aside from the administrative and judicial orders stands the *Conseil constitutionnel*, which reviews the constitutionality of the statutes at the request of MPs or of litigants.

1.3 Court Filings and Proceedings

As a matter of principle, French justice is public. French trials are generally held in public and judgments are issued in public too.

There are limited exceptions for matters where secrecy is required in order to protect certain public interests (such as certain issues involving minors, family matters such as divorce, or some insolvency-related proceedings). Court filings are not accessible to the public.

1.4 Legal Representation in Court

With limited exceptions, only qualified attorneys may represent parties in front of French courts. Violation of such rule results in exposure to criminal sanction.

Right of appearance is extended to attorneys registered with a European Union Bar. However, this is not possible for non-EU attorneys, unless they pass a special exam.

These rules do not apply to so-called "oral proceedings", namely those in front of commercial courts (*Tribunaux de commerce*), where parties can elect to be represented either by themselves or by an agent who does not need to be a qualified attorney. However, this rule does not apply to such proceedings at the appeal level.

2. Litigation Funding

2.1 Third-party Litigation Funding

Third party litigation funding is new in France and, except for international arbitration, still undeveloped compared to countries such as Australia, the United Kingdom or Germany.

Besides the lack of punitive damages, the fact that litigation in France is less costly and tends to last longer than in other countries as well as the fact that class actions have a limited scope (see **3 Initiating a Lawsuit**) might partly explain why this is the case.

Nevertheless, recent changes such as the implementation of the EU Damages Directive could broaden litigation funding in the future.

As of the time of writing, third party funding remains unregulated and therefore relies on general principles of French law and lawyers' ethical rules, namely:

- contractual freedom (Article 1102 of the French Civil Code);

- freedom of payment: under Article 1342-1 of the French Civil Code, *"payment can be made even by a person who is not obliged to do so, unless the creditor justifiably refuses it"*; and
- Article 11.3 of the French lawyers' code of conduct, which provides that lawyers may only collect fees from their client *"or from their client's agent"*.

In the absence of a specific legal framework, scholars and legal professionals have discussed whether third-party funding agreements could be construed as loans. Since the banking sector is heavily regulated in France and only duly authorised financial institutions may grant loans on a regular basis, such an interpretation would restrict the growth of third party litigation funding in the country.

For the most part, these debates have reached the conclusion that it would be unlikely for French courts to construe third party litigation funding agreements as loans since the "repayment" of the "loaned" sums is only incurred in the event of a favourable outcome, whereas the repayment of an actual loan is always incurred.

To a lesser extent, legal literature has also considered whether third party funding agreements could be construed as a form of betting – a heavily regulated business in France as well – but likewise has concluded that they should not be seen as such since they are not essentially speculative in nature.

The French Supreme Court (*Cour de cassation*) has not ruled on the matter yet. However, one court of appeal has done so. In 2006, following an international arbitration case in which the respondent, a French company, was awarded over a million dollars in legal fees and procedural costs, the said company sued in France the German company that had funded the arbitration claimant. The court of appeal held that a third-party funding agreement is a sui generis contract, indicating that it was valid under French law even if it did not fit into any of its established legal categories. The case was, however, ultimately dismissed on the grounds that French courts lacked jurisdiction over the matter.

Both the National Council of Bar Associations and the Paris Bar Association have welcomed the development of third-party funding in France, which they see as a positive development for access to justice.

They have also emphasised that lawyers owe their ethical obligations solely to their client, ie the funded party, and not to the funder, which means that:

- they should not take any instruction from the funder regarding the proceedings; and
- they may not disclose any privileged information to the funder.

Legal privilege under French law cannot be waived by the client. In other words, if the client wishes to disclose any privileged information related to the proceedings to the funder, he (or she) must do it himself and he may not ask his lawyer to do so.

Specific concerns have also arisen regarding third party funding in international arbitration. The ICC and the Paris Bar Association, among others, have pointed out the risks associated with non-disclosure of third-party funding agreements, namely regarding the potential annulment of the award and/or obstacles to its enforcement, and have recommended that the funded party's attorney encourages his or her client to disclose the existence of such an agreement.

2.2 Contingency Fees

Article 11.3 of the National Regulation of Lawyers prohibits pure contingency fee arrangements. Attorneys may, however, charge success fees that represent a portion of the total fees.

3. Initiating a Lawsuit

3.1 Rules on Pre-action Conduct

The initial complaint must mention the steps that have been taken in an attempt to settle the dispute out of court. Therefore it is highly recommended, though not mandatory, to send a formal notice to the defendant (*mise en demeure*) before initiating a lawsuit as it will serve to prove that an amicable solution has been sought.

A formal notice is recommended also as its date will serve as the starting point for calculating legal interest when payments are due.

The defendant is under no obligation to reply to a formal notice.

3.2 Statutes of Limitations

The common civil limitation period lasts five years and starts from the day the claimant knew or should have known the facts giving rise to the cause of action. This limitation period may to a certain degree be reduced or extended contractually (no less than a year and no more than ten years).

3.3 Jurisdictional Requirements for a Defendant

Before initiating a lawsuit, the claimant must determine which court has jurisdiction over the case considering its subject matter, the territorial jurisdiction rules and the quantum of the claims.

Regarding the subject matter, several courts have exclusive jurisdiction in certain areas of law. For instance, labour courts have exclusive jurisdiction for most work relationships while commercial courts have exclusive jurisdiction when commercial parties are involved. Civil High Courts

(*Tribunaux de grande instance*) have exclusive jurisdiction over certain litigations such as intellectual property disputes, personal civil status claims, estate disputes or exequatur. In contrast to other courts, parties must be represented by an attorney before the *Tribunal de grande instance*.

Regarding territorial jurisdiction, the claimant may choose either the court where the defendant lives or the court of the place:

- of delivery or performance of the contract;
- of the event causing liability or where the damage was suffered; or
- where real property is situated.

3.4 Initial Complaint

In civil matters, the initial complaint (*assignation*) must contain certain mandatory information: the jurisdiction, the factual and legal grounds of the claims, the steps taken in an effort to settle the dispute out of court, the remedies sought, the list of exhibits, etc.

The legal reasoning and claims may be amended later on: up until the final hearing in the case of an "oral procedure" or until the closing of the written phase in the case of a "written procedure" (ie before the *Tribunal de grande instance*).

3.5 Rules of Service

Before the *Tribunal de grande instance*, the claimant must request that a bailiff serves the initial complaint (*assignation*) to the defendant in person. Once the complaint is served, the judicial proceedings have not started yet and it is up to the claimant to lodge the complaint before the court within four months or else it shall be null and void.

Before certain courts such as labour courts, the claimant must file the initial complaint and it is the court which summons the parties.

3.6 Failure to Respond to a Lawsuit

If the defendant fails to take part in the proceedings, the court may try the case by relying solely on the writings and evidence provided by the claimant. The ruling may be either "by default" or "deemed adversarial", depending on the circumstances. The judicial remedies available to the defendant may take the form either of an opposition in the first case (which enables the defendant to annihilate the judgment and reopen the debate) or of a regular appeal in the second case. When the defendant fails to take part in the proceedings because the initial complaint has not been served in person, the ruling must be notified to the defendant within six months or else it becomes null and void.

3.7 Representative or Collective Actions

Certain groups and associations may bring representative actions for the defence of collective interests. In recent years, class actions have also been introduced in certain areas of law (consumer law, health law, discrimination in the workplace, environmental protection and personal data). Only certain specific associations may bring class actions, which are always opt-in proceedings.

3.8 Requirement for a Costs Estimate

There is no legal requirement to provide clients with a cost estimate of the potential litigation at the outset. However, it is mandatory for attorneys to sign a fee agreement with their client describing the fee calculation method (ie hourly rates, flat fees).

4. Pre-trial Proceedings

4.1 Interim Applications/Motions

Under French law, a specific judge is usually in charge of the preparation of the case. Before the *Tribunal de grande instance*, the preparation belongs to the pre-trial judge called "*Juge de la mise en état*", who has exclusive jurisdiction to rule on interim applications both for case management issues and for interim remedies. Before the commercial and labour courts where there is no "*mise en état*" phase (since the proceedings are oral), a reporting judge may be in charge of these interim applications.

The judge delivers rulings called "*jugements avant-dire droit*", which do not take the matter out of his or her hands and do not have the force of *res judicata* on the merits. There are two types of such rulings:

- pre-trial rulings aimed at handling temporary situations during the proceedings, for instance obtaining the sequestration of a property until the outcome of the proceedings, setting visiting rights and custody during divorce proceedings, or ordering the payment of a provision to the creditor when the existence of the obligation is not seriously disputable; and
- pre-trial rulings ordering any preparatory inquiries or investigative measures such as:
  - (a) an order for a party or a third party to provide certain documents requested by the other party. The *Juge de la mise en état* has entire discretion to assess whether such a document is necessary for the resolution of the dispute; or
  - (b) a technical expertise or a civil investigation (including witness hearings, which are rare in practice).

4.2 Early Judgment Applications

Under French law, there is no procedural mechanism to apply for early judgment on the merits.

4.3 Dispositive Motions

A party may file what are called "*exceptions de procédure*", ie procedural motions that are likely to bring the case to an end, such as for lack of jurisdiction.

The *Juge de la mise en état* has exclusive jurisdiction over these exceptions, which are no longer admissible when the court hears the case on the merits.

All procedural exceptions must be raised at the same time and in limine litis, before any substantive defence on the merits.

4.4 Requirements for Interested Parties to Join a Lawsuit

Interested parties not named as a claimant/plaintiff or defendant may join a lawsuit through a voluntary action (*intervention volontaire*). These interested parties may either bring claims of their own or support another party's claim or position. The intervention is admissible if the party has a legitimate interest and proves the existence of sufficient connections with the original claim.

4.5 Applications for Security for Defendant's Costs

It is possible for the Family Court to issue an interim order so that a spouse pays a sum to help the other spouse pay legal fees. Similarly, before the *Tribunal de grande instance*, the *Juge de la mise en état* may order that a party pay a sum of money as security for the other party's legal costs. However, the French Supreme Court ruled in 2015 that the party asking for a provision for costs must prove that the obligation on the merits is not seriously disputable.

4.6 Costs of Interim Applications/Motions

When an early judgment is issued on a procedural issue, the *Juge de la mise en état* often orders the losing party to pay a certain amount for legal fees.

If an expertise is ordered, the *Juge de la mise en état* generally orders that the parties pay a provision for the expert's fees.

5. Discovery

5.1 Discovery and Civil Cases

'Discovery' does not exist under French law.

5.2 Alternatives to Discovery Mechanisms

In civil proceedings (broadly defined as non-criminal proceedings), the parties must prove the relevant facts supporting their respective claims, with no obligation to provide unfavourable evidence.

In contrast to common law, French law combines both adversarial and inquisitorial systems, where the judge plays an active role in trying to reveal the truth during the preparatory phase (*mise en état*) so that the trial can be judged with the necessary and relevant evidence.

The evidence is either "legal" (ie, only certain types of proof are admissible according to strict legal criteria, for example a written proof or a testimony) or "free" (for example for commercial matters, where any kind of evidence is admissible).

In line with the general French approach to evidence, the principle that "*one should not be compelled to provide evidence against one's own interests*" prevailed for a long time but is now tempered by Article 10 of the French Code of Civil Procedure (FCCP), which states that "*Everyone is required to lend his aid to the court so that the truth may be revealed*".

Nowadays, each party must give its arguments and exhibits spontaneously and in due course (by virtue of the adversarial principle controlled by the judge, who guarantees the fairness of the proceedings). Moreover, a party can also be compelled, on the other party's demand and – if needed – on a judge's injunction, to provide some useful elements for the resolution of the dispute, even against its own interests.

Thus, the judge can force either a party or a third party to provide evidence and ensures that it is shared in due course so that the parties can prepare their defence.

The judge can go even further, ordering civil investigations called investigative measures (*mesures d'instruction*), for instance ordering legal expertise or hearing witnesses.

These measures are submitted to strict requirements: the requesting party must demonstrate sufficient connection with the dispute, identify precisely the subject of the request and explain its necessity, as the judge shall not make up for a party's deficiency in providing evidence.

For instance, the judge may order *in futurum* investigative measures (ie pre-trial measures), provided these preventive measures obey various conditions, such as a legitimate ground, proportionate to the aim pursued, before trial and seeking proofs upon which the resolution of the dispute depends.

5.3 Legal Privilege

French law recognises the concept of legal privilege with the concept of "*secret professionnel*". Any exchange of information between an attorney (excluding in-house lawyers) and his or her client are subject to professional secrecy. The infringement of professional secrecy, by either litigating or transaction lawyers (who are granted the same status under Article 65 of the French Act of 1971), constitutes both a breach of ethical rules and a criminal offence (Article 226-13 of the French Criminal Code). Therefore, respecting professional secrecy may impede the provision of certain documents or information.

Also, business secrecy also allows a party to refuse to provide certain sensitive material, because it is confidential or strategic for the party's competitiveness.

5.4 Rules Disallowing Disclosure of a Document

The right to privacy (protected by both civil and criminal French law) can be another barrier to the production of some documents.

Hence, this matter is very indicative of the differing approaches and legal discrepancies between French law and common law systems.

For instance, the USA uses discovery and the Supreme Court applies serious sanctions on those who refuse to provide information while the French *Cour de cassation* criticises fishing expeditions and protects other fundamental principles and interests based on legal instruments such as the Blocking Statute of 1968, which prohibits any communication of economic, industrial or technical information to be used as evidence by foreign authorities, under criminal penalties.

6. Injunctive Relief

6.1 Circumstances of Injunctive Relief

French law provides for injunctive relief called provisional measures (*mesures conservatoires*) to achieve a broad range of objectives: to safeguard a right or a good (seizing money to secure a debt), to preserve evidence for a future action (seizing counterfeit goods), or to prevent immediate or irreparable damage.

For instance, conservatory attachments (*saisies conservatoires*) and judicial securities (*sûretés judiciaires*) are provisional measures that enable a creditor to freeze real estate or movable assets, tangible or intangible, belonging to the alleged debtor.

It is sufficient that the debt obligation appears grounded in principle (ie there is no need for it to be certain, of a fixed amount or due), that there can be no serious challenge to it and to demonstrate that some circumstances are likely to threaten the recovery of the debt (such as late payment or non-payment, unsuccessful formal notice, insolvency of debtors, etc).

The measure is enforced on prior authorisation from the enforcement judge or on another writ of execution.

These kinds of provisional measures must respect a strict legal framework; in particular, the requesting party must bring an action on the merits of the case within a short time period, under penalty of nullity of the provisional measure. If the litigant wins the case, he or she will turn the freezing order into a compulsory sale and will get the money back.

6.2 Arrangements for Obtaining Urgent Injunctive Relief

In addition, French law enables claimants to introduce proceedings to obtain interim relief. Interim relief orders (*ordonnances de référé*) do not have the force of *res judicata* on the merits but are provisionally enforceable *ipso jure* (Article 484 et seq. of the FCCP).

A party can quickly get interim relief introducing these provisional proceedings, among which are:

- The regular interim relief proceedings (*référé ordinaire*) before the President of the civil *Tribunal de grande instance* (Article 808 FCCP) or before the President of the Commercial Court (Article 872 of the French Commercial Code), provided there is some emergency under an existing dispute but no serious challenge as to what is requested by the party.
- Several specific cases depending on the party's intended purpose:
  - (a) the conservatory injunction (*référé conservatoire*) based on Article 809, al. 1 FCCP for civil cases or Article 873, al. 1 FCC for commercial cases: when there is a serious challenge but there is a need to prevent imminent damage or a disorder that is obviously unlawful;
  - (b) the interim payment injunction (*référé provision*) based on Article 809, al. 2 FCCP for civil cases or Article 873, al. 2 FCC for commercial cases: when a debt cannot be seriously questioned, the interim judge can award provisional compensation to a party;
  - (c) the injunction order (*référé injunction*) useful for consumer protection and in contract law; or
  - (d) the probative injunction (*référé probatoire*) based on Article 145 FCCP, mentioned above.
- Even faster in case of extreme emergency: the "from hour to hour" interim relief proceedings (*référé d'heure à heure*), arrangement granted to a party appearing before the interim relief judge, even during public holidays or non-working days, either in the hearing room or at the judge's residence (ie opened doors, *portes ouvertes*), according to Article 485 of the FCCP.

6.3 Availability of Injunctive Relief on an Ex Parte Basis

In France, injunctive relief can also be obtained on an *ex parte* basis, ie without notice to the respondent and without the respondent present: it is an order upon a party's motion (*ordonnance sur requête*). As it is a non-adversarial procedure, the claimant's purpose is to bring an unexpected surprise to the respondent.

However, in practice, this type of motion is increasingly difficult to obtain. In addition, the adversarial debate will be restored later with the procedure on the merits in any case.

6.4 Applicant's Liability for Damages

Should the defendant successfully later discharge the injunction (by requesting the lifting of the conservatory attachments or appealing and overturning the *référé* order), the boomerang effect could be potentially harsh: the applicant could be held liable for the damages the respondent suffered.

Thus, the applicant would have to reimburse the sums he or she provisionally obtained, to compensate all the harmful consequences, sometimes to pay all the legal fees, and he or she could also be sentenced to pay damages for abusive proceedings. That is why the provisional measures are said to be *"at the risk and expense of the applicant"* ("*aux risques et périls du demandeur*").

As a result, the applicant can be required to provide securities (a deposit, a real or personal guarantee) in some instances (Article 489 FCCP).

Under Article 521 of the FCCP, the respondent can also avoid the provisional enforcement from the applicant by lodging cash or securities himself or herself (for example, a bank guarantee would suffice to lift a provisional attachment).

6.5 Respondent's Worldwide Assets and Injunctive Relief

In principle, injunctive relief is ordered in France by the judge where the measure is enforced. On an exceptional basis, it can also be granted against assets of the respondent located in foreign countries, under certain conditions (if the precautionary attachment is brought at the same time against the debtor's assets both in France and abroad).

6.6 Third Parties and Injunctive Relief

As mentioned above, and similar to the compulsory production of documents located in the hands of a third party, the provisional measures can also be obtained against third parties (for example, a provisional attachment on the wages of a defendant would be enforced in the hands of his or her employer).

6.7 Consequences of a Respondent's Non-compliance

Under French law, a respondent can hardly fail to comply with the terms of an injunction, as the provisional measure is immediately enforceable *ipso jure*. In addition, the injunction can be complemented by preventive yet punitive measures called "penalty payments" (*astreintes*). These penalties prevent delays in implementation, for instance when the debtor delays providing a document or paying a sum of money. However, there is no such thing as contempt of court.

7. Trials and Hearings

7.1 Trial Proceedings

Proceedings differ largely depending on each type of jurisdiction.

A common characteristic is that proceedings start with the filing of a writ (or in certain instances a form), which will be followed by the exchange of written submissions and evidence by the parties before a hearing for oral arguments takes place.

Whereas administrative proceedings tend to be mainly based on written materials (oral arguments being limited), judicial proceedings are based on filing of submissions and evidence concluded by oral arguments at a dedicated hearing in front of a panel of three judges or a single judge.

However, and except for criminal trials, oral arguments are generally limited to an hour or two, without involving witnesses or experts at trial.

In some courts (such as the *Tribunaux de grande instance*), each party often presents its closing argument through its attorney without any intervention by the judges, while in other courts (such as the *Tribunaux de commerce*), the oral argument is more interactive with the judge(s), who may ask for clarifications on limited points.

7.2 Case Management Hearings

After the filing of the initial writ of summons, most courts hold case management hearings every four weeks or so in order to prepare the case file for the oral arguments date and rule over any interlocutory motion (lack of jurisdiction, dispute over evidence, etc).

7.3 Jury Trials in Civil Cases

The types of evidence admissible depend on each type of jurisdiction but will generally be composed of documentary evidence, testimonies and investigative measures decided by the court in case management hearings.

Usually (at least in civil and commercial trials), evidence must be brought to the court by the parties, save when they struggle to obtain it without a court order.

7.4 Rules That Govern Admission of Evidence

Under French law, jury trials only exist in criminal matters and are excluded in all civil, commercial, labour or administrative disputes.

7.5 Expert Testimony

Although parties can file experts' written reports as evidence or ask the court to appoint an expert to make an assessment on a specific issue, it is rare that experts, even those appointed by the court, provide evidence at trial.

This is due to the fact that the trial hearing is mostly limited to an oral presentation of the parties' arguments where the parties' attorneys summarise the evidence of their clients, rather than cross-examination of the evidence with witnesses or experts being present.

7.6 Extent to Which Hearings are Open to the Public

Closing argument hearings are in principle public (with limitations in certain public interest matters). Transcripts are very limited, even in criminal matters, and never record verbatim the dialogue of the persons present.

Except in simple disputes, judgments are issued weeks or months after the closing argument hearing (typically four to eight weeks).

Although parties have access to the full judgment, third parties normally have access to an anonymised version of judgments only, upon evidence of an interest. The right of access to judgments is supposed to be being widened and made easier but this is in practice true for superior courts only at the moment.

7.7 General Timeframes for Proceedings

Proceedings on the merits of a dispute generally take one year to two years to be decided by most courts.

In certain situations, accelerated proceedings on the merits can be offered by courts (called "*jour fixe*" or "*bref délai*") upon evidence of an emergency situation. In such a case, the hearing for oral arguments follows directly the delivery of the initial writ and takes place a few weeks after it.

This is in addition to interim proceedings that do not rule on the merits of a dispute.

8. Settlement

8.1 Court Approval

Although possible, court approval is not required to settle a lawsuit. Parties can settle at any time, including after a judgment has been rendered.

Settlement agreements are governed by Articles 2044 et seq. of the French Civil Code.

The conditions of validity of a settlement are the same as those applicable to other contracts (ie consent of the parties, contractual capacity, lawful and specific content pursuant to Article 1128 of the French Civil Code). Mutual concessions by the parties are required.

Settling is not possible for issues related to public order or non-pecuniary rights such as capacity of the persons, citizenship, filiation, etc.

In criminal matters, settlements with the victim are permitted under certain conditions. However, it does not affect the ability of the Public Prosecutor to prosecute. Deferred prosecution agreements with the Public Prosecutor are only available for legal persons and for certain offences (Article 41-1-2 of the French Criminal Procedural Code).

Settlement agreements should be instrumentalised in a written document in order to be approved.

8.2 Settlement of Lawsuits and Confidentiality

A non-disclosure clause can be included in the agreement.

8.3 Enforcement of Settlement Agreements

Parties can ask the judge to certify the settlement agreement to ensure enforceability (Article 1567 of the FCCP). The parties can appeal against the refusal of the court to certify the settlement.

8.4 Setting Aside Settlement Agreements

Settlements preclude further lawsuits initiated by the parties based on the same grounds. Parties may provide a clause to anticipate the consequences of a future dispute concerning either the interpretation or enforcement of the agreement.

9. Damages and Judgment

9.1 Awards Available to a Successful Litigant

Before a 2016 civil law reform, a distinction was made based on whether the plaintiff asked the judge to compel the defendant to do or to give something. In the first case (obligation to do), the obligation could only result in the award of damages. Enforcement in kind used to be an exception.

Since the reform, when it comes to enforcing a judgment, enforcement in kind has become the principle. Therefore, it is only when execution in kind is impossible that the awarding of damages may be considered by the judge.

In addition, the FCCP authorises litigants to require from the judge that the party that lost the case pays for legal costs, including legal fees.

9.2 Rules Regarding Damages

Under French civil law, the main rule for damages is full compensation, meaning that the claimant may only receive the exact compensation for the damage incurred, without any kind of personal gain. This principle applies to contract law, knowing that only damage that could have been foreseen at the time of the contract's conclusion shall be compensated.

It follows that punitive damages, mostly accepted in common law, are still prohibited in French civil law. However, the punitive role is not entirely missing from French civil law. With regard to contract law, the contracting parties may decide to insert a clause applicable in case of breach of contract. This clause is referred to as a penalty clause (*clause pénale*).

In principle, for an injury to be recoverable, evidence of direct, personal and certain damage must be provided.

The requirement for direct and certain damage results in the refusal to repair prospective damage, meaning damage that could very well never come to exist. However, the boundary between the certain and the uncertain is not always easy to draw. The damage resulting from a loss of opportunity, defined as the loss of a "favourable event", is now deemed to be compensable; though compensation for loss of opportunity is only entitled to partial compensation, that is, the estimated value of the probability of that positive event happening.

In terms of classification, French civil law commonly distinguishes between material, bodily and moral damage.

Material damage consists of an infringement of the victim's property rights, mainly damage caused to movable or immovable property, easily assessable in money.

As for personal injury damage, this causes harm to the physical integrity of an individual. The different types of personal injury damage are classified in a reference table, the "*Dintilhac nomenclature*", used for injury evaluation.

Finally, moral damage represents harm caused to honour, modesty, feelings of affection such as losing a loved one or attending to the suffering endured by a relative.

Damages are often evaluated by judicial experts.

9.3 Pre- and Post-judgment Interest

Legal interest may be added to the damages and is calculated according to legal interest rates. Legal interest is incurred as of the date of the formal notice.

9.4 Enforcement Mechanisms for a Domestic Judgment

In France, the principle is that judgments are not enforceable if an appeal is made (with certain exceptions such as emergency orders). However, the creditor may request that the judgment be enforceable provisionally, which the judge may grant or not.

The judge may also order the debtor to pay penalty payments in case of failure to pay (a penalty for each day of delay).

If the debtor does not spontaneously adhere to the judgment, the creditor shall serve the decision by bailiff to his or her opponent. The bailiff may then proceed to various attachments provided for by the French Code of Civil Enforcement Procedures: the "*saisie-attribution*" enables the bailiff to seize the debtor's available sums in his or her bank accounts; the "*saisie sur salaire*" allows the creditor to seize the debtor's wages, that is, directly in the hands of the employer.

The enforcement judge has jurisdiction to settle disputes relating to the enforcement of a court order.

9.5 Enforcement of a Judgment From a Foreign Country

The exequatur procedure is necessary for a foreign judgment to be enforceable in the French territory. However, for judgments within the European Union, the regulation provides that decisions given in one Member State are, in principle, recognised in other Member States with no need for any specific procedure.

10. Appeal

10.1 Levels of Appeal or Review Available to a Litigant Party

Appeal under French law allows for a re-examination of the case, both in fact and in law.

10.2 Rules Concerning Appeals of Judgments

Most first-degree decisions as well as regulatory authorities' sanctions can be challenged by way of appeal.

An appeal can be lodged against a pre-trial judgment, but it will only be reviewed by the court of appeal together with the appeal lodged against the judgment on the merits.

10.3 Procedure for Taking an Appeal

Representation by an attorney is compulsory before the court of appeal.

The parties have one month from the notification of the judgment to lodge an appeal.

The appeal period can be reduced to 15 days, namely for: interlocutory orders and interim relief orders; orders on motions; and decisions of the enforcement judge.

In both the above cases, the time limit is extended by one month when the notified party is domiciled in the French overseas territories and by two months when the notified party is located abroad.

The notice of appeal must specify which findings of the provisions of the judgment are challenged, unless the appeal aims at overturning the judgment in its entirety.

Once the appeal has been lodged, the case can be allotted to a standard track or to a fast track. The latter deals with urgent cases – including but not limited to appeals against interim relief orders.

On the standard track, the appellant has three months to file his or her submissions. The defendant has then three months from the notification of the appellant's submissions to respond. On the fast track, the time given to the parties to file their submissions is reduced to one month each.

The judge in charge of managing the case on either track can order further rounds of submissions.

10.4 Issues Considered by the Appeal Court at an Appeal

The parties must specify in their first submissions all their claims on the merits. In principle new claims made in subsequent submissions may be held inadmissible, save for claims specifically intended to respond to the party's submissions and exhibits or dealing with new issues raised after the filing of the first submissions.

This restriction only applies to claims; new factual or legal arguments may still be raised in subsequent submissions, as long as they relate to the parties' claims.

The scope of the dispute referred to the court of appeal is therefore limited by the notice of appeal and the parties' initial submissions.

10.5 Court-imposed Conditions on Granting an Appeal

A court of appeal cannot dismiss an appeal that complies with the rules mentioned above.

However, a party can petition the appeal judge in charge of managing the case to strike out the appeal of a party that has not complied with the appealed judgment, in case provisional enforcement has been ordered by the first-degree tribunal.

11. Costs

11.1 Responsibility for Paying the Costs of Litigation

A distinction is made between expenses considered by French law as directly related to the conduct of a trial (called *"dépens"*) and other expenses.

Expenses falling within the *dépens* regime are enumerated by Article 695 of the FCCP and include duties and taxes collected by the court administration, court translation costs for international notices, compensation of a court-appointed expert, costs relating to investigation measures and public officers' remuneration.

The principle is that these costs are borne by the losing party, except if the court decides otherwise.

It is important to point out that attorneys' fees (and more generally other trial costs) are not included in this list of costs. The court will decide freely whether the losing party will have to pay for the attorneys' fees of the prevailing party and, if so, which part of the fees will be reimbursed by the losing party.

In practice, courts generally oblige the losing party to pay but only for a very small part of the fees paid by the prevailing party to its attorneys.

11.2 Interest Awarded on Costs

Article 1231-7 of the Civil Code provides that any award of compensation shall bear interest at the legal rate from the date of delivery of the judgment, unless the court decides otherwise.

This is applicable to attorneys' fees.

12. Alternative Dispute Resolution

12.1 Views on ADR in this Jurisdiction

The most popular alternative dispute resolute (ADR) methods in France are mediation and conciliation (settlement and arbitration are dealt with specifically in **8 Settlement** and **13 Arbitration**).

Mediation and conciliation are defined by the FCCP as structured processes in which the parties aim at reaching an agreement for the resolution of a dispute, with the help of a third person.

The main difference between mediators and conciliators is that a judge may be a conciliator himself if he or she decides so, whereas a mediator is always a third party. Moreover, mediators receive fees from the parties while conciliators are volunteers.

Mediation and conciliation may be suggested either by the parties themselves or by the judge.

The popularity of judicial ADR methods is increasing as they offer advantages such as confidentiality, flexibility, and the saving of significant time and money. Courts often induce parties to initiate either mediation or conciliation. It has become standard practice for some courts, in certain matters, to suggest mediation at the beginning of the proceedings and to recommend names of mediators.

According to the Centre for Mediation and Arbitration of Paris (CMAP), the success rate of mediation cases in France

was 71% in 2017. Mediation generally lasts from three to six months in commercial cases.

Mediation or conciliation clauses may also be included in contracts by parties (this is known as conventional mediation or conciliation).

12.2 ADR Within the Legal System

As a general rule, neither mediation nor conciliation is compulsory. Both are based on consent and must be accepted by all parties. There is no legal sanction against a party that refuses to enter into or fails to reach an agreement.

However, as an exception, an attempt at conciliation is mandatory before the start of legal proceedings in certain proceedings, such as labour law disputes, divorce proceedings, etc.

An attempt at conciliation or mediation may also become compulsory due to the willingness of the parties. If they have provided for mandatory (and not optional) conciliation or mediation in their contract, they cannot initiate litigation unless they have first used such a mediation or conciliation. If a claimant has failed to undertake these prior stages, the defendant can assert that the claim is inadmissible, it being specified that, in principle, the claimant cannot undertake a conciliation or mediation once the litigation is engaged. It is not necessary to attempt a conciliation or mediation in proceedings for interim relief dictated by emergency situations, which therefore cannot be dismissed on such grounds.

12.3 ADR Institutions

In France, since the 1980s, several institutions have been dedicated to ADR – such as the *Institut Français de la Médiation*, created in 2007, which offers mediation services – but also professional training organisations for mediators, mediation labour unions and professional mediation networks.

Moreover, specific mediation institutions were created by the government, operating in different fields (public as well as private). The most successful one is the *Médiateur des Entreprises*, a national service reporting to the Ministry of Economic and Financial Affairs that was created in 2010 in order to help companies solve their disputes with clients or suppliers. This institution includes a mediation department that dealt with over 1,000 cases in 2016 and has an 80% success rate according to a 2015 public report regarding the efficiency of ADR methods in France.

13. Arbitration

13.1 Laws Regarding the Conduct of Arbitrations

France is a major place in the world for arbitration. The International Chambers of Commerce (ICC) and the International Court of Arbitration are hosted in Paris.

Arbitrations can be organised either on an ad hoc basis or under the auspices of arbitral institutions (such as the ICC).

Arbitration procedure is heavily dependent on the will of the parties, as provided in arbitration clauses (before the dispute arises) or compromises (after the dispute arose) (Articles 1442 and 1509 of the FCCP).

Sets of laws governing arbitration procedure often have a purely residual character and should be considered subsidiary. The applicable body of rules may depend on the purpose of the arbitration.

International arbitrations *"involving the interest of international trade"* are governed by Articles 1504 to 1527 of the FCCP.

Domestic arbitrations are governed by Articles 1442 to 1503 of the FCCP and Articles 2059 to 2061 of the French Civil Code.

In any event, the due process of law, the adversarial principle, the rights of defence and the equality of arms must govern the arbitration process.

13.2 Subject Matter not Referred to Arbitration

Disputes relating to persons' capacity and status, divorce, judicial separation and any litigation involving public institutions or public order issues cannot be settled through arbitration.

13.3 Circumstances to Challenge an Arbitral Award

Several judicial remedies are available to challenge arbitration awards.

(a) Appeals on the merits are restricted to domestic awards if such an appeal has been specified by the parties (Articles 1489 and 1518 of the FCCP).

(b) Annulment appeals are available in any case when:

- the arbitral tribunal wrongly upheld or declined jurisdiction;
- the arbitral tribunal was not properly constituted;
- the arbitral tribunal ruled without complying with the mandate conferred upon it;
- due process of law was violated;

- recognition or enforcement of the award violates domestic or international public order; or
- for domestic arbitration only: reasons supporting the decision are not stated, the date of the award or the name and signature of the arbitrators are not written, or the decision was not adopted by the majority of the arbitrators.

Appeals should be lodged before the court of appeal the day the award was released and up to one month after being served or notified to the opposing party.

The relevant court of appeal is the one that has territorial jurisdiction where the award was rendered.

Suspensive effect of the appeal is applicable to domestic awards only, notwithstanding the ability of the Arbitration Tribunal to order provisional enforcement.

And provisional enforcement can be challenged by the parties through a specific application before the President of the Court of Appeal.

An appeal against the arbitration award also triggers an appeal against the subsequent enforcement order.

(c) Finally, full judicial review of the arbitration might also be possible mostly in the event of a fraud (Articles 1502 and 1506 of the FCCP).

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13.4 Procedure for Enforcing Domestic and Foreign Arbitration

Exequatur is automatically granted when the award has been fully or partially confirmed by the court of appeal (Articles 1498 and 1527 of the FCCP).

Otherwise, the enforcement of the award requires a fast and simplified ex parte judicial application.

The application file should include an original of both the award and the arbitration agreement (or certified copies of them). For awards in foreign languages, a French transcript may also be requested.

Applications should be filed:

- before the lower court (*Tribunal de grande instance*) that has territorial jurisdiction if there is no pending appeal (Articles 1487 and 1516 of the FCCP); or
- before the Paris lower court for foreign awards (Article 1516 of the FCCP).

Enforcement can be denied if the award and/or the enforcement itself would constitute a blatant violation of domestic or international public order.

An appeal can be lodged against such decisions. Reasons to deny enforcement must be stated in the decision.

Favourable enforcement decisions:

- cannot be appealed when they affect domestic and international arbitrations, except when parties agreed to waive their right to claim for the annulment of the award (Articles 1499 and 1524 of the FCCP);
- can be appealed when they affect foreign awards when they are based on annulment grounds provided in Article 1520 FCCP (see above and Article 1525 FCCP).