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Litigation 2023

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France: Law & Practice

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FRANCE

Law and Practice

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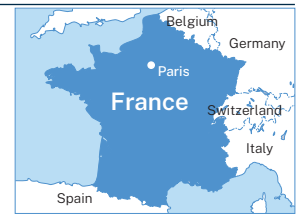

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FRANCE

1. General

1.1 General Characteristics of the Legal System

The French legal system is based on civil law, established by statutes (issued either by the Parliament or by the government in some instances).

French courts may construe law but have no right to create it 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 Court System

The French court system has a double pyramid structure. There are two separate orders, namely, 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:

- first-level courts;
- appeal courts, which review the full merits of the dispute for a second time (ie, law and facts); and
- 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. 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 judiciaires* have jurisdiction over most matters (including criminal, tort law, family, real estate and intellectual property) but not over commercial and labour matters (which go respectively to the *tribunaux de commerce* (commercial tribunals) and *Conseils de prud'hommes* (labour tribunals).

The commercial tribunals are composed of judges elected from among businesspeople, whereas the labour tribunals are composed of judges elected from among both businesspeople and employees. The other courts consist of "professional judges" (ie, holding professional credentials).

Appeal courts adjudicate the disputes rendered by first-degree courts of their jurisdiction. The Paris Appeal Court has, in addition, jurisdiction over decisions of the French antitrust authority (*Autorité de la Concurrence*) and the financial markets authority (*Autorité des marchés financiers*).

The creation, in 2018, of an international chamber at the Paris Commercial Court and in the Paris Appeal Court is a turning point and is intended to facilitate access to French commercial courts for transnational commercial disputes and enhance Paris' attractiveness as a venue for such disputes.

The International Commercial Courts of Paris (ICCP) deal with disputes relating to international commercial contracts and may be designated by a contract clause.

If both parties agree, English may be used in the debates in court and proceedings (for example, exhibits) and certain rules of common law may apply, when not inconsistent with French rules (for example, cross-examination of witnesses).

Along with administrative and judicial orders, there is 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. Trials are generally held in public and judgments are issued in public too.

There are limited exceptions where secrecy is required to protect certain interests (eg, issues involving minors, family matters such as divorce, some insolvency-related proceedings or when privacy or commercial secrecy are at stake).

Court filings are not accessible to the public.

1.4 Legal Representation in Court

With limited exceptions, only qualified attorneys may represent parties.

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.

Exceptions exist before specific courts, such as labour or civil courts (for small claims).

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 the United Kingdom, Germany or Australia.

This might be partly explained by the fact that, besides the lack of punitive damages, litigation in France is less costly and class actions have a limited scope.

Recent changes such as the implementation of the EU Damages Directive have not broadened litigation funding in France.

So far, third-party funding remains unregulated and relies on general principles of French law and lawyers' ethical rules, including:

- contractual freedom (Article 1102 of the Civil Code);
- freedom of payment (under Article 1342-1 of the Civil Code); 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."

The Interpretation of Third-Party Funding in France

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.

Thus, 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 they could be construed as a form of betting (also a heavily regulated business in France) but has concluded the opposite since they are not essentially speculative in nature.

The French Supreme Court has not ruled on the matter yet.

Concerns Over Legal Obligation, Privilege and Arbitration

Both the National Council of Bar Associations and the Paris Bar Association have welcomed the development of third-party funding, 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 clients wish to disclose any privileged information related to the proceedings to the funder, they must do it themselves and they may not ask their lawyer to do so.

A number of concerns have also been raised regarding third-party funding in international arbitrations. The ICC and the Paris Bar Association, among others, have highlighted the risks associated with non-disclosure of third-party funding agreements, especially regarding the potential annulment of the award and/or obstacles to its enforcement, and have recommended that the funded party's attorney encourages their client to disclose the existence of such an agreement.

2.2 Third-Party Funding: Lawsuits

Since third-party litigation funding is unregulated, there are no restrictions on the types of lawsuits that can be funded.

2.3 Third-Party Funding for Plaintiff and Defendant

For the same reason, it seems available to both the plaintiff and defendant.

2.4 Minimum and Maximum Amounts of Third-Party Funding

There is no legal limitation on the maximum and minimum amounts that can be provided by a third-party.

2.5 Types of Costs Considered Under Third-Party Funding

As court fees are generally low, a third-party funder might consider covering legal fees in addition to the cost of legal opinions or experts, if necessary.

2.6 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.

2.7 Time Limit for Obtaining Third-Party Funding

As this matter remains unregulated, there is no such time limit.

3. Initiating a Lawsuit

3.1 Rules on Pre-action Conduct

It is highly recommended, though not mandatory, to send a formal notice to the defendant (*mise en demeure*) before initiating a lawsuit. Its date serves as a starting point for calculating legal interest when payments are due.

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

In certain cases, before initiating a lawsuit, the claimant must resort to alternative dispute resolution, otherwise the summons would automatically be ruled inadmissible. See **12. Alternative Dispute Resolution (ADR)**. The steps taken to reach an amicable agreement must be mentioned in the summons.

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 subject matter, several courts have exclusive jurisdiction in certain areas. For instance, labour courts have exclusive jurisdiction for most work relationship disputes while commercial courts have exclusive jurisdiction when commercial parties are involved. *Tribunaux judiciaires* have exclusive jurisdiction over certain litigation 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 *tribunaux judiciaires* or *tribunaux de commerce* for specific matters, due to their nature or if the amount at stake is higher than EUR10,000.

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 or summons (*assignation*) must contain certain mandatory information: the jurisdiction, the factual and legal grounds of the claims, the remedies sought and the list of exhibits. The claimant may also mention the designated chamber if any.

Since 1 July 2021, before service, the claimant must ask for a hearing date and submit a draft summons to the court registry. Once set, the date and time of the first hearing shall be mentioned in the summons served on the defendant. Once served, the claimant must register the final summons with the court registry at least 15 days before the hearing date and at the latest two months after communication of the hearing date.

Legal reasoning and the claims may be amended later: up to the final hearing for an “oral procedure” (usually before commercial courts) or up to the closure of the written phase for a “written procedure” (before *tribunaux judiciaires*).

3.5 Rules of Service

Before *tribunaux judiciaires*, the claimant must ask a bailiff to serve the summons to the defendant in person. Upon service, the judicial proceedings have not yet begun, and it remains up to the claimant to file the suit before the court within two months or else the claim shall be null and void.

Before certain courts such as labour courts, the claimant must file the initial complaint and it is the responsibility of the court to summon the parties.

3.6 Failure to Respond

If the defendant fails to take part in the proceedings, the court may try the case 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 such as 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 Requirements for Cost Estimate

There is no legal requirement to provide clients with a cost estimate of any potential litigation at its outset. However, it is mandatory for attorneys to sign a fee agreement with their client describing the fee calculation method (hourly rates, flat fees, success 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 *tribunaux judiciaires*, the preparation belongs to the pretrial judge (*juge de la mise en état*) who has exclusive jurisdiction to rule on interim applications both for case management issues and interim remedies. Before commercial and labour courts, where there is no *mise en état* phase (since the proceedings are oral), a 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 the judge's hands nor does it have the force of *res judicata* on the merits of the proceedings. There are two types:

- Pretrial rulings handling temporary situations during the proceedings, for instance:
  - (a) obtaining the sequestration of a property until the outcome;
  - (b) setting visiting rights and custody during divorce proceedings; or
  - (c) ordering the payment of a provision to the creditor when the existence of the obligation is not seriously disputable.

- Pretrial 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 pretrial judge has full 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 generally no procedural mechanism to apply for early judgment on the merits.

4.3 Dispositive Motions

The pretrial judge has exclusive jurisdiction over procedural motions that are likely to bring the case to an end without review of the merits, among which *exceptions de procédure* such as lack of jurisdiction or *fin de non-recevoir* such as statute of limitations or absence of legal interest in bringing proceedings.

Exceptions de procédure must be raised at the same time and in limine litis, before any substantive defence on the merits or *fin de non-recevoir*.

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

Before *tribunaux judiciaires*, the pretrial judge may order a party to pay a sum of money as security for the other party's legal costs. For instance, the family court can issue an interim order so that a spouse pays a sum to help the other spouse pay legal fees.

However, the French Supreme Court ruled that the party asking for a provision for costs must prove the obligation is not seriously disputable on its merits.

4.6 Costs of Interim Applications/Motions

When an early judgment is issued on a procedural issue, the pretrial judge often orders the losing party to pay a certain amount for legal fees.

If an expert is appointed, they generally order the parties to pay a provision for the expert's fees.

4.7 Application/Motion Timeframe

The pretrial judge provides a timetable to the parties to organise their submissions. However, the duration is extremely variable depending on the case and procedural exceptions raised. By way of exception, during the first hearing, if there is an emergency or if the case is ready to be judged, the pretrial judge can send the parties immediately to trial, which is called short route (*circuit court*).

The parties may conclude a procedural agreement called a *convention participative de mise en état* in which they undertake to work jointly and in good faith for the preparation of the final hearing. Since November 2021, they can automatically waive any exception de procedure or

fin de non-recevoir motions, except for those that are revealed after the agreement.

5. Discovery

5.1 Discovery and Civil Cases

"Discovery", as understood in common law jurisdictions, does not exist under French law.

5.2 Discovery and Third Parties

There is no discovery from third parties as such.

5.3 Discovery in This Jurisdiction

As a result, there is no applicable information about a general approach to discovery in this jurisdiction.

5.4 Alternatives to Discovery Mechanisms

In French civil proceedings (broadly defined as non-criminal proceedings), the parties must prove the relevant facts supporting their respective claims.

Contrary 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 "free" (for example in commercial or criminal matters) or "legal" (only certain types of proof are admissible under strict legal criteria, for example written proofs or testimonies).

In France, 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 Civil Code, which states that "everyone is required to lend his aid to the court so that the truth may be revealed".

Nowadays, by virtue of the adversarial principle supervised by the judge (who guarantees the fairness of the proceedings), each party must give its arguments and exhibits spontaneously and in due course. Moreover, a party can also be compelled, on the other party's demand and on a judge's injunction if needed, 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 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*), like legal expertise or hearing of witnesses.

These measures are submitted to strict requirements: the requesting party must demonstrate sufficient connection with the dispute, precisely identify 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, pretrial measures), provided they obey various conditions (having a legitimate ground, being sought before trial, being proportionate to the aim pursued and seeking proofs upon which the resolution of the dispute depends).

5.5 Legal Privilege

French law recognises legal privilege under the concept of *secret professionnel*. Any exchange

of information between attorneys and clients is subject to professional secrecy. The infringement of professional secrecy, by either litigating or transaction lawyers (who are granted the same status), constitutes both a breach of ethical rules and a criminal offence. Therefore, respecting professional secrecy may impede giving certain documents or information.

Business secrecy also allows a party to refuse to provide certain sensitive material, where it is confidential or key to its competitiveness.

5.6 Rules Disallowing Disclosure of a Document

The right to privacy (protected by both civil and criminal law) can be another barrier to the production of some documents. For instance, a drone picture of a private property taken without the owners' consent can be judged inadmissible if it was neither necessary nor proportionate.

This example is indicative of the different approaches taken by, and the legal discrepancies between, French law and common law systems.

For instance, the US uses discovery and the Supreme Court applies serious sanctions on those refusing to provide information, whereas the *Cour de cassation* critiques fishing expeditions and protects other fundamental principles and interests under legal instruments, including the Blocking Statute of 1968, which prohibits any communication to foreign authorities of economic, industrial or technical information for the purpose of use as evidence, under the threat of criminal penalties.

6. Injunctive Relief

6.1 Circumstances of Injunctive Relief

French law provides injunctive relief called provisional measures (*mesures conservatoires*) to achieve a broad range of objectives, such as:

- safeguarding a right or a good (seizing money to secure a debt);
- preserving evidence for a future action (seizing counterfeit goods); or
- preventing immediate or irreparable damage.

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

In order to demonstrate that there is no serious challenge to the debt obligation and that some circumstances are likely to threaten its recovery (late or non-payment, unsuccessful formal notice, insolvency of debtors, etc), it is sufficient for the debt obligation to appear grounded in principle (not necessary to be certain, of a fixed amount nor to be due).

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 period, under penalty of nullity. If the litigant wins the case, they will turn the freezing order into a compulsory sale and will get his money back.

6.2 Arrangements for Obtaining Urgent Injunctive Relief

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

A party can quickly get interim relief introducing these provisional proceedings with mention of the hearing date. Several of these proceedings are set out below.

- The regular interim relief proceedings (*référé ordinaire*) before the president of the *tribunal judiciaire* or before the president of the commercial court, provided there is some emergency, an existing dispute but no serious challenge to it.
- Several specific cases depending on the party's intended purpose:
  (a) the conservatory injunction (*référé conservatoire*), when there is a serious challenge but there is a need to prevent imminent damage or an obviously unlawful disorder;
  (b) the interim payment injunction (*référé provision*), when a debt cannot be seriously questioned the interim judge can award provisional compensation to a party;
  (c) the injunction order (*référé injonction*), useful for consumer protection and in contract law; or
  (d) the probative injunction (*référé probatoire*), as mentioned above.
- Even faster in the case of an 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 ("opened doors").

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*) and is a non-adversarial process. The claimant seeks to surprise the respondent by using this method.

In practice, however, this type of motion is becoming increasingly difficult to obtain. Furthermore, in any case, the adversarial debate will be reinstated later during the proceedings on the merits of the case.

6.4 Liability for Damages for the Applicant

Should the defendant successfully later discharge the injunction (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 they provisionally obtained;
- compensate for all the harmful consequences;
- sometimes pay all the legal fees; and
- potentially 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".

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

Also, the respondent can avoid the provisional enforcement from the applicant by lodging cash or securities themselves (a bank guarantee of the amount of damages would suffice to lift a provisional attachment).

6.5 Respondent's Worldwide Assets and Injunctive Relief

In principle, injunctive relief is ordered 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 pre-cautionary attachment is brought at the same time against the debtor's assets both in France and abroad).

6.6 Third Parties and Injunctive Relief

Like the compulsory production of documents located in the hands of a third party, provisional measures can also be obtained against third parties (for example, a provisional attachment on the wages of a defendant might be enforced directly in the hands of their 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 (*astreinte*). This prevents 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 in France.

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 a form in certain instances), followed by the exchange of written submissions and evidence by the parties before a hearing where oral arguments take place.

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

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

In some courts (such as *tribunaux judiciaires*), each party will generally present its closing argument through its attorney without any intervention from the judges, while in other courts (such as *tribunaux de commerce*), the oral argument is more interactive, the judge(s) asking 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 to prepare the case file for the oral arguments date and rule over any

interlocutory motions (lack of jurisdiction, dispute over evidence, etc).

Before *tribunaux judiciaires*, when the parties expressly agree, certain proceedings may be conducted without any hearing. In this case, the factual and legal reasoning, as well as claims, shall be submitted exclusively in writing.

7.3 Jury Trials in Civil Cases

Under French law, jury trials only exist for the most serious criminal matters before the *Cour d'assises* (which has jurisdiction to judge criminal acts punishable with over 20 years of imprisonment) and are excluded in all civil, commercial, labour or administrative disputes.

7.4 Rules That Govern Admission of Evidence

The types of evidence admissible depend on the type of jurisdiction. Regarding civil matters, the FCCP sets rules–not applicable before commercial courts–restricting admissible evidence that depend on the nature and the gravity of the dispute.

Evidence generally consists in 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.

While both civil and commercial courts reject evidence when obtained by unlawful or disloyal means, they can be admissible in criminal proceedings.

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 testimony at trial.

This is because 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 (except before the ICCP, see **1.2 Court System**).

7.6 Extent to Which Hearings Are Open to the Public

Closing argument hearings are in principle public (with limitations in certain matters; see **1.3 Court Filings and Proceedings**). Transcripts are very limited, even in criminal matters, and never record verbatim the dialogue of the persons present, except before *Cours d'assises* under certain circumstances.

Except in simple disputes and before *Cours d'assises*, judgments are issued weeks or months after the closing argument hearing (typically four to eight weeks).

Parties have access to the full judgment of their case. Under certain conditions, third parties may also request copies of judgments. Moreover, in principle, the public has access to anonymised versions of decisions rendered by French courts, since an executive order of June 2020 enshrined the open data of court decisions. Judicial courts decisions must be posted online within six months of their date (two months for administrative courts).

7.7 Level of Intervention by a Judge

Judges' interactions with parties and their lawyers, when cases have come to trial, have increased recently.

In the past, only criminal trials involved a thorough interaction. This is now frequent in all types of courts, especially in commercial courts where judges often ask for explanations, though only on the points they deem useful.

7.8 General Timeframes for Proceedings

Proceedings on the merits of a dispute generally take one to two years to be decided by most courts. It tends to be longer nowadays, due to the congestion of the courts and the accumulated backlog of cases during the COVID-19 period.

There can be accelerated proceedings on the merits (called *jour fixe*, *bref délai* or *procédure accélérée au fond*) upon evidence of an emergency. In such cases, the hearing for oral arguments takes place a few weeks after the delivery of the initial writ.

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.

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). Mutual concessions by the parties are required.

If those conditions are not met, the trial judge may declare the settlement null and void, even if the latter has been probated.

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

In criminal matters, settlements with the victim are permitted. However, it does not affect the ability of the public prosecutor to pursue a prosecution. Deferred prosecution agreements (convention *judiciaire d'intérêt public*) are only available for legal persons and for certain offences (Articles 41-1-2 and 41-1-3 of the French Code of Criminal Procedure).

Settlement agreements should be instrumentalised in a written document 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. The parties can appeal against the refusal of the court.

Upon the enactment of the Act of 22 December 2021, settlements shall be enforceable when countersigned by the lawyers of each of the parties and endorsed by the clerk of the court (Article L.111-3 of the French Code of Civil Enforcement Procedures).

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 the Successful Litigant

Forced execution in kind has been the principle since 2016. When execution in kind is impossible, the judge may consider awarding damages to compensate the prejudice caused.

In addition, litigants can ask the judge to order the losing party pay for the legal costs, including legal fees.

9.2 Rules Regarding Damages

The main rule for damages is full compensation, meaning that the claimant may only receive the exact compensation for the damage suffered, 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 prohibited in French civil law.

However, the parties to a contract may decide to insert a penalty clause (*clause pénale*) applicable in cases of breach of contract and upon formal notice by the other party. Only the judge can either moderate or increase it if its amount is manifestly excessive or too low compared to the suffered damage. In certain instances, it may be considered abusive (such as in residential lease agreements or consumer disputes).

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

Thus, prospective damages (which could never materialise) are not compensated. However, the boundary between certain and uncertain is not always easy to draw. Damages resulting from a loss of opportunity, defined as the loss of a "favourable event", are now deemed to be compensable; though they are only entitled to partial compensation (ie, the estimated value of the probability of that positive event happening).

In terms of classification, French civil law commonly distinguishes between pecuniary damage (loss of margin, loss of expected profit, etc) and non-pecuniary (or moral) damage (harm caused to honour, reputation, feelings of affection, etc).

In case of personal injury damage, when the physical integrity of an individual is at stake, a reference table called the *Dintilhac nomenclature* is useful to identify the many different types of damage that can be repaired.

Damages can be evaluated by judicial experts.

9.3 Pre- and Post-judgment Interest

Legal interest:

- may be added to the damages;
- is incurred from the date of delivery of the court decision (or of the formal notice); and
- is calculated according to either legal or contractual rates.

9.4 Enforcement Mechanisms of a Domestic Judgment

Since 2020, all court decisions are automatically enforceable immediately (ie, provisionally) notwithstanding an appeal against the decision. However, the court may decide to dismiss provisional enforceability in whole or in part, if it is deemed incompatible with the nature of the case or if it entails excessive consequences.

Similarly, in case of appeal or opposition, the first President of the court may be asked to dismiss provisional enforcement if there is a serious plea for annulment or if it entails manifestly excessive consequences.

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 a bailiff to their opponent. Following this, the bailiff may 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 their bank accounts; and
- the *saisie sur salaire* allows the creditor to seize the debtor's wages, that is, directly from 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 enforced on French territory. However, within the European Union, 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 to a Litigation

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

Since 2020, appealing against first instance decisions does not suspend the decisions' effects: they are provisionally enforceable as of right, unless the law or the judge decides otherwise.

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 pretrial judgment but, in most instances, it will only be reviewed by the appeal court together with the appeal lodged against the judgment on the merits.

10.3 Procedure for Taking an Appeal

In most cases, representation by an attorney is compulsory before the appeal court.

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

The appeal period can be reduced to 15 days, particularly for interlocutory and interim relief orders, orders on motions and decisions from the enforcement judge.

The time limit is extended by one month when the notified party is domiciled in French overseas territories and by two months when abroad.

The notice of appeal shall state whether the appeal aims at cancelling the judgment on procedural grounds or challenging its findings. In the latter case, the notice must specify which findings are challenged.

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, appellants have three months from the filing of the notice of appeal to file their submissions. The defendant then has three months from the notification of the appellant's submissions to respond. On the fast track, it is reduced to one month each, which can be further reduced on a case-by-case basis by the presiding judge.

Under the same conditions as for the notice of appeal, the time limit is extended when the notified party is domiciled in the French overseas territories or abroad.

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

In cases of extreme urgency where parties' rights are "at risk", parties can petition the highest-ranking judge of the court to have their case heard on a fixed date.

10.4 Issues Considered by the Appeal Court at an Appeal

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

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 if they relate to the parties' claims.

The appeal court only rules on the final submissions filed. This entails that any claims or legal arguments not restated by the parties in their final submissions are deemed dropped.

10.5 Court-Imposed Conditions on Granting an Appeal

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

However, a party can petition the appeal judge to strike out the appeal of the other party when it does not comply with the appealed judgment requirements (for instance, to pay the damages awarded).

The judge also declines to strike out the appeal when the party is unable – for objective reasons – to comply with the decision or when enforcing the decision could entail manifestly excessive consequences.

10.6 Powers of the Appellate Court After an Appeal Hearing

When the appeal aims at cancelling the first-instance decision, the appeal court is apprised of the full scope of the dispute. This means that the court must hear the entire case and cannot refer it back to the lower courts when ruling that the deferred decision shall be cancelled.

In the other hypothesis, the appeal court can only rule on the merits that are challenged.

In all cases, the court shall ground its decision on the written submissions of the parties and their exhibits.

In rare circumstances, it can reopen the debates after the appeal has been heard.

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 Articles 695 et seq of the FCCP and include:

- duties and taxes collected by the court administration;
- court translation costs for international notices;
- compensation for a court-appointed expert;
- costs relating to investigation measures; and
- public officers' remuneration.

They do not include attorney's fees (and some other trial costs).

11.2 Factors Considered When Awarding Costs

In general, the *dépens* are entirely borne by the losing party. However, the court may decide otherwise, depending on either the behaviour of the parties or reasons of equity. Moreover, in some matters, French law provides specific rules for allocating these costs.

Regarding the other costs (namely, attorney's fees), the court decides freely whether the losing party must pay the attorney's fees of the prevailing party and, if so, which part of the fees must be reimbursed.

In practice, French courts sometimes oblige the losing party to pay, but only for a small part of the attorney's fees.

11.3 Interest Awarded on Costs

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 (ADR)

12.1 Views of ADR Within the Country

The most popular alternative dispute resolution methods in France are mediation and conciliation that are 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 judges may themselves be conciliators if they decide 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.

Parties may also contractually agree to use the *Procédure participative* (participatory procedure) in which they undertake to work jointly and in good faith for an amicable resolution. The agreement is recorded in a private deed countersigned by the parties' lawyers.

To enforce an ADR agreement, the parties may refer it to the judge for approval. Since March 2022, an ADR agreement may even be enforceable when countersigned by the parties' lawyers and with a visa from the court's registry.

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 it. In certain matters, it has become standard practice for some courts 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 60% in 2020, but only 27% have been initiated by both parties. Mediation generally lasts from three to six months in commercial cases.

Parties may include mediation or conciliation clauses in contracts (this is known as conventional mediation or conciliation).

12.2 ADR Within the Legal System

Generally, neither mediation, conciliation nor *Procédure participative* is compulsory. They are based on consent and must be accepted by all parties.

By exception, an ADR attempt is mandatory before initiating certain proceedings, such as labour law disputes or divorce proceedings.

An ADR attempt may also become compulsory due to the willingness of the parties. If they have provided for mandatory conciliation or mediation in their contract, they must use it first, before initiating litigation. Failing to do so, the defendant can assert that the claim is inadmissible (except in proceedings of interim relief depending on emergency situations).

A 2019 French Act has widened the judge's power to ask the parties to use mediation at every step of the proceedings, even during pre-trial or specific proceedings where it used to be prohibited (divorce and judicial separation).

It also introduced a mandatory ADR proceeding for low financial stakes disputes (under EUR5,000) and neighbourhood disputes, except in certain cases (for example, in the case of legitimate grounds or for consumer or mortgage loans).

Since 2022, the judge may order the parties to proceed to mediation, in which case the deadlines to submit their motions or appeal are suspended. Although this is an injunction, there are no sanction against parties who do not comply.

12.3 ADR Institutions

Several organisations have been established since the 1980s with a particular focus on alternative dispute resolution, including the *Institut*

Français de la Médiation which was launched in 2007, as well as professional training organisations for mediators, labour unions and professional networks.

The government has also established a number of specific mediation institutions that work in a variety of fields, including both public and private ones. The most successful one is the *Médiateur des Entreprises*, a national service reporting to the Ministry of Economic and Financial Affairs created in 2010 to help companies solve their disputes with clients or suppliers. According to a 2019 report, its mediation department handled over 1,300 cases in 2018 and has a 75% success rate.

13. Arbitration

13.1 Laws Regarding the Conduct of Arbitration

France is a major centre of arbitration. The International Chambers of Commerce (ICC) and the International Court of Arbitration are located in Paris.

The arbitration process can be conducted either on an ad hoc basis or under the auspices of an arbitral institution (such as the ICC).

Arbitration procedures are greatly influenced by the will of the parties, as specified in arbitration clauses (before a dispute arises) or compromises (after a dispute has arisen).

There is often a purely residual nature to the sets of laws governing arbitration procedures. The applicable body of rules may depend on the purpose of the arbitration.

There are international arbitrations "involving the interest of international trade", as well as domestic arbitrations. In any event, the due process of law, adversarial principle, rights of defence and equality of arms must govern the arbitration process.

13.2 Subject Matters 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

There are several judicial remedies available to challenge an arbitration award.

Appeals on the merits are restricted to domestic awards if such an appeal has been specified by the parties.

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

Appeal proceedings should be brought before the appeals court the day the award is released and within one month of the opposing party being served or notified.

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

Despite the reform of appeal procedure, the suspensive effect of the appeal remains applicable to domestic awards, notwithstanding the ability of the arbitration tribunal to order provisional enforcement.

Moreover, provisional enforcement can be challenged by the parties through a specific application before the President of the appeal court.

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

Finally, full judicial review of the arbitration might also be possible, mostly in the event of a fraud.

13.4 Procedure for Enforcing Domestic and Foreign Arbitration

Exequatur is automatically granted when the award has been fully or partially confirmed by the appeal court.

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). For awards in foreign languages, a French transcript may also be requested.

Applications should be filed:

- before the *tribunal judiciaire* in whose jurisdiction it was issued; or
- before the Paris *tribunal judiciaire* for foreign awards.

Enforcement can be denied if the award and/or the enforcement itself constitutes a blatant violation of domestic or international public order. An appeal can be lodged against such decisions within one month after being notified.

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; and
- can be appealed when they affect foreign awards when they are based on annulment grounds provided in Article 1520 of the FCCP.

14. Outlook and COVID-19

14.1 Proposals for Dispute Resolution Reform

The Decree of 11 December 2019 which supplements the French Act of 25 March 2019 titled “Planning Law for 2018-2022 and Reforming Law for Justice” provided an answer to proposals for dispute resolution reform.

Due to the recent nature of these reforms, we do not have sufficient insight into their practical implementation to make further comments or to present new proposals for reforming dispute resolution.

Nevertheless, there is a tendency to believe that the proliferation of reforms, particularly in civil procedure, has ultimately resulted in greater pro-

cedural formalities and restrictions imposed on litigants and lawyers.

14.2 Impact of COVID-19

COVID-19 has had an impact on French litigation.

In particular, the 23 March 2020 Act established a state of health emergency (*état d'urgence sanitaire*) and empowered the French government to legislate by decree and/or ordinance.

A number of decrees and ordinances were issued in an attempt to regulate the impact of COVID-19 and adapt the response of French litigation. Among other measures, a moratorium was imposed on procedural deadlines, judicial review and the statute of limitations. The moratorium suspended their time limits until August 2020.

In addition, physical attendance at hearings (police interviews, custody hearings, trials, etc) was limited. The depositing of files – possibly with written comments – was recommended and, when not possible, the hearings were held either via videoconference (through Zoom, Teams, etc) or physically (respecting social distancing and "barrier gestures") after filing legal submissions on platforms other than the "Virtual Private Network for Lawyers" (called "RPVA" or "e-Bar") such as Atlas or Plex.

An Act of 30 July 2022 put an end to the exceptional regimes created to combat the COVID-19 pandemic.

In recent years, some of those measures, such as electronic exchange of documents between lawyers and judges, have become commonplace. For instance, lawyers are now able to communicate with French courts through these platforms, as well as send their submissions and accompanying documents.

Kiejman & Marembert was founded in 2000 and has 11 lawyers on staff. It specialises in complex litigation involving major strategic and economic interests, including white-collar criminal defence, corporate and finance litigation, and media and entertainment litigation. Its clients include listed French and international companies, major industry groups, international or cultural institutions, private equity and family offices, film and television producers, and media outlets, in addition to heads of state, corporate executives, and personalities in the arts, culture, literature, fashion and sport. The firm's key practice areas are white-collar crime litigation (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 litigation involving media, entertainment and arts.

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