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**Dispute resolution in France :
an overview for foreign lawyers**

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Dispute resolution at Campbell, Philippart, Laigo & Associés

The dispute resolution department of Campbell, Philippart, Laigo & Associés deals with the prevention and resolution of disputes in a broad range of fields, principally in the area of business law.

The areas in which we practise include commercial contracts, real estate, construction and engineering, intellectual property, company law and employment law.

The firm advises on the choice and drafting of appropriate dispute resolution mechanisms (jurisdiction clauses, agreements to arbitrate, mediation clauses).

We assist and advise in the early stages of disputes, assessing the strength of the case and advising on the evidence.

We assist parties in negotiating settlements, whether informally or within the structure of a formal mediation.

Finally, we provide representation before the courts throughout France and before arbitral tribunals. Certain members of the firm also act as arbitrators.

We have particular expertise in the field of international dispute resolution, often working with foreign lawyers in cross-border matters.

Dispute resolution in France : an overview for foreign lawyers

- **The courts – often lay courts, even in commercial matters**

The principal civil court is the *Tribunal de Grande Instance*, which has general jurisdiction over non-commercial matters. The *Tribunal de Grande Instance* also has specialised jurisdiction over certain matters important to businesses, notably trademarks and patents.

However, many cases go before lay courts, at least at first instance. In particular, Commercial Courts having general jurisdiction over commercial matters are made up of representatives of the business community. Employment tribunals are composed of representatives of employers and employees.

- **Appeals are common**

Litigation is often a two stage process, in that there is usually an automatic right to appeal, which is often exercised.

Courts of appeal are decentralised (there are currently 35).

When giving estimates of length of proceedings, it is therefore prudent to reason in terms of a decision at first instance plus an appeal. For example, in the case of a commercial matter heard in Paris and going to appeal, the proceedings are unlikely to be concluded in less than a couple of years.

Appeals are rehearings rather than a review of the previous decision. Parties can therefore use new evidence and arguments, although there are restrictions on the bringing of new claims.

The general rule is that an appeal will operate an automatic stay of enforcement of the first instance decision. However, a first instance court may order provisional enforcement of its decision and certain decisions are provisionally enforceable as of right (for example certain elements of awards in employment cases).

An appeal judge has powers to stay provisional enforcement or to make orders for security. The powers to stay will usually require the applicant to show that enforcement will cause manifestly excessive consequences.

Final appeals go to the *Cour de Cassation*, essentially on matters of law only and this form of appeal rarely suspends the decision of the court below. This form of appeal is not a rehearing and if necessary, the *Cour de Cassation* will remit the case for a new hearing before a different Court of the Appeal.

- **Costs – a contribution towards real costs**

The general rule is that the successful party in proceedings will be awarded costs. However, the award of costs will not cover the real costs of litigation. There are two orders for costs. The first is an order for what is known as *dépens*. This essentially covers court and service fees, plus a small amount of taxed fees of the lawyers. However, it also covers the cost of the fees of a court-appointed expert, which can be substantial. The second order made for costs is made under article 700 of the Civil Procedure Code and is a contribution towards costs not covered by *dépens*. The amounts awarded at first instance vary widely but are often only a few thousand euros. The amounts awarded on appeal are more generous but when litigating in France, parties should work on the basis that most of their real costs will not be recoverable.

- **Preparing the case : evidence and hearings.**

The French court system leaves practically no place for oral evidence and a very much reduced role for oral argument. This feature needs to be borne in mind when managing pre-contentious matters, when considering the evidence and when preparing a case for hearing.

Save in exceptional cases, there is no oral witness evidence in French proceedings. Cases will therefore be decided above all on the basis of contemporaneous written evidence such as contractual documentation and correspondence.

It is therefore very often crucial to ensure that correspondence between the parties is carefully managed in the pre-contentious phase, in order to set out a party's allegation clearly, or in order to put on record the fact that certain allegations are contested.

Surprisingly from a common law point of view, there is no general process of discovery of documents in the possession of the parties. The general rule is that the parties are free to produce – or not to produce – whatever documents they wish.

Parties may make formal request for disclosure of specific documents and may apply to the court for an order for disclosure of these but even such orders for specific disclosure are by no means granted as a matter of routine.

Parties may produce written witness statements but these are not subject to testing by cross-examination. The courts accord the weight they think fit to such statements.

Two features of the system are of use in filling in the evidential gaps. Firstly, an independent officer known as a *huissier* (usually translated as bailiff, as this officer also serves process and assists in the execution of decisions) can be called upon to provide an independent factual report for use in court. Examples of such use are the physical state of a machine, or premises, the blocking of access, or the use of advertising in a particular place. Where it is necessary to obtain access to private premises not belonging to the party obtaining the evidence, a court order can be obtained *ex parte* granting access.

Secondly, French procedure makes very wide use of reports from court-appointed experts. Experts play a crucial role not only in technical cases involving engineering and construction but in also in cases involving the taking of accounts and assessment of damages. As the style and length of hearings is not suited to detailed fact-finding, experts will be used in many cases where in common law systems the judge would simply examine detailed evidence produced by the parties.

The final hearing of most matters will be very short when compared with common law systems. Argument is often limited in practice to less than half an hour for each side.

In order to make its decision, the court will therefore use essentially the written briefs (*conclusions*) lodged by each side, as well as a trial file consisting of the briefs reduced to their essential arguments together with copies of the documents relied upon.

- **Pre-trial measures**

These are elements of the procedural system which are very important in litigation strategy and the French system is very well-equipped in terms of pre-trial conservatory measures.

In particular, the courts are able to make *ex parte* orders for the freezing of a wide range of assets (for instance land, bank accounts, sums owed to the defendant by third parties). Once the principle of the claim is shown and it is demonstrated that there is a threat to recovery, the order is made. Moreover, there is no duty of full and frank disclosure in order to obtain the order and experience shows that such orders are relatively easy to obtain and very difficult to set aside.

Importantly, the French courts will make such freezing orders in aid of purely foreign proceedings provided that the assets are situated in France.

On the other hand, pre-trial injunctive relief is from a common law point of view much less satisfactory. The injunction known to common lawyers is above all a mechanism for preventing action while weighing up the balance of convenience. In French procedure, this is not the approach : injunctions are essentially summary judgments on the merits, even if they are provisional and can be set aside at trial. Usually, the existence of a serious dispute will be a defence to such measures. Nonetheless, the provisions of the Civil Procedure Code do specifically provide for the granting of injunctions in order to prevent “imminent damage” and whilst such measures are not easily obtained, they are available in appropriate situations (for example where there is a threat of destruction of property).

The mechanisms described above for obtaining injunctive relief use the rapid procedure known as *référé* but this form of procedure is also used where common law systems would refer to summary judgment, where there is no serious defence.

Decisions made using the *référé* procedure are immediately enforceable as of right.

The lack of effective injunctive relief in many cases is made up for in matters where rapid decisions are absolutely necessary by mechanisms permitting expedited trials at first instance and on appeal.

Finally, in certain areas of the law, specific pre-trial procedures exist. A notable example of this is the field of intellectual property. Thus, in trademark matters, the court can make *ex parte* orders for seizure of infringing articles and can also provisionally order cessation of use of the mark using a mechanism which more closely resembles the common law injunction. Also, in certain areas such as the press, publishing and media, the approach to injunctions and rapid hearings is more robust, so that parties can obtain prompt remedies which are made absolutely necessary by the circumstances.

- **Mediation**

Mediation of disputes remains rare in France, although there is a growing body of support for it among judges and practitioners.

The Civil Procedure Code contains modern provisions facilitating the use of mediation and recent case law has favoured enforcement of agreements to mediate. There are also a number of highly professional mediation organisations having mediator panels.

Experience in France shows that whilst it can be very difficult to put a mediation into place in the absence of a mandatory provision in the contract, the success rates once mediation is attempted compare favourably with those in other, more mediation friendly jurisdictions.

- **Arbitration**

French law has a strong policy favouring international arbitration. This is reflected in a number of ways.

1/ If despite an arbitration agreement a party brings an action before a French court in relation to a dispute arising out of the underlying contract, the court will dismiss the action and invite the parties to refer their dispute to arbitration.

2/ This will also be the case if the validity of the arbitration agreement is contested. The arbitral tribunal has primary jurisdiction to rule on the validity of the arbitration agreement. That jurisdiction may not be pre-empted by a court of law.

The only situation where a French court will agree to assume jurisdiction over the dispute brought before it is where the arbitration is manifestly illegal or inapplicable.

3/ An arbitration agreement is entirely separable from the underlying contract. The nullity or illegality of the latter would leave the arbitration untainted.

4/ If an international arbitration has its seat in France, the parties are free to submit the arbitral proceedings to the procedural law or the procedural rules of their choice.

5/ French courts will not interfere with the conduct of arbitral proceedings. For instance, they will not issue injunctions against the arbitrators or the parties.

6/ Obtaining an exequatur order enforcing an international order is cheap, quick and easy. It is done by *ex parte* application to the President of the *Tribunal de Grande Instance*, with a

certified copy and a translation of the award (and of the arbitration agreement) being filed in support.

7/ Where the arbitral tribunal has declared that its award will be enforceable notwithstanding any appeal, French courts will enforce the award in France as soon as an exequatur order has been issued. In such cases, an appeal of the exequatur order will not stay the enforcement of the award.

8/ If the arbitral tribunal has not declared that its award will be enforceable notwithstanding any appeal against the award or against an exequatur order, an appeal will operate a stay of enforcement but the party in whose favour the award was rendered is nonetheless entitled to freeze the assets of the debtor which are located in France.

9/ Errors of law or manifest disregard of the law are not grounds for vacating international awards.

French courts will never review the merits of international arbitral awards.

Violations of public policy are of no consequence and do not affect the validity of the award unless the violations are flagrant, real and concrete.

10/ The requirements for recognizing foreign international awards are less stringent than those set out in the New York Convention of 1958.

If an award is set aside in the country where the arbitration took place, French courts are not bound by the findings of the foreign court. Accordingly, they may nonetheless decide to enforce that award in France if they conclude that there are no grounds under French law to refuse recognition to that award.

11/ Owing in particular to the presence of the ICC in Paris, and the great number of arbitrations held in France, French courts have developed over the years an abundant body of arbitration-friendly case law which is regarded to be at the cutting edge of legal thinking in this field.

12/ If your clients have contracts with French parties or with parties having assets in France, providing for disputes with such parties to be referred to arbitration is a valid choice.

13/ In conclusion, if your clients enter into an arbitration agreement, providing for France as the seat of the arbitration is always a safe bet.