This second edition of *Commercial Litigation* aims to provide an updated first port of call for clients and lawyers to start to appreciate the issues in each jurisdiction. Each chapter is set out in such a way that readers can make quick comparisons between the litigation terrain in each country.

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COMMERCIAL LITIGATION
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SECOND EDITION

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FOREWORD

Andrew Horrocks | Andrew Horrocks Law Limited
Maurice Phelan | Mason Hayes & Curran

Four years have now passed since the publication of the first edition of this book. Despite the generally improving economic outlook, the significant increase in commercial litigation remains evident, partly still caused by the previous financial crisis.

The growth of cross-border commerce means that jurisdictional principles have become more important as litigants are increasingly likely to find themselves involved in disputes in jurisdictions unfamiliar to them. They and their usual lawyers may have limited, if any, understanding of how the local legal system works. Sophisticated litigants are also increasingly aware of the benefits of bringing a claim in a jurisdiction more favourable to their cause of action, even if that means litigating in unfamiliar territories. It is therefore now more important than ever for parties and their advisors alike to be able to obtain an overview of the way litigation is conducted around the world.

Since the publication of the first edition, there have been a number of other noticeable trends. One is the increasing level of case management in commercial litigation undertaken by the courts in our own jurisdictions to attempt to avoid delay and reduce costs. The imposition of stricter time limits requires parties and in turn their lawyers to ensure resources are better managed.

The need to find cost-effective routes to the resolution of commercial disputes also remains a key trend. The market for mediation and other alternative dispute resolution services continues to expand, and arbitration remains popular for disputes arising out of cross-border commerce and investment. Insurance products relating to the costs of litigation have been available for some time in our jurisdictions, and here and elsewhere there is also a third party funding market.

The contributors to this second edition are all leading lawyers in their jurisdictions and are ideally placed to provide practical, straightforward commentary on the inner workings of their respective legal systems. Their kind contributions are greatly appreciated by us. We have been particularly pleased as general editors to have been able to gather such a breadth of contributors for this new book, from just about every major jurisdiction in the world. We express our thanks to all those at Sweet & Maxwell who have worked tirelessly to bring together the chapters and have assisted hugely in the editorial process.

As with the previous edition, a work of this nature will not allow for in-depth analysis or provide solutions for every problem encountered by litigants. The book is intended rather to provide a first port of call so that readers can start to appreciate the approach of the courts in each jurisdiction to commercial litigation and better understand both the procedure they adopt and how the dispute will be resolved in practice.

We hope this book will assist all who come to use it, and will be happy to receive suggestions for future editions.

Andrew Horrocks and Maurice Phelan, London and Dublin, September 2015

FRANCE

Thierry Bernard | CORUS, société d'avocat

1. COURT STRUCTURE

The commercial courts, independent jurisdictions of the civil courts, have jurisdiction to hear disputes between traders, be they natural persons or trading companies.

However, there are some exceptions:

- Some commercial litigations do not lay with the commercial court, but with the court of first instance (that is, the civil court) that has exclusive material jurisdiction: for instance, litigations in the intellectual property, competition law or commercial leases areas.
- The appeal against any commercial court's decisions takes place before the court of appeal situated in the litigation's jurisdiction.

2. PRE-ACTION

2.1 Are parties to potential litigation required to conduct themselves in accordance with any rules prior to the start of formal proceedings?

It is becoming more and more frequent for parties to provide in the contract that, in case of a dispute, they must follow an amicable dispute settlement procedure before they proceed to trial. In that case, the parties must comply with this requirement or they risk having their action declared inadmissible.

If no such clause is specified in the contract, the judge can still offer to the parties the possibility to first try a conciliation or a mediation, before going to trial (*Article 127, Civil Procedure Code*).

2.2 Are there any time limits for bringing a claim? If so, what are they?

The statutory limitation period in commercial matters is five years, subject to certain exceptions. For example, in insurance cases, the limitation period is two years.

Between professionals, the limitation period can be shortened or extended by agreement of the parties. It may not, however, be reduced to less than one year or extended to more than ten years.

3. PROCEDURE AND TIMETABLE IN CIVIL COURTS

3.1 How are proceedings commenced?

Plaintiff

The lawsuit is initiated by the plaintiff, who submits a claim to the court or before the judge (for instance, the interim relief judge). This procedure is initiated by a subpoena.

The subpoena is served by a bailiff on the defendant and represents a summons to the court designated by the applicant. The second original is served on the applicant to enable him or her to submit his or her case to the court.

The subpoena must clearly state the facts of the case and set out the legal foundation on which the claim is based. Since 1 April 2015, the summons must specify the steps carried out by the parties in order to try to reach an amicable agreement before bringing the case to court, unless the demanding party justifies legitimate grounds in respect of urgency or the matter considered, such as law and order.

Copies of any supporting documents and evidence that will be relied upon in relation to the claim before the court must be attached to the summons.

The defendant's absence will not prevent the court from making a ruling.

Defendant's response

Before the commercial court, a party may defend itself personally without legal representation. The parties have the right to be assisted or represented by any person of their choice. A representative, if not a lawyer, must be able to show proof of special authority.

The date of the first hearing will be set out in the summons. Although in principle the proceedings before the commercial court are oral, in practice the pre-trial judge will set deadlines for each party to respond in writing to the other's claims.

Each party must provide its writs (claims and submissions) and evidence (in support of its claim) to its opponent before the expiry of the deadline in order to comply with the adversarial principle (*principe du contradictoire*).

3.2 What are the main steps to trial, once a claim has been formally commenced? What is the usual timetable to trial?

The four stages of a trial are:

(i) The summons: a writ served by a bailiff under which the party wishes to assert a right, the plaintiff or applicant, calls on its opponent, the defendant, to appear in court either in person or through its legal representative.

(ii) Pre-trial stage: the case, assigned to the competent court, will be prepared for judicial assessment. Preparation for trial is achieved by the exchange of written arguments.

When the parties or the judge considers that there has been sufficient discussion, the judge will declare the closure of the exchange and set a hearing date for the parties' claims to be heard before the court or a judge.

(iii) The hearing: This is the court session during which the judge evokes the case and hears the parties and any witnesses or experts before delivering a decision.

(iv) Judgment: after a period of consultation (the deliberation), the judge makes his or her decision, supported with legal argument and fact.

A judgment can be rendered before the court adjudicates on the merits of the case when one or more procedure issues have arisen or when a procedural act, such as the provision of expertise, has been demanded by one or several partie(s).

Timetable for a case to reach trial

It is difficult to give a precise indication of the duration of proceedings before the French commercial courts, as it depends above all on the number of cases pending before the relevant court, and the time taken by the parties in the exchange of submissions and evidence (which, in turn, depends on the complexity of the case).

However, to give a rough idea of the time-frame between the summons and the decision, a case before the Paris Commercial Court of instance can take from a few months to, more generally, about one year.

3.3 Is it possible to expedite the normal timetable to trial? If so, how?

In urgent cases, it is possible to submit an urgent application to the presiding judge of the commercial court. The commercial court's presiding judge in these circumstances is entitled to take all steps, precautionary measures or reinstatement measures to prevent imminent damage or stop an imminent disturbance.

The presiding judge will issue an interim order. This is a provisional decision, rendered after hearing both parties, at the request of one party.

An interim judge adjudicates based on what is obvious and undeniable. This allows a quick decision to be made. However, the decision does not have the value of a decision on the merits: which means that an interim judgment is susceptible to challenge following substantive proceedings.

In some urgent cases, an applicant may apply to the commercial court's presiding judge for the defendant to be tried expediently on the full merits of the case and not simply at an interim level. The presiding judge will set the time-frame for this process (a few days or weeks).

Appeals in respect of interim orders fall within the jurisdiction of the Cour d'appel (court of appeal).

4. DOCUMENTARY EVIDENCE

4.1 Are the parties obliged to search for, retain or exchange documentary evidence prior to trial?

The judge is responsible for ensuring that the parties exchange all evidence relating to the case. He can rely on his or her judgment only upon items, submissions and documents cited by the parties that have been subject to examination.

A full and mutual exchange of facts, evidence and legal arguments must be made voluntarily in good time and in writing, in order to permit a fair trial that upholds the rights of defence.

Failure to comply with this requirement is severely punished in that the judge will disregard any evidence, argument or document not disclosed to the opposing party.

If a party suspects that another party is withholding evidence, it can request that the court compel the other party to produce the evidence in question. The judge must ensure compliance with the adversarial principle. The judge may, by injunction or order subject to penalty, require the disclosure of a piece of evidence, but can exclude from the proceedings any piece of evidence that is not provided in a timely manner.

4.2 Are there any special rules concerning the exchange of electronic documents?

In France, Law No. 2000-230 of 13 March 2000, which adapts the law of evidence to information technology and in relation to electronic signatures, recognises the legal value of electronic documents and signatures.

Consequently, written evidence is now "evidence originating from a series of letters, characters, numbers or any other signs or symbols with an intelligible meaning, whatever the medium and mode of transmission".

Electronic documents are thus admissible as evidence in the same way as paper documents, if the author can be properly identified and if they are prepared and stored in a way that protects their integrity.

The law and decrees specify the practical conditions that electronic documents and electronic signatures must meet to be enforceable against third parties. Depending on the technical security level of the electronic process used and its recognition by the authorised departments of the state, electronic documentation can constitute evidence giving rise to rebuttable or non-rebuttable presumptions.

On 21 June 2013 (consolidated on 6 May 2015), a decree was passed that organises the conditions under which electronic communications can be used between lawyers and between lawyers and the jurisdiction in the procedure before the commercial courts. Lawyers access the system of electronic communication provided by the commercial courts by using the Private Virtual Lawyer Network (PVLN), which has a secure end point that allows an interconnection with the national exchange and the tracking platform i-greffe. Lawyers access the PVLN through an "e-Bar", which falls under the National Bar Council's remit.

4.3 Can any documents be withheld from the other side or from the court?

When dealing with a client verbally or in writing, a lawyer must maintain confidentiality with regard to the subject being discussed. A lawyer's duty of professional confidentiality is of a general, absolute and public order nature.

Verbal communications or written correspondence between lawyers is by nature confidential, so no disclosure by the recipient can be made and no correspondence between lawyers can be used, including in court.

The rules of confidentiality relating to exchanges between lawyers have the advantage of facilitating inter-party talks, which can lead to settlements. The parties may not assert the existence of such discussions before the court. It is, however, possible to "de-confidentialise" these exchanges in certain very strict and exceptional circumstances (essentially, correspondence between lawyers sent with the label "official").

Public hearings, document inspection

Commercial proceedings have three main features. They are public, and most importantly oral and adversarial.

The proceedings are public to the extent that anyone who so wishes can attend the hearings. However, the parties have the right to request that the case be heard in court chambers, that is, in private. In that case, the decision will be rendered in open court.

The proceedings are adversarial because, in its decision, the court can only take into account those submissions and documents that the opposite party has had the opportunity to discuss.

In theory, the entire procedure before the commercial court is oral. The claims of the parties are noted in the court file or recorded in minutes. Once the judgment is pronounced, the court does not retain the case evidence.

5. WITNESS EVIDENCE

5.1 Do parties exchange witness evidence prior to trial? If so, how and at what stage in the proceedings?

The parties are required to exchange any testimonial evidence or witness statements to which they intend to rely in support of their claims. This communication to the court and the other parties must be completed before the oral hearing in order to enable each party to best defend its interests, in full knowledge of the opposing arguments.

This is the adversarial principle.

In order to be admissible before the commercial court, the witnesses' statements must fulfil the substantive and form conditions and must contain mandatory elements, such as the description of the facts that the author had attended to or that he or she had personally noted. The registrant is liable to fines and imprisonment penalties in case of perjury, according to Article 441-7 and subsequent of the Penal Code.

5.2 Do witnesses give evidence at trial? If so, how? Is it possible for the court to hear oral testimony from expert or ordinary witnesses via teleconferencing, or any other remote live connection system?

Evidence relating to a matter involving a sum greater than EUR 1,500 is in principle to be made in writing (*Article 1341, French Civil Code*). Notwithstanding this provision, Article 110-3 of the French Commercial Code states: "with regard to merchants, commercial instruments can be evidenced by any means unless the law provides otherwise", except for certain types of contract, such as partnership agreements (*Article 183, French Civil Code*) and sale and pledge of a business (*Article L 141-5, French Commercial Code*). Invoices are obligatory.

Procedural law provides that the parties may submit written statements to the judge. To ensure fidelity, the statement must:

- Come from persons who have directly witnessed what is being attested to.
- Be accompanied by an identity document.
- Specify that it has been prepared in contemplation of its production in court.
- Be handwritten and signed.
- State the address and marital status of the signatory, and his or her relationship with the concerned parties.
- Relate the facts to which its author has been a witness or has personally observed.

It should be stated that the witness must understand that he or she is testifying in court and that perjury is a criminal infringement.

A witness statement may also result from a report prepared by a bailiff (the bailiff requires a person to answer questions and the answers are recorded in the report).

In the civil and commercial area, if the videoconference is an admissible technological tool, it implies that the judge considers its use as necessary for the proper administration of justice.

5.3 Can a witness be forced to attend court for the purposes of giving evidence?

The court may require that the author of a statement gives evidence in person (*Article 203, French Civil Procedure Code*). However, it is quite unusual before a commercial court. Only persons who can demonstrate a legitimate reason (professional confidentiality, parents or relatives, and so on) will be relieved from having to testify (*Article 206, French Civil Procedure Code*). Apart from these cases, the witness will be compelled to participate in the investigation. Defaulting witnesses may be summoned at their expense if their attendance is deemed necessary. Defaulting witnesses and those who, without good reason, refuse to give evidence or take the oath may be subject to a civil fine of up to EUR 3,000.

6. EXPERT EVIDENCE

6.1 Are parties permitted to use experts in the proceedings to give opinion evidence? If so, who appoints the expert?

A party to a dispute may, either before or during the litigation proceedings, appoint an expert, whom they will remunerate. This expert investigation is qualified as unilateral. When the parties concerned appoint one or more experts whether as a result of a contract clause or an agreement reached within the framework of the dispute, it is referred to as an amicable investigation.

A court-ordered expert investigation is ordered by the judge and is governed by the specific provisions of the French Civil Procedure Code. The judge may appoint any person of his or her choosing to inform him or her, by way of a report, consultation or investigation, of a question of fact that requires the skills of an expert.

6.2 Do parties exchange expert evidence prior to trial? If so, how and at what stage in the proceedings?

During the expert appraisal, the expert must remain impartial and independent regarding the parties, and must invite all parties and their counsel to every expert meeting.

In most cases, the expert will submit an expert's "pre-report", indicating in advance to the parties the findings he or she is about to communicate. The parties may, throughout the expert's appraisal, provide explanatory notes and/or comments on the pre-report, or simply any relevant information and/or documents to the expert.

Any communication addressed to or by the expert must be communicated without delay to all parties in order to comply with the adversarial principle.

6.3 Do experts give evidence at trial? If so, how?

The involvement of an expert commissioned by a written order of the judge will always lead to a written report that is communicated to all parties and the judge.

However, the judge is not bound by the findings of this report. The parties may also contest the contents of the expert's report.

6.4 How are experts paid and are there any rules to ensure that expert evidence is impartial?

If an expert appraisal is provided in the contract, the rules as to how it will be conducted and how it will be paid for must also be specified in the contract.

In the case of court-ordered expert appraisals, it is the judge who appoints the expert. The expert has no accountability except to the judge who appointed him or her. Therefore, the determination of the cost of an expert appraisal is not dependent upon a fee agreement with the parties; the expert will set the amount. However, this fee-setting discretion is closely monitored by the judge, according to the rules of the French Civil Procedure Code.

The judge will order an advance on fees to be paid in order to cover the expert's initial expenses, regardless of how the parties subsequently conduct themselves during the investigation. Generally, this provision is paid by the party who requested the expert. In the absence of a mandatory instruction from the court, the expert will start his or her investigation only once the court registry has confirmed that the advance has been deposited. From that point on, the expert is obliged to ask the judge for an extra advance if there is an obvious shortfall in the initial advance. Moreover, the expert can receive authorisation to collect a part of the deposit if the complexity of the case requires it and if the state of his or her operations justifies it.

The expert's fee is normally borne by the losing party (unless the judge specifies otherwise).

7. ENDING A CLAIM/ALTERNATIVE DISPUTE RESOLUTION (ADR)

7.1 What are the main ways in which a claim may be brought to an end before trial?

The *désistement d'instance* (withdrawal of proceedings) is the renunciation of initiated proceedings, which does not prohibit a subsequent recommencement of the proceedings (unless blocked by a statute of limitations or by a reason for delayed action).

The withdrawal may be partial and relate only to certain of the claims which have been referred to the court. In this instance, the judge must still rule on the other claims.

The *désistement d'action* is a waiver from the possibility of claiming for the recognition of a right and for the sanction of a violation of it. The waiver must be accompanied by a withdrawal of the proceedings, when such proceedings are pending.

In the case of an abandonment of the action, the applicant's withdrawal is final and any further claim against the same person summonsed in the same capacity for the same purpose and based on the same facts will be inadmissible.

If an abandonment of proceedings and/or action is declared unilaterally by the applicant, the latter is exposed to the risk that the other party might claim compensation for the costs it incurred as a result of the proceedings.

However, if the defendant has filed counterclaims against the plaintiff, the plaintiff may not withdraw without the consent of the defendant.

Generally, the withdrawal takes place in the context of a settlement, which can be reached at any time to bring the proceedings to an end. There is no requirement for the settlement to be approved by the court before it can take effect, and its terms may even be confidential regarding the latter.

7.2 What ADR procedures are available?

The parties are free to agree to use an ADR, either under contract or otherwise, in the event of a dispute. The parties choose the person or organisation that will oversee the procedures, and decide whether they wish to have representation or not. They help the parties to decide whether to initiate legal proceedings. Confidentiality obligations bind the parties and the third-party intermediary. It should be noted that the use of an ADR does not suspend the statute of limitations. In the event that an ADR is unsuccessful, the parties risk losing their right of action or having the limitation period reduced.

The refusal to employ an ADR procedure which has been provided for under contract may be sanctioned as a breach of contract and of the obligation of good faith. In addition, the judge may declare the claim inadmissible.

The ADR can take several forms:

Conciliation

Parties may undertake, either in a contract or after the dispute has arisen, to negotiate a settlement or a compromise before referring the dispute to the court. Such an undertaking is equivalent to an obligation to negotiate, but the parties have no obligation to reach an agreement. However, if the conciliation fails and the dispute persists, the parties may refer it to a court for resolution.

Conciliation can be initiated by a judge or by the parties themselves. The latter may at any time ask a judge to acknowledge their conciliation. The judge may at any time delegate his or her conciliatory mission by appointing a conciliator. The conciliator may hear third parties. The mission may be terminated at any time by a decision of the judge, one of the parties or the conciliator. The agreement is recorded in a document signed by the parties and the judge or in a statement signed by the parties and the conciliator. The conciliator's findings and any testimony he or she collects may not be produced in the subsequent proceedings without the agreement of the parties.

Mediation

The judge may order the appointment of a mediator with the agreement of the parties. The mediator will be responsible for comparing the views of the parties in order to resolve the dispute within a maximum period of three months, renewable once. This process does not remove the jurisdiction of the judge. The mediator has no powers of investigation, but can hear third parties. The process may be terminated at any time by a decision of the judge, one of the parties or the mediator. The court approves the agreement that the parties present to him or her. The mediator's findings and any testimony he or she collects may not be produced in the subsequent proceedings without the agreement of the parties.

Mediation in this sense is a procedure midway between conciliation and arbitration, as it involves the decision of a third person who does not, however, have judicial power, that is, he or she cannot settle a dispute.

Arbitration

Parties may agree an arbitration clause (before the occurrence of the dispute) or conclude an agreement (once a dispute has arisen between them) to appoint an independent arbitrator (a natural or legal person, such as an arbitration centre or a trade association, which will be responsible for organising the mission without being able to arbitrate itself).

An arbitration clause will not prevent the parties from seeking a precautionary measure from an interim judge. The arbitration agreement must be in writing, and must specify the object of the dispute, the name of the arbitrator, and his or her mission. The duration of the arbitration is specified in the arbitration agreement; otherwise, the default duration will be six months.

Unlike mediators and conciliators, arbitrators may take any investigative measures they deem appropriate. An arbitration award has *res judicata* authority upon pronouncement. However, it is not enforceable (in order to enforce an arbitration award, an enforcement order must be issued by the first instance court). Unless otherwise agreed, the parties can appeal to have an arbitration award amended or cancelled.

7.3 Can the court compel the parties to use ADR?

The commercial court cannot compel the parties to employ an ADR unless the parties have previously adopted such a contractual commitment. Thus, if a party decides, despite the existence of such a contractual commitment, to submit its case for an ADR, the court may, if the co-contractor so requests, instruct the parties to attempt an amicable settlement before going to trial. However, if the parties fail to reach an agreement, they will still be able to submit their dispute to the commercial judge for settlement.

Since the above-mentioned decree of 2015, the judge can offer to the parties the possibility to settle their litigation amicably even if there is no contractual commitment between the parties for an ADR. Moreover, it is now mandatory, according to that same decree, for the subpoena (or any other document that opens a judicial procedure) to specify the diligences to be undertaken by the parties in order to try to settle amicably. An exception to this mandatory request is made when there is a legitimate motive, such as an emergency situation or a situation related to public order.

Directive 2013/11/EU of the European Parliament and Council of 21 May 2013 on out-of-court settlement of commercial litigations applies to the out-of-court settlement procedures of national and cross-border disputes concerning the contractual obligations of sales or services concluded between a professional and a customer established in the European Union that require an out-of-court settlement of disputes (OSD) entity. Judicial mediators and conciliators are specifically excluded from the directive's scope (*Article 2*). The directive's main provisions relate to:

- Access to the OSD.
- The requirements for the OSD entities and procedures.
- The information for the customers that must be delivered by the professionals.
- The cooperation and exchange of expertise between the OSD entities and the national authorities.

The directive is completed by Regulation 524/2013 of the 21 May 2013 on the online settlement of commercial litigations, which aims at developing a European platform for out-of-court settlement of litigations arising from online transactions.

The transposition of Directive 2013/11/EU in France has not yet been implemented, but shall be done before 9 July 2015.

8. TRIAL

8.1 What are the main stages of a civil trial? How long would a significant commercial litigation trial last?

See *Section 3* above.

8.2 Are civil court hearings held in public? Are court documents available to the public?

In principle, the proceedings are public except when the law requires that they take place in private, that is, behind closed doors. A public hearing may be conducted in closed session in three cases:

- If a public hearing would result in an invasion of privacy.
- If all parties so request.
- If there is disorder that disrupts the serenity of the proceedings.

The organisation of the trial is overseen by the presiding judge during the public hearing. It is forbidden for those attending to speak without being so asked, to give signs of approval or disapproval, or disrupt the proceedings in any way. The presiding judge has the power to expel any person who fails to comply with his or her orders.

Judgments

The judges before whom the case was argued then have to deliberate upon it. These deliberations are held in secret and the decision is made by a majority vote.

After the deliberation, a judgment may be pronounced directly. Its delivery may, however, be postponed to a later date so that the judges can deliberate further. The presiding judge must then notify the parties, stating the reasons for the extension and the new date on which the decision will be rendered. The presiding judge may also choose to make the disposition of cases available to the court registry. In that case, he or she must inform the parties and indicate a date.

It is difficult to estimate the average length of deliberation for court sentences: it depends on the court in question and the complexity of the case. It can be immediate or it can take from a few days to a few months.

When the decision is pronounced in open court, it is delivered by one of the judges who participated in the deliberation in the absence of the others and of the public prosecutor. The judge may limit him- or herself to the operative part, that is, the most important part of the decision, which contains the solution of the dispute and which has *res judicata* authority, without having to give reasons.

9. REMEDIES

9.1 What are the main remedies available prior to trial? In what circumstances can such remedies be obtained?

A creditor may implement either "precautionary" or "interim" measures.

(i) A precautionary measure is one whereby, pending a final decision, a judge petitioned by the creditor decides to place a debtor's property under judicial control in order to ensure the effectiveness of the enforcement measures that will be taken once the time limit for appeal or redress has expired.

These measures are very varied and include sequestration, the deposition of money, the appointment of an administrator, conservatory seizure, and the seizure of money or movable property held by a third party, for example, by a bank or a tenant.

If the creditor has a title instrument, even if a ruling has been challenged by third parties or appealed, he or she can put a precautionary measure into effect without having to seek an order of the president of the commercial court if the claim is of a commercial nature.

If this is not the case, the prior authorisation of the judge is required. The procedure need not be adversarial – the judge merely verifies that the claim appears to be "founded in principle". There is no express condition of urgency. The creditor must demonstrate that there are "circumstances that may jeopardise the recovery" of the claim (for example, bad faith of the debtor who conceals his or her assets, the great number of creditors). The judge does not implement the measure; rather, he or she authorises it. The measure is implemented by the bailiff, at the request of the beneficiary of the authorisation.

The precautionary measure must be taken within three months of the judge's order authorising it; otherwise, the authorisation lapses. If the creditor has not already initiated a procedure to have his or her claim recognised, he or she must do so within one month of the implementation of the measure; otherwise, the measure is invalid.

The debtor must be notified of the precautionary measure within eight days. The appeal does not suspend the effect of the precautionary measure, which continues until the judge lifts the measure or declares it invalid.

(ii) The interim judge may be petitioned by a writ for interim measures that must be ordered promptly regarding the case's requirements. These include the payment of a provision, expulsion, prohibition under penalty from doing something, and the preservation of a form of evidence. The procedure is adversarial.

There is no comprehensive inventory of interim measures: by way of summary proceedings, one may obtain all interim measures which are not subject to any serious challenge or which are justified by the existence of a dispute. In addition, the interim judge may order all urgent measures necessary either to prevent imminent harm or to stop manifestly unlawful disturbances.

9.2 What final remedies are available at trial?

The commercial court may pronounce a number of very different orders, such as an order to pay damages for harm caused, pay the price of an object sold, publish an extract from the decision in newspapers, to confirm the validity of a sale, compel a party to perform its contractual obligations.

10. ENFORCEMENT

10.1 How is an award of damages enforced if a party fails to make payment voluntarily?

A court decision becomes enforceable if it cannot be appealed or if the defeated party fails to act within the prescribed deadlines. In that case, the law presumes that the losing party acquiesced. The successful person may initiate proceedings to obtain the benefits that his or her opponent owes him or her.

Enforcement measures include the seizure and sale of tangible movable property, seizure-allocation of debts, seizure of intangible rights, seizure of remuneration, seizure-attachment, seizure of real property and measures of expulsion.

The enforcement judge has jurisdiction to resolve the difficulties in enforcing a court decision or a writ of execution. At the request of the creditor, the enforcement judge may impose fines on those who fail to perform their obligation. More often, at the request of the debtor, the enforcement judge may grant terms of payment.

11. APPEALS

11.1 Is it possible for a defeated party to appeal a decision after the close of trial? In what circumstances will a party be allowed to appeal?

The appeal is a remedy under ordinary law aimed at having a judgment reversed or cancelled by a court of appeal. Any decision may be appealed subject to a certain threshold: the commercial court rules as the first and last resort when the amount of the dispute does not exceed EUR 4,000.

To lodge an appeal, two conditions must be met: capacity (having been a party to the first-instance proceedings) and interest (if the first-instance judges did not give satisfaction in relation to all points of the application). In addition, the parties must not have waived the right to appeal (for example, in the case of a contractual waiver).

If an appeal is not possible (the case concerns an amount less than EUR 4,000), only an appeal in cassation is permitted. If an appeal is possible (case amount exceeds EUR 4,000), the commercial chamber of the court of appeal will then re-examine the entire case a second time.

If one party appeals, the other party may also request that the original ruling be reviewed if it does not give full satisfaction.

The appeal period is usually one month. The decision becomes final once the appeal period has expired. As long as the deadline has not expired, the judgment cannot, in principle, be executed.

11.2 What is the basic procedure for an appeal?

The appeal is made by a unilateral declaration lodged at the registry of the court of appeal. The latter will give each respondent (*intimé*) a copy of the declaration.

Since 2012, any attorney has been fully entitled to lodge an appeal and represent a party before the court of appeal of his or her jurisdiction (in the past, a legal representative known as an *avoué* was the only person so entitled; this profession has been since abolished).

The appellant must file his or her arguments with the registry (along with supporting documents) within three months, under penalty of the appeal being struck off.

An urgent procedure (*à jour fixe* or "fixed day") may be implemented when the parties' rights are in jeopardy. The appeal can also be filed jointly by the parties.

The appeal has two effects:

- The execution of the judgment is suspended.
- The appellate court rules on matters of fact and law, which means that the case is re-examined in full. However, the parties may not submit new requests to the court.

The decision of the court of appeal can only be the object of an appeal in cassation that is non-suspensive of execution. The Court of Cassation only has jurisdiction in matters of law and does not assess the facts. If the court quashes or reverses a decision, it refers the matter to a new appellate court, which re-examines the case in its entirety, taking into account the points of law addressed by the Court of Cassation.

12. COSTS/FUNDING

12.1 How are legal fees ordinarily charged to a client? On an hourly rate?

Fees for consulting, assistance, advice, drafting of private agreements and pleadings are agreed with the client in advance.

Failing an agreement between lawyer and client, the fee is set according to custom, depending on the client's financial situation, the difficulty of the case, the expenses incurred by the lawyer, his or her reputation and the services necessary.

The French market has aligned itself in recent years with the UK/US-inspired practice of billing on the basis of time spent, with attorneys' hourly rates varying depending on their experience and specialty. That said, for simple and/or recurring litigation, an estimated budget or special lump-sum fees can also be implemented.

Depending on the file, a portion of the fees may also be based on the outcome of the case.

12.2 Are there any restrictions on lawyers entering into "no win, no fee" agreements with their clients?

The setting of fees on the sole basis of the judicial outcome is prohibited.

It is, however, possible to enter into an agreement which, in addition to the compensation for services rendered, provides for an additional fee based on the result obtained or the service rendered.

Fees may be freely determined in an agreement between the parties. A fee agreement is not, however, formally required by law. Lawyers must advise their clients when first consulted, and regularly thereafter, of the method for determining fees and how they are likely to evolve. Where appropriate, this information is contained in the fee agreement.

12.3 Is it permissible for a third party to fund a claim? Are there any restrictions on the use of such funding?

In France there isn't any specific regulation about the possibility for a third party to fund a claim.

However, there is a similar legal situation, where the rights of a creditor against his or her debtor are contested and a lawsuit has been open. In the course of the trial, the creditor decides to transfer his or her litigious rights to a third party, the transferee, who pays a price (in theory, below the amount of the claimed sum for the litigious rights) to the creditor.

This situation is actually a common transfer of assignment (regulated by Article 1690 of the French Civil Code), but the litigious status of the transferred rights is ruled by some specific public order provisions. Indeed, Article 1699 of the French Civil Code provides that the debtor then has the possibility to end the trial by reimbursing the transferee the amount the latter paid to the transferor for the above-mentioned litigious rights.

This amount must actually be paid by the debtor in order to terminate the lawsuit. It is forbidden for judges, lawyers or other court officers to become transferees of claims or litigious disputes before the courts in which jurisdiction they practice (Article 1597, French Civil code).

12.4 Is it possible to obtain insurance which will cover the costs of bringing the claim?

A legal expenses policy is an agreement, governed by the Insurance Code, which a natural person or legal entity enters into with an insurance company whereby the latter undertakes to bear the costs of the insured's defence, including assistance in the amicable settlement of the dispute.

The insurer alone may not defend his or her client against a lawyer. The text therefore provides that the insured must be represented or assisted, upon request, if his or her opponent is defended by a lawyer. The insurer cannot impose the choice of counsel. The lawyer's fees are negotiated directly between the lawyer and his or her client, and may not be agreed with the insurer.

12.5 Can the court order a losing party to pay a winning party's costs? If so, in what circumstances and to what extent?

Article 700 of the Code of Civil Procedure allows the judge, at the request of the opposing party, to order the losing party to pay a lump sum intended to cover all expenses not included in the "costs" (*dépens*), such as legal fees, travel expenses and correspondence costs. The burden of Article 700 falls on the person ordered to pay costs, or the losing party if there is no such order. The judge must take equity and the economic situation of the parties into consideration. Thus, a party may be ordered to pay costs without being held liable under Article 700.

Costs are the expenses relating to proceedings, writs and enforcement proceedings. They are the sums that it was necessary to incur in order to obtain a court decision, with the exception of counsel's fees, which are excluded.

The judge, by any decision terminating the proceeding, must rule on the burden of costs, that is, specify who has to pay them. The burden of costs falls in principle on the party who loses the case. The judge may nevertheless decide otherwise by a reasoned decision.

Article 700 of the Code of Civil Procedure allows the judge to order the losing party to pay to the other a sum of money intended to cover all expenses not included in the costs. This indemnity has a legal basis and purpose distinct from those pertaining to costs.

Thus, for example, the legal fees and the travel and correspondence expenses incurred by the party may be included in an application under Article 700.

The judge ruling on such an application has the sovereign discretion to assess the condition of equity provided for by the text. The judge may grant the request in whole or in part, or reject it, if he or she considers that equity does not require that the application be granted. If he or she holds the other party liable for a sum under Article 700 of the Code of Civil Procedure, the judge specifies a lump sum in the decision, without giving details or reasons.

In practice, the sums awarded by French judges are modest and often substantially less than the amounts actually spent. However, in rare cases, for example, if a procedure is considered improper and if the bills of costs (including attorneys' bills) are produced, the judges may award amounts close to those actually paid.

12.6 Can the court make an order providing security for costs prior to permitting a claim to proceed? If so, what are the circumstances in which such an order is possible?

There are no specific rules providing security for costs prior to permitting a claim to proceed.

13. COLLECTIVE ACTIONS

13.1 Can claimants with similar claims bring a collective action against an alleged wrongdoer?

There are three kinds of proceedings whereby an action can be brought before a court within a collective interest framework, though such proceedings are more restrictive than the class actions known in common-law countries. These are:

- The action *en représentation conjointe* (joint representation action), which allows a consumer association to act on behalf of several consumers who have suffered damage from the same origin, and for which it has been specifically authorised.
- The action *collective en cessation d'agissements illicites* (collective action seeking the cessation of unlawful conduct), which allows authorised consumer-defence associations to seek legal remedies for any direct or indirect harm to consumers' collective interests.

In practice, the above two actions are rare in France and French consumers generally have to file lawsuits individually.

- The group action concerning consumer issues introduced in Frenc Law in 2014 is the nearest from the usual common-law "class action". The procedure allows customers believing themselves to be victims of the same fraud perpetrated by the same company to gather in order to obtain compensation for the allegedly suffered harm. This procedure relates only to "everyday" litigations that violate consumer law and competition law and cause material damage.

13.2 Is the procedure for bringing a collective action different to the procedure for a normal claim?

Within the framework of the new procedure instituted in 2014, victims will turn to a certified national consumer association, which will take legal action in order to obtain compensation in the clients' name once the above-mentioned association has excluded abusive actions or ones without legal base. The individual claims will be merged into one single claim. However, in the frameworks of the two other already existing procedures, the actions that consumer associations may initiate in the interests of consumers remain, from the legal standpoint, personal actions: although the law allows these associations to sue in consumers' collective interest, the damages they receive are awarded to them personally and they may not distribute them to the other consumers. They may not file the individual actions of injured consumers, though the latter may join the association's lawsuit by means of a third-party application and claim compensation for their injury.

14. OTHER SPECIAL FEATURES

14.1 Are there any other special features of the commercial litigation regime that litigants should be aware of?

The Parliament has recently allowed the government to issue an ordinance (to come) in order to amend the contract law, thanks to the modernisation and simplification law No. 2015-177 of 16 February 2015. The main goal is to modernise, simplify, improve the clarity of and enhance the accessibility to the common contract law, to the terms of the obligation and to the right of proof. The bill is likely to be presented to the Council of Ministers in early 2016.

14.2 Are there any forthcoming changes to commercial litigation practice in your jurisdiction or any proposals for reform?

In France, unlike many other jurisdictions, a lawyer (*avocat*) cannot practise within a company (in-house lawyer).

The proposed merger of the professions of *avocat* (lawyer) and *juriste d'entreprise* (corporate lawyer) has been regularly discussed for several years, but failed once again in 2014 (the French Economic Minister eventually declined to submit the proposition of merger before the Parliament in his the Macron law project of 19 February 2015).

This means, in particular, that the confidentiality of exchanges between the parties (for example, when negotiating a possible amicable settlement) can only be guaranteed today through communications between the lawyers of both parties, which are legally covered by professional secrecy, and not between the corporate lawyers of the parties.

Nevertheless, it seems quite possible that this question about the merger of the professions of lawyer and corporate lawyer will return to the Parliament's agenda in the future.

What is more, the Macron law project foresees that cases involving companies with more than 150 employees should be open before specialised commercial courts. Hitherto, such cases were dealt with by the ordinary commercial court of the judicial seat of the involved company.

Recently (6 May 2015), the senators approved the Macron law project and the establishment of specialised commercial courts, despite them being controversial. However, and against the government's opinion, the Senate decided that only companies with more than 250 employees will automatically fall under the jurisdiction of these specialised commercial courts. The text has been passed by the National Assembly and should be definitively adopted in mid-July 2015.

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