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CONTENTS

France

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Efficiency/integrity

General overview

The French court system is by and large divided into judicial and administrative courts. The judicial courts hear all civil and criminal disputes, whereas administrative ones usually hear public law-related issues. The Code of Civil Procedure and the Code of Criminal Procedure govern the proceedings in the judicial system and set forth a comprehensive appellate pyramidal system, with the courts of first instance, the courts of appeal and the *Cour de cassation* (Supreme Court).

The French judicial system has evolved considerably in 2011 and 2012, reflecting the legislators' determination to guarantee the proper administration of justice through the acceleration of procedures and processing of claims.

Notwithstanding a regulatory recess between 27 March 2012 and 6 August 2012 for the presidential election, significant changes in judicial proceedings have occurred.

In particular, some proceedings have been dematerialised with the creation of an "e-procedure" for civil, criminal, and administrative disputes. The civil appellate procedure has also probably seen the most significant change, with the disappearance of the profession of *Avoués* (process service).

Dematerialisation of proceedings

Significant reform regarding the dematerialisation of civil, criminal, and administrative proceedings has been made and new communication systems between lawyers and jurisdictions have been implemented. For instance, the *Reseau Privé Virtuel des Avocats* (RPVA, Private virtual network for lawyers) has been set up through an internet-based network. Judicial officers also use a similar system.

The most significant change concerns the civil appeal procedure. Pursuant to Decree n° 2009-1524 of 9 December 2009 on appeal with compulsory representation, Articles of the French Code of Civil Procedure have been amended and now provide that communication of pleadings should be made using the electronic system upon lack of admissibility. This obligation has been implemented gradually:

- As of 1 January 2011, the statement of civil appeal by declaration at the registry must be made through the RPVA (except in cases where representation is not mandatory).
- As of 1 January 2013, the principle of electronic communication applies to all procedural documents (statements of appeal, letters, etc.) before all courts (except the courts of appeal of Nouméa and Papeete) in all proceedings with compulsory representation. However, exhibits are excluded from this reform, and electronic submission of pleadings is optional.
- This system also applies to communications between counsel. Notification of briefs can now be made through the RPVA, and it is no longer compulsory to use the Court's services.

Reform of the appeal procedure

In addition to the shift toward electronic communication, as of 1 January 2012 the Court of Appeal's procedures now allow all "*avocats*" to appear before the Court of Appeal without the assistance of attorneys who, up until then, specialised in Court of Appeal proceedings, and who were called "*avoués*".

Before this date, the *avoués* represented attorneys and referred to magistrates all necessary information concerning the pre-trial proceedings, performed all the acts, and advised attorneys on procedure.

However, it is likely that former *avoués* will continue to be involved in a significant volume of cases.

Reform of the oral proceedings before the commercial courts

French jurisdictions basically envisage two types of distinct proceedings:

- oral proceedings before lower courts and commercial courts, which implies the parties have no obligation to submit written submissions to such jurisdiction, and the precedence of oral debates over any written document that may be addressed, in a way that a new claim can be solicited at the bar at the last moment; and
- written proceedings before courts of first instance, courts of appeal, and the Supreme Court (*Cour de cassation)*, which implies written pleadings binding the parties.

In this context, oral proceedings of the commercial courts have recently changed: Decree n° 2012-1451, dated 24 December 2012, related to expert assessments and investigations of cases, created a judge who coordinates the proceedings before the trial and may make an oral report during the hearing, before the pleas, called the *juge chargé d'instruire l'affaire*.

However, there remains uncertainty as to the precise role and influence of this new judge over the oral proceedings since previously the *juges-rapporteurs* had, *mutatis mutandis,* the same role.

Reform of corporate and criminal business law

Through Law n° 2012-387, dated 22 March 2012, the French legislator has simplified certain areas of corporate law, notably relating to: (i) the status of directors and officers; (ii) operations having an effect on the share capital and the company's shares; (iii) meetings of shareholders; and (iv) contributions considering certain informational documents and publicity.

However, the most significant changes in this area relate to the decriminalisation of certain offences of corporate law, in response to excessive penalisation under the Law of 24 March 1966 on commercial companies, the remedy of which is now of a civil nature only.

The new law, purely and simply, abolished notably the following criminal infringements:

- Omission from the memorandum and Articles of Association of a public limited company of the declaration relating to the distribution of the capital shares among all partners, or the depositing of the funds; also in the event of an increase of share capital, which previously meant a penalty of two years' imprisonment and a fine of €9,000 (formerly Article L. 241-1 of the French Commercial code).
- Failure by managers, when the equity capital of the company, due to losses identified in the accounting documents, became less than half the share capital: 1) to, in the four months following approval of the accounts having revealed these losses, consult the members in order to decide whether the company should be dissolved early; and 2) to file with the commercial court registry, and publish the decision adopted by the members, previously meant a penalty of six months' imprisonment and a fine of €4,500 (formerly Articles L. 241-6 and L. 242-29 of the Commercial code).
- If the founders, chairman of the board of directors, directors or managing directors of a public limited company, and the holders of shares, trade: (i) shares paid in cash which did not remain in the registered form until they were fully paid up; and (ii) shares paid in cash for which the payment of one-quarter has not been made, which meant a penalty of one year's imprisonment and a fine of €9,000 (formerly Article L. 242-4 of the Commercial code).
- The fact, for the president or the directors of a public limited company, of failing to append to the attendance sheet the proxies given to each representative, to record the decisions of any meeting of shareholders in minutes signed by the members of the committee indicating the date and venue of the meeting, the means used to convene it, the agenda, the composition of the committee, the number of shares represented in the voting, and the quorum achieved, the documents and reports submitted to the meeting, a summary of the proceedings, the text of the resolutions put to the vote, and the results of the voting (formerly Article L. 242-15 of the Commercial code).

Enforcement of judgments/awards

Enforcement of foreign judgments has not recently seen any significant changes.

However, the Code of Civil Procedures of Execution that came into force on 1 June 2012 now codifies established law without significant disruptions.

The list of enforceable decisions (*titres exécutoires*) set forth in Article L. 111-3 of the Code of Civil Procedures of Execution has been extended, and now concerns all decisions or acts that have been conferred enforceability (*force exécutoire*) by jurisdictions of the judicial or administrative order. In concrete terms, this means that settlements, mediation agreements, official reports initially obtained outside the courts, for instance, and homologated by a judge, may be enforceable.

Furthermore, on 6 December 2012, the Council of the European Union adopted an important modification to the EC Council Regulation 44/2001 dated 22 December 2000 ("Brussels I Regulation"), that lays down rules governing the jurisdiction of courts and the recognition and enforcement of judgments in civil and commercial matters in European Union countries. This revision abolishes the *exequatur* procedure in all civil and commercial matters, the goal of which was to seek a court order to allow enforcement of a foreign court ruling.

The Council of the European Union has intended to counterbalance the abolition of the *exequatur* procedure by instituting necessary safeguards, such as a special review in situations, for instance, where the defendant was not personally served in a way that enabled it to defend itself, or where it could not object to the claim by reason of *force majeure* or extraordinary circumstances.

The abolition of these intermediate measures should not be applied by Member State courts until 10 January 2015.

Cross-border litigation

A foreign judgment can be enforced in France only in the event that such judgment has passed the *exequatur* procedure.

Exequatur is granted only after legal proceedings during which the international reliability of the foreign judgment is controlled. Case-law has set forth three criteria for doing so: (i) that the foreign judge has jurisdiction over the matter; (ii) that the judgment complies with the French notion of international public order; and (iii) that such judgment is not fraudulent to French Law. Therefore French judges do not need to check that the law applied by the foreign judge would be the one designated by the French conflict of laws provisions (*Cour de cassation*, Civ. 1re, 20 February 2007).

The *exequatur* procedure is subject to its own rules: it is independent from any substantive proceedings that occurred abroad and from any substantive proceedings directly initiated in France.

Thus, the *exequatur* procedure is conducted before the *Tribunal de Grande Instance*, regardless of the order, the degree, or the nature of the foreign authority that has rendered the decision. Pursuant to Article R. 212-8 of the Code of the judicial organisation, the foreign judgment is normally brought before a single judge but can also be sent to a panel in certain circumstances.

The *exequatur* procedure is always initiated by a summons and is always public.

Privilege and disclosure

French Law does not contemplate any duty of disclosure or discovery contrary to common law jurisdictions: both parties must therefore spontaneously and mutually convey all documents invoked in support of their claims pursuant to Articles 132 to 137 of the Code of Civil Procedure and to ethical obligations, but this is limited to the conveyance of all documents submitted in court, falling within the scope of the right to a fair trial under Article 6 § 1 of the European Convention on Human Rights.

However, a party remains free to ask the courts to order the compulsory production of documents or measures aiming at gathering evidence. Such request may be made at the interlocutory proceedings stage or even after proceedings on the merits have started. The judge will honour this request in its sole discretion, giving due regard to the relevance of the solicited documents to the trial.

Moreover, the court may, at any time and *ex officio*, call upon the parties to produce any additional evidence.

Costs and funding

There have been no recent notable developments regarding costs and funding in French civil procedure in the last 12 months.

The traditional distinction between "*dépens*" and "*frais irrépétibles*" still governs civil procedure.

The "*dépens*" are defined in Article 695 of the Code of Civil Procedure and consist of the costs and disbursements incurred throughout the proceedings, and as such include court fees, experts' fees, bailiffs' fees, and translation costs.

The "*frais irrépétibles*" mostly cover the fees not included in the "*dépens*", such as counsel's fees, travel expenses incurred for the need of the trial, or fees incurred for amicable expertise. Article 700 of the French Code of Civil Procedure allows the winning party to obtain the payment by the other party of the "*dépens*", and all the other expenses incurred in the course of the trial, including attorneys' fees.

However, customarily the legal fees awarded usually correspond to a fraction of those incurred.

Attorneys' fees are governed in France by the Law of 31 December 1971 on legal professions, as amended by the Laws of 31 December 1990 and 10 July 1991.

In practice, in most cases a fee agreement is directly signed between the attorney and the client, foreseeing a flat fee or a method of calculation. However, purely conditional or contingency fee agreements are forbidden.

Disputes regarding legal fees will be brought before the Chairperson of the French Bar Association (*Bâtonnier*) in the first instance, the first President of the Court of Appeal in case of appeal, and, if necessary, the *Cour de cassation*.

Interim relief

No major development has affected the interlocutory proceedings and conservatory measures afforded by French Law in the last 12 months.

The French "*procédure de référé*" enables litigants to seek measures to protect their interests in an accelerated procedure. Its specifications are defined by the Code of Civil Procedure.

The *Référé* order is a temporary decision rendered in cases in which the urgent measures sought cannot seriously be challenged, or cases which stem from a dispute between parties, and in which the protective or restorative measures sought are to prevent imminent damage or put an end to a manifestly illegal nuisance.

The *Référé* does not have the effect of *res judicata*, it cannot be modified without new circumstances, and it is, in principle, temporarily enforceable.

The *Référé* order can be appealed except if it has been handed down by the first President of the Court of Appeal or as a final decision (due to the amount or the subject of the claim).

French Law also affords conservatory measures such as freezing orders (*saisies conservatoires*) or judicial mortgages (*hypothèques judiciaires*).

International arbitration

General overview

There were no new significant reforms relating to international arbitration following the important Decree n° 2011-48 of 13 January 2011 on Arbitration, which came into force on 1 May 2011, and which reaffirmed France's leading position as an arbitration-friendly jurisdiction, and which, for the most part, incorporated well-established case-law principles developed in France for more than 30 years.

France therefore remains a leading pro-arbitration jurisdiction, through in particular the recognition, as previously admitted by case-law, that the consent to arbitrate in an international matter need not

necessarily be in writing (Article 1507 of the Code of Civil Procedure).

Moreover, French courts may play a facilitator role in support of the arbitral process, called *Juge d'appui*. In international arbitration, the *Juge d'appui* is the President of the *Tribunal de Grande Instance* of Paris and has jurisdiction to intervene in aid of the arbitral process where: (i) the arbitration has its seat in France; (ii) the parties have chosen French procedural law to govern the proceedings; (iii) the parties have expressly granted jurisdiction to French courts regarding disputes relating to the arbitral process; or, and perhaps most importantly, where (iv) one of the parties faces the risk of denial of justice. Typically, the *Juge d'appui* may intervene in matters relating to difficulty of constitution of the arbitral tribunal, challenge or removal of arbitrators, and may also order interim measures, or assist with the collection of evidence.

Pursuant to the new law, the parties in international arbitrations may expressly choose to waive their right to seek annulment of the award (Article 1522 of the Code of Civil Procedure).

As a matter of practice, setting aside an award rendered in an international arbitration is rare, thereby showing once more the trends of the French courts toward favouring arbitration. Indeed, pursuant to Article 1520 of the Code of Civil Procedure, an award may only be set aside where:

(1) the arbitral tribunal wrongly upheld or declined jurisdiction;
(2) the arbitral tribunal was not properly constituted;
(3) the arbitral tribunal ruled without complying with the mandate conferred upon it;
(4) due process was violated; or
(5) recognition or enforcement of the award is contrary to international public policy.

Recent landmark decisions

There have been limited decisions pertaining directly to the new law coming into force. However, three decisions on Article 1526 of the Code of Civil Procedure are worth mentioning. The Article provides that both setting aside procedures and appeal of the decision that granted the execution of the award (*exequatur*) should not put the execution of the award on hold, unless a judge determines that the rights of a party may be seriously affected. On three occasions in 2012, the Chairman of the Court of Appeal (*Premier Président*) denied such possibility, which shows the tendency of the French Courts to favour the effectiveness of the award.

In addition, while not stemming from the new law but rather from the previous version of the Code of Civil Procedure, several decisions relating to independence and impartiality of arbitrators are worth mentioning, as they tend to show a certain hesitation of the French Courts in this respect.

In a Supreme Court (*Cour de cassation*) decision dated 1 February 2012 (1re Civ.) the Court ruled that an arbitrator should have disclosed that in the past he represented a company, not a party to the arbitration, in order to afford the party to the proceedings the right to decide whether to challenge the arbitrator in due time. In the matter at hand, a Claimant had initiated proceedings regarding an alleged breach of contract against a Respondent whose task was to effect conciliation between Claimant and the third party in relation to their separate contractual relationship.

The *Cour de cassation* therefore seems to extend the obligation of disclosure in relation to the arbitrator's relationship with third parties to an arbitration, and such decision may therefore be interpreted as fairly strict.

On the other hand, in a much-awaited decision of 4 July 2012, the *Cour de cassation* (1re Civ.) ruled that the fact that an arbitrator participated in a colloquium in which the Respondent party and its counsel to the arbitration also participated need not necessarily be disclosed by the arbitrator. While this decision is quite liberal, one should note that the Supreme Court expressly noted that such involvement occurred only occasionally, and that the arbitrator attended such conference in the capacity of a delegate, not a speaker.

The landmark decision of 2012 is that of the French Supreme Court of 10 October 2012 in the *Tecso* matter (1re Civ.). In that decision, the French Supreme Court quashed a ruling of the Paris Court of Appeal which had decided to set aside an award on the grounds that one of the members of the Arbitral tribunal had failed to disclose during the arbitration that he had acted as "of counsel" from February 1989 to October 2000 in a major international law firm and had, on a couple of occasions since 2000,

given certain legal advice to the firm. It must be noted that one of the party representatives in the arbitration had acted and was still acting for the international firm, although not necessarily in the arbitration at hand in the name of the firm. In quashing the decision, the *Cour de cassation* ruled that by failing to determine why such facts could raise justifiable doubts in the eyes of the parties regarding the impartiality and independence of the arbitrator, the Paris Court of Appeal failed to allow the Supreme Court to perform a proper control, in violation of the French Code of Civil Procedure (Article 1484 (2) former version, prior to the coming into force of Decree n° 2011-48 of 13 January 2011).

Such decision therefore seems to alleviate the obligation for an arbitrator to disclose such facts or circumstances, by ruling that the failure to disclose does not itself necessarily mean that the award will be set aside. In particular, it now appears necessary to explain and justify why such non-disclosure may be construed as a breach of independence and impartiality.

Among the principles recognised by the new Law on Arbitration regarding the arbitral process, three principles are worth noting: loyalty; celerity; and confidentiality (Article 1464 of the Code of Civil Procedure).

With respect to loyalty, a recent decision reaffirmed the principle similar to estoppel, that a party who, in knowledge of the facts and without any legitimate reason, failed to raise an irregularity during arbitral proceedings, is prevented from doing so at a later stage, often at the setting-aside stage. In such a matter, the *Cour de cassation* on 19 December 2012 (1re Civ.) upheld the Paris Court of Appeal decision not to set aside an award on the grounds that the Claimant should have initiated a challenge against the members of the Arbitral tribunal for alleged lack of impartiality or independence, as permitted by the applicable arbitral rules, rather than wait five days before the award was rendered to merely rely on rumors pertaining to the nationality of the arbitrators and their possible professional relationship.

With respect to celerity, undoubtedly the new Law on Arbitration now grants the Arbitral tribunal a legal basis to force the Parties to abide by the procedural calendar or to sanction, for instance, dilatory tactics when deciding on the allocation of costs. On the other hand, the duty for the Arbitral tribunal to render an award within the time-limit set by the law, the Parties' agreement, or the applicable arbitration rules, is all the more present.

Finally, with respect to confidentiality, a distinction ought to be made between domestic arbitration which recognises the existence of such principle in arbitration (Article 1464 (4) of the Code of Civil Procedure) and international arbitration that does not, unless in both cases the Parties agree otherwise. This distinction may be interpreted as unfortunate, given that in the eyes of the users, arbitration, be it domestic or international, is confidential. In fact, confidentiality is often perceived by the users, as evidenced in many surveys, as one of the main advantages of arbitration. That being said, the French legislator decided to leave sufficient flexibility as far as international arbitration is concerned, in order to take into account investment arbitration where transparency is also often a key feature. The same concern was also raised by the drafters of the new 2012 ICC Rules of Arbitration, who, after lengthy discussions, ultimately decided not to introduce general confidentiality provisions in the Rules. It is therefore up to the Parties, and also to the Arbitral tribunal, to suggest including confidentiality provisions in the Parties' agreement or the Terms of Reference where applicable.

New ICC Rules

The New ICC Rules of Arbitration came into force on 1 January 2012 and have not, to the best of our knowledge, given rise to any major difficulty.

One of the new distinctive features of the Rules relates to the Emergency Arbitrator provisions (Article 29 of the ICC Rules and Appendix V of the Rules). Such Emergency Arbitrator Rules have been used on selected occasions and have proven to be a viable alternative for obtaining urgent interim and conservatory measures that cannot await the constitution of an arbitral tribunal.

Other provisions of the new Rules, in particular relating to the general duty to conduct the arbitration in an expeditious and cost-effective manner with regard to the complexity and value of the dispute (Article 22 (1) of the ICC Rules), are being implemented by arbitral tribunals, such as, for instance, the now-compulsory case management conference (Article 24 (1) of the ICC Rules).

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Philippe Cavalieros, of counsel in Winston & Strawn's Paris office, advises and represents companies in the field of international commercial and investment arbitration, and is also regularly appointed as Arbitrator in international arbitrations conducted under most major rules, particularly the Rules of the ICC.

Prior to joining Winston & Strawn, Philippe held the positions of General Counsel, Eurasia, and Head of the International Arbitration department of the Renault Group. In this position, he supervised all legal matters of the Eurasian Region, and represented the Group in all issues with regard to arbitration. He was in charge of Renault's acquisition of equity interests in AvtoVaz (Lada), the Russian automobile manufacturer, for an amount of $1.25bn, as well as its takeover by the Renault-Nissan Alliance.

He began his career as deputy Counsel to the International Court of Arbitration of the ICC, where he was involved in numerous international arbitration proceedings.

With his background, Philippe has therefore gained a 360-degree knowledge of international arbitration, and a better understanding of the expectations of the users.

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