

“WHAT IS NOT CLEAR IS NOT FRENCH” – LITIGATING IN FRANCE (PART 1)

So said the revolutionary, Antoine de Rivarol. The common law of England with its binding rule of precedent authority enables us to have some idea where we stand on most legal issues. The French approach has no such limitation. These articles seek to offer a practical insight into how the French system is organised and works, with a particular bias towards insurance claims, so that initial contact with it may be a little less daunting. This first part, reviews the structure of the legal professions. Subsequent editions of the Key will examine more practical issues of litigating.

The Role of the Insurer's Lawyer

While we view the Insurer's involvement on the basis of his contract with the insured, in France, Insurers are frequently joined as direct Defendants along with the Insured, as a result of specific provision in the *Code des Assurances*. Sometimes, the Insurer will also have separate representation.

UK Insurers often instruct their lawyers to handle all aspects of an insurance claim, including the litigation, policy coverage issues and valuation. French insurance companies employ their own inspectors, who often have a legal qualification, to manage the claim day to day, leaving the *avocat* to deal with the litigation. That said, *Stasi & Associés*, our associated firm in Paris, are certainly prepared (subject to conflicted interests) to advise on such issues, if required.

Do not be surprised, however, if the *avocat* is reluctant to give a view on quantum. Because French courts do not follow generally precedent (definitive decisions of the *Cour de Cassation* excepted), a court in, e.g., Nantes, is entirely capable of reaching a different conclusion on identical facts from one in Nice.

The court appoints its expert to assess the damages and French insurers usually retain experts to assess reserves. Certain types of damage in personal injury cases are determined by reference to scale tables, and a 'broad brush' valuation can often be obtained.

Split Profession

In France, lawyers and judges form entirely distinct professions. The role of the '*avocat*' does not easily translate into 'barrister' or 'solicitor', not being limited to court representation *while* including certain functions of a solicitor. Their organisation is decentralised; a bar ('*barreau*') exists at each major regional trial centre. *Avocats* usually practise in smaller firms than their English counterparts, and can also set up multi-disciplinary practices, the *Société Civile Professionnelle*. In managing litigation in France, *Stasi & Associés*, though based in Paris, usually prepares the pleadings and handles the case generally. All interlocutory steps, however, including service of pleadings, require the employment of an *avocat* in the relevant trial centre, although *Stasi & Associés* undertake the final pleading in court.

The *avocats* assist the interests of justice, helping the parties to plead their cases and the judges to reach a decision. A strict code of professional ethics governs what they may do in the interests of the client. They do not, e.g., prepare the evidence, such as witness statements, or disclosure of documents.

Juges or *Magistrats Judiciaires* form a separate legal profession, the *corps judiciaire*. They are supplemented by non-professional judges, e.g. in the *Conseil des Prud'hommes*, dealing with employment issues, and the *Tribunal de Commerce*. A variant of 'trial by one's peers', their role is about as close as the French system gets to a jury. **These** are usually elected through the local chamber of commerce.

Judges sit in a panel of three, to exclude any possible personal prejudice. In common law litigation, the judge effectively acts as arbiter of the competing cases, deciding liability after a trial, where oral evidence and legal argument is heard. In countries with a civil code the court acts as inquisitor, controlling and directing the litigation and undertaking a lot of the preparatory work. With proceedings issued, the court sets its timetable and decides the issues and evidence required to establish the facts on which the decision is made. Normally, this task is assigned to the *Juge de la mise en état*, a procedural judge.

The Court Structure

The organisation of French courts is de-centralised. Most private civil (as opposed to criminal) disputes are heard in the *Tribunal de Grande Instance*. There are 191 in metropolitan and overseas France, with at least one in every *département* (the administrative region, equivalent to counties), **excluding** the more specialised *Tribunaux de Commerce*, dealing exclusively with commercial disputes. The *Tribunal de Police*, deals with road traffic offences and can award compensation to road accident victims.

Appeal lies to the *Cour d'Appel*, with 33 around the country, usually in the regional centres. **Here, the services of an *Avoué* are required.** A bench of three judges hears appeals, which can be made **on fact or law**, the court relying on the facts recorded on the court file of the lower court. This appeal is as of right, on the principle that the interests of justice should allow the parties at least 2 bites of the cherry. Further appeal lies **on issues of law** to the *Cour de Cassation*, **based in Paris. An *avocat à la Cour de Cassation* must**

be retained. It has the power to quash decisions, or give a definitive judgment, if any further factual inquiry, is not required, thus applying the law consistently across a de-centralised jurisdiction where precedent does not bind.

Alongside this framework is the *Tribunal Administratif*, a parallel system with its own corps of judges and appeals structure (the *Conseil d'État* replacing the *Cour de Cassation*). Its jurisdiction covers most matters involving public authorities, including contract and liability disputes, e.g., a claim involving defects in a public building will litigate in the *Tribunal Administratif*.

The criminal courts also assume the civil jurisdiction, where victims can initiate criminal prosecutions and/or be joined as the *partie civile* to claim compensation for serious road accidents or in catastrophe litigation, e.g. a chemical plant catching fire or suffering an explosion with serious injuries or fatalities and substantial property damage. A motor Insurer should not wait for the disposal of criminal proceedings, anticipating a subsequent civil action, as he may find himself facing an award of damages, effectively by default. The New Criminal Code of 1994 introduced the criminal liability for corporations, under which the directors of a company could find themselves liable to criminal charges, if the incident was caused by an act or omission, which would have been criminal if done by an individual. Although the criminal law generally requires intention, recklessness or gross negligence can attract a criminal charge.

It is therefore very important to ensure that any claim notified, which could attract a criminal prosecution, is addressed immediately. Within a matter of days, the *Juge d'instruction* can order an expert investigation with a view to criminal charges. Evidence will be collected by the police at a time when the Insurer may need an opportunity for forensic examination. By the time it is released, such examination may be worthless and the hope of a successful defence dashed, so that obtaining immediate legal and technical advice and notification of the interest to the court may prove to be a worthwhile investment.

In the next instalment, Michael Walker will examine procedural aspects of litigating in France.

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