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Comparative study between the Civil Procedures of France, Germany and China

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This publication takes the form of a comparative analysis of the Civil Procedure Law of three countries - France, Germany and China, which share the “continental” law system – and presents the different systems and compares their respective methods of enforcement. It is undertaken in the framework of the EU-China IPR2 Project and builds on the work and analysis undertaken by the EU-China Trade Project (2004-2008) www.euctp.org. Since its launch in 2007, IPR2 has developed a series of activities in support of strengthening the legislative framework and enforcement capacity in China and to promote cooperation between China and EU in the protection of IP and international standards of IPR enforcement.

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A Comparative Study between the Civil Procedures of France, Germany and China

by

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Introduction

Procedure is to substantive law, in the world of justice, what software is to hardware, in the world of Information Technology. A computer is of no use if cannot be operated by a strong, stable and user-friendly operating system, and if the applications put in use do not perform well. A law only proves its efficiency if rules of procedure allow an efficient enforcement.

It is, therefore, interesting to look into different systems and compare their respective methods of enforcement, and more particularly those that are used in a civil procedure, where a party wished to obtain satisfaction of a right granted by law, against another party, and refers the case to a Court of justice.

This comparison focuses on three countries, namely France, Germany and China, which have in common of belonging to the “continental” family of law (as opposed to the Common Law system, which is entirely different).

The study covers the essential aspects of an ordinary civil case, from the role of the professionals involved, the organisation of the court system until the enforcement of the judgement rendered by a court.

The study does not cover criminal, administrative or other specific types of procedures that may apply in the respective countries.

Finally, the purpose of the comparative study is not to lead to a conclusion that would state which system is better. We would prefer each reader to reach his/her own conclusion.

What we would suggest, however, is to invite the reader to proceed to the comparison with some criteria in mind, such as, but not limited to:

- Independence of the Court from outside influence,
- Degree of autonomy of the parties in the running of their procedure,
- Availability of procedures dealing with urgent matters,
- Possibility to secure, in advance, and before starting the procedure, the enforceability of the future judgement,
- Flexibility of the evolution of the procedure
- Transparency and guarantees of fairness between the litigants
- Availability of enforcement tools and control over them
- Etc.

Legal professions

The service of justice is usually provided by persons who have received a specific legal education and have chosen to enter a professional carrier in this field. Prosecutors represent the State, Lawyers represent the litigants (their clients) and judges hear cases and make judgments. And, apart from clerks and other type of assistants that may be of assistance in the process of rendering justice, other professions may also be involved in the preparation (collecting of evidence) or enforcement of legal decisions.

JUDGES, PROSECUTORS AND LAWYERS

In China, there is one unified legal examination, the National Uniform Judicial Exam, which serves as a basis for the legal professions. Then, the graduate chooses to become either a judge, a prosecutor, a notary or a lawyer (a profession for which a license is required). Although it is possible to move from one profession to another, it is not possible to act simultaneously in more than one at the same time.

In France, *like in China, there is also one basic legal exam required (called "Master 1" ,but usually most French law student would apply for a 'Master 2' degree in order to get a specialisation in any particular field of law), which leads to a choice: either becoming a judge or a prosecutor, or a lawyer'.*. The main difference with China is that both judges and prosecutors are considered as one professional body (the "Magistrature", composed of "Magistrats"), which means that the members of this profession may become judges, or prosecutors, and during their professional carrier, change from one to the other. After the law exam, they go to a special school to be trained as "magistrates". As to the lawyers, they also have to attend a special school, organised by the Law society or "Bar" (one "bar" per Appeal Court in major cities), and obtain a "Certificate of Aptitude to the Profession of Attorney" (CAPA). Then, they become members of the Bar in their jurisdiction. It is possible (although relatively rare) that, after some years of practice, a lawyer becomes a judge (but this is entirely different of the practice in the UK, where the most successful and experience barristers, after having qualified to "Queen's Counsel" – the superior degree in the profession – may eventually, at the end of their carrier, become judges).

In Germany, Judges and Prosecutors alike need to pass the First and Second State Exam in law. Before the First Exam, students have to visit the law school at a University for at least three and a half years. After passing the First Exam there has to be a practical training period of two years, which is followed by the Second State Exam. All attorneys at law are admitted to plead before all first instance courts and appeal courts.

SPECIALISED SUPREME COURT LAWYERS

France and Germany have, in their judicial system organisation a unique Supreme Court: the" Cour de Cassation" in France and the "Federal Supreme Court" in Germany, who both (see below) control the proper application of the law by lower courts (1st instance and appeal). Before this Supreme Court, litigants are represented by specialised attorneys – a limited number – who have gone through a special nomination procedure (Germany), or obtained an additional qualification (France) and whose exclusive practice is before such Supreme Court.

In China there is no such specialised sector of the lawyers profession.

BAILIFFS

The term Bailiff ("*huissier"* in French) designates an official personin charge of keeping order in an official buildings. ***In France and Germany***, the same term designates a profession that plays a key role in the implementation of justice. They are often called considered as “auxiliaries” of justice (in French *"huissiers of justice"*). They are used, by the litigants, to serve all notices and documents that fall in the litigants’ responsibility and are not performed by the Court ex officio. And once the judgement is rendered, they take action, on behalf of the litigant, to enforce the decision, and in particular, seize assets. ***In France,*** they are extensively used whenever a litigant wishes, prior to starting a case, or while the case is pending, to establish evidence of a fact: the Bailiff is, for example, required by one the parties concerned to examine a site, take photos, make a description etc.. and lay such findings down in a report that will be presented in Court as evidence, with all the strength attached to such a report, made by a professional who took an oath when entering the profession.

In China, there is no Bailiff in the French or German sense of *huissier*. Service of documents and enforcement is made by the Courts (see below). However, the preservation of evidence can be made by using a “Notary Public”, but their role and scope of jurisdiction is quite different of that of a "huissier".

AUCTIONEERS

The legal side of this profession is a special feature of France. Whenever movable assets are seized, in the process of enforcing a judgement, they are sold at an auction organised by an Auctioneer (the same profession that organises private auction sales), and the money collected serves to pay the creditor. In Germany this is covered by the task of the Bailiff.

Structure of the Judicial System

The three judicial systems operate on the basis of two levels of jurisdiction plus a third level of revision. However, this similarity is only apparent. From some aspects, the Chinese system is quite different of the two other countries, whereas for others, the German and Chinese have similarities and are different of the French system.

FIRST INSTANCE

France and Germany have both a first instance jurisdiction, which – depending on the amount involved in the case – can be a lower level court or a higher level court.

In France*,* the lower “local district” level (“Tribunal d’Instance”) monetary threshold is 10.000 € and the court is composed of one judge only, whereas the higher level (“Tribunal de Grande Instance”) takes up cases above the threshold and is composed generally of a panel of three judges (or one only, if the proceedings at issue is a “référé” i.e. an urgent procedure, or for disputes falling within the jurisdiction of the Judge of commercial rents, or if the parties to the case agree). Apart from the threshold, there are other specific differences in the competence of the two civil tribunals. For example, patent and trademark related matters are exclusively dealt with by some “Tribunal de Grande Instance”, whereas the Tribunal d’Instance has exclusive jurisdiction over certain specific categories of conflicts, such as those between landlords and tenants, and have no jurisdiction over IP matters, regardless of the monetary stakes of the case. There are other types of tribunals: the Commercial Courts, which are composed of non-professional judges, who are businessmen coming from the private sector, with exclusive jurisdiction over all conflicts between merchants or between banks or between commercial companies (including unfair competition disputes) and for

commercial transactions, and the "Conseils de Prud'Hommes", whose judges are also coming from the private sector, and which have exclusive jurisdiction over all conflicts relating to or in connection with employment contract issues between employers and employees.

In addition, the tribunal of proximity ("Juridiction de proximité") has jurisdiction in civil cases, for personal lawsuits or actions related to movables not exceeding a threshold of 4.000 euros.

In ***Germany***, the situation is very similar to that of France but the threshold is lower : 5,000 € between the *"Amstgericht"* (municipal), which sits with one judge, and the *"Landgericht"* (regional), which sits with three judges, (in practice however, cases are referred to one judge only).

In China, there is also a distinction between "Basic People's Courts", at the county level, the "Intermediate People's Courts" at the City level (with a panel of three judges) and the "Higher People's Court", at the Provincial level (also with a panel of three). The main difference between China and the other two countries is that the law only provides the general criteria for calculating the threshold. The specific threshold is determined, separately, by each jurisdiction.

APPEAL

The appeal system in France is different of that of Germany, which is in fact more similar to the Chinese system.

Whereas in ***France*** there is only one Court of Appeal per major city, which takes all first level judgements (regardless of which level) made in its geographical jurisdiction, in ***Germany***, an appeal against a judgement made at the lower level *(Amstgericht)* is brought before the higher level *(Landgericht)* which serves as a court of appeal, and an appeal against a judgement made at the higher level is brought before an "Upper Regional Court" *("Oberlandgericht")* - there is at least one in each state – which operates with a panel of three judges (unless agreed otherwise by the litigants and the panel). ***In China*** like in Germany, a Higher Court is the appeal level to an Intermediate Court, which in turn is the appeal level of a Basic court. As to judgements of first instance rendered directly by a Higher People's Court, they are referred at the appeal level to the (unique) Supreme People's Court, in Beijing.

SUPERVISION

Basically, the concept of supervision is like a third degree of jurisdiction, limited to certain issues (normally points of law), which aims at controlling the proper application of the law. This is the role of the ***French*** *"Cour de Cassation"* and of the ***German*** Federal Supreme Court *("Bundesgerichtshof").* In both countries, the initiative to bring a case to the supreme court belongs to either of the parties concerned in the case, and the time for filing such an action is relatively short. In ***Germany***, the supervision has to be explicitly allowed by the Appeal Court.

In China each level of jurisdiction (starting from the Intermediate) may operate as a revision level for a judgement rendered by the level below. The number of circumstances allowing the re-opening of case through an application for a "re-trial" have recently been increased to a large extent (see below), and the time for filing a request for revision (re-trial) is much longer (2 years) than in France and Germany. In addition, the initiative to re-open a case does not only belong to the parties to the case. The Court and the Procuratorate may also start the revision at anytime.

Venue

BASIC PRINCIPLE

The three countries follow the same basic rule: a legal action is to be brought before the Court where the Defendant is domiciled or where a legal entity has its principal place of business (France) or is registered (Germany). When there are several defendants, the plaintiff is free to choose the jurisdiction of any of them (in Germany, this is subject to certain conditions).

ALTERNATIVE CHOICE

In contractual disputes and tort matters, the three countries also follow the same rules: place of delivery of the contractual item or service (France and Germany) or place "relevant to the contract" (China) and place where the act was committed or where the damage was suffered (for torts).

Germany also provides the possibility to file a law suit in the place of "habitual residence" (for students or workers), or where the assets of the defendant are located, of where (succession matters) the deceased was domiciled. ***China*** provides for the possibility to chose, as an alternative, the venue of the plaintiff, in certain special circumstances (divorce, or a defendant who cannot be found, or who is in prison or labour camp).

EXCLUSIVE JURISDICTION

The three countries provide for exceptions to the above principle, where only one venue is possible: litigation related to real estate. The only competent court is the court where the real estate is located. ***Germany*** adds another exclusive jurisdiction in favour of the place where environment damage occurs. ***China*** provides for exclusive jurisdiction for cases concerning harbour operations and inheritance. ***In France****, some exclusive jurisdiction rules apply for patent and trademark disputes or for disputes arising between employers and employees in relation to an employment contract.*

JURISDICTION BY AGREEMENT

Subject to the above exclusive jurisdiction, the three countries provide for a possibility to agree, in a contract, on another venue chosen by the parties to the contract. In ***France*** and ***Germany*** however, this possibility is only opened for commercial matters. ***China*** provides that the agreement should be in written form and remain within the general legal range of legal provisions governing jurisdiction.

Basic principles of procedure

INDEPENDENCE OF THE COURTS

This fundamental principle is stressed in the three countries. ***China*** stipulates, in particular, that *"The People's Courts shall adjudicate civil cases independently according to law, and shall not be subject to any interference from an administrative organ, public organisation, or individual" (article 6 of the Code of Civil Procedure).*

This general principle should, however, be construed in the specific context described by article 15 of the Code, which stipulates that *"If the Civil rights and interests of the State, of a collective organisation, or of an individual, have been infringed, a state organ, a public organisation, an enterprise, or an institution may support the injured unit or individual to initiate a legal action in a People's Court".* The term "support" indicates that persons who are not a party may still may play a role, and have some influence, in the procedure.

Furthermore, ***in China*** when a case reaches a certain importance or complexity, to set up and refer the case to what is called a Judicial Committee, which is composed of several persons who are not necessarily judges, who are appointed ad removed by the Standing Committees of the People's Congress at the corresponding levels, upon the recommendation of the presidents of these courts. The members of the Judicial Committee do not attend the hearing. Their task is to sum up judicial experience and to discuss important or difficult cases, and other issues relating to the judicial work. The actual decision is, then made following the opinion made by this Judicial Committee.

Finally, it must be noted that the work of the People's Courts is, at all levels, controlled by representatives of the local People's Congress.

CONTROL OF THE LAWSUIT BY THE PARTIES

In France and Germany this principle leads the whole procedure. The plaintiff and the defendant organise and develop *their* case according to their needs and goals, without interference from the Court. Of course, some decisions have to be made by the Court in the course of the procedure, but the Court would not impose if both parties agree. The most common cause of disagreement would be the pace of the procedure – fast or slow – and how the parties perform their obligation to produce evidence and file arguments within a reasonable time. In both countries, the Court is in charge of pushing the parties to act in due time (a specific legal requirement in Germany).

In China*,* no express reference is made to such a fundamental principle. The law, however, provides that the parties are entitled to "dispose of their rights" in civil litigation, which allows them a certain flexibility to bend the rules (for example, agree to examine evidence even if it has been supplied beyond the time limit).

RIGHT TO A COLLEGIAL DECISION

There is not much difference between the three countries that follow the same principle with possible exceptions (lower level courts, or – in France and Germany – an agreement otherwise between the parties

ADVERSARY PRINCIPLE

According to this principle, evidence is to be produced by the parties respectively, and court investigation is the exception. This is the case in ***France*** and ***Germany***. In ***China***, the Court may investigate and collect evidence that cannot be obtained by the parties for some realistic reason, or that the Court itself considers necessary. But all evidence need to be cross-examined by the parties when they are taken as a basis for finding the facts.

ORAL OR WRITTEN

This is an essential characteristic of a procedure. If a procedure is oral, a defendant may appear before the Court and present its defence orally, without the plaintiff having any knowledge of what he/she is going to say. If the procedure is written, the judge can only base his decision on arguments that have been submitted in writing, in advance, and

communicated to the plaintiff (who can reply, also in writing). Of course, a written procedure may contain an oral hearing, where the attorneys develop orally the arguments that have been fixed in the written pleadings.

In France, a civil procedure *on the merits* starting higher at the "Tribunal de Grande Instance" level, and a procedure before the Court of Appeal *(except in labour law cases where the proceedings remains oral even in appeal),* is always in writing. This is an absolute legal requirement. The Court may not base its decision on an argument that has not been filed (and communicated in de time to the other party) in writing.

In Germany the procedure is theoretically oral but in practice, pleadings are always prepared in writing and filed beforehand. The writing mode is, therefore, a practice but not a legal requirement.

In China, the plaintiff should normally submit his complaint in writing and the defendant should do the same for his defence. However, it is not rare that a defendant appears before the court without having filed or presented any arguments beforehand, in writing.

IMMEDIACY AND TIME LIMIT

Immediacy means that the judgment is to be rendered "immediately" (in practice within a reasonably short time) after the hearing. Therefore, it has to be rendered by the same judges who attended the hearing. This principle applies to the three countries. ***In France*** and ***Germany***, a judgement rendered by a panel different than that who heard the case in trial would be nul and void. ***In China,*** the concept of "immediacy" (same judges) is not expressly mentioned in the law. In practice, it is implemented.

Time limit refers to the duration of the whole procedure, from service of the summon to the judgement.

In France, there is a general concept of *"reasonable time"* and judges consult with the parties to keep the procedure going, but the parties may request. ***Germany*** provides for a similar concept of reasonable speed where the judge's duty is to push the litigants to produce their arguments and evidence in due time.

In China, to try civil cases promptly is a legal requirement in the civil procedure code. Time, is very strict (6 months for a first instance and 3 months for a second instance) for domestic cases, but there is no limit of time for cases that involve a foreign element (some cases where the hearing took place more than 8 years ago are still awaiting judgement).

PRINCIPLE OF ADMINISTRATION OF JUSTICE IN OPEN COURT

In France and Germany*,* access to all courts is freely open to the public (unless specific circumstance require otherwise). ***In China,*** it is necessary to register before entering the Court.

CONCILIATION

In France, *a Decree n°2010-1165 dated October 1, 2010 (entering into force on December 1, 2010) has introduced some new rules on conciliation.*

The parties can attempt to conciliate upon their request or at the Judge's request during the course of the proceedings. The parties may always request from the Judge to approve their conciliation.

The judge may also delegate the 'conciliation' task by appointing a conciliator of justice, and will set the duration of its mission and indicate when the case would be heard for a hearing where the Judge will acknowledge the conciliation of the parties or otherwise settle the case. The statements of the conciliator and the declarations collected during the 'conciliation' shall neither be produced or used thereafter in the course of the judicial proceedings without the agreement of all the parties nor in the course of any other litigation. The conciliator of justice would keep the judge informed on the difficulties encountered in the course of his assignment and the success or failure of the conciliation.

The Judge may at any time terminate the conciliation, at the request of one party or upon the initiative of the conciliator or even ex officio if the purpose of the conciliation is jeopardised. Specific rules regarding the prior attempt to conciliate apply before each tribunal (Tribunal d'Instance, Tribunal of proximity, Commercial Court and 'Conseils de Prud'hommes)'.

In Germany, conciliation is compulsory only according to State Law for cases of minor financial relief. However, the courts at any instances are obliged to invite and encourage the parties to negotiate a settlement.

In China, in handling civil cases, the Court may mediate disputes if the parties agree of their own accord. The conciliation may happen at any time during the whole course of the procedure. The parties may require the court to solve their dispute by conciliation when they come to an agreement. Each hearing terminates with the question, asked by the court, as to whether the litigants wish to conciliate. When a conciliation agreement is reached, the court draws up a written conciliation agreement, which sets forth the claims of the action, the facts about the case, and the result of the mediation. Once the conciliation agreement is signed and exchanged by both parties, it comes into effect. If no agreement is reached through conciliation or if one party retracts his conciliation before the agreement is served, the people's court renders a judgment without delay.

Representation of the Parties

In France and Germany, the litigants must be represented by lawyers (except before lower courts, where they can appear in person or be represented by any person with a Power of Attorney).

In France, there is a distinction between representation, i.e. filing written pleadings in the name of the client, and the act of appearing before the court and presenting the oral argument. The act of orally pleading is opened to all qualified lawyers, whereas the right to file written pleadings (representation) is the exclusive right of the members of the Bar in the given jurisdiction.

Lawyers, in ***France*** and ***Germany***, are never asked to produce a power of attorney, regardless of the nationality or residence of their client. In ***Germany***, if the plaintiff is not from EU, it may be requested to make a security payment.

In China, the parties may be represented by a lawyer, a near relative, a person recommended by a social organisation or the unit to which the party belongs, or any other citizen approved by the Court.

If foreign litigants need and decide to be represented by a lawyer they must appoint a Chinese lawyer (article 239 of the Civil Procedure Code) and if they have no domicile in China, the Power of Attorney must be authenticated by a notary in their country of origin and legalised by the Chinese embassy in the said country.

Collection of Evidence and Preservation of Assets

ADMISSIBLE EVIDENCE

In France, evidence are normally written documents, but affidavits containing the declarations of witnesses are admissible (subject to certain conditions, such as the mention of the full identity of the witness, its relation – if any – with any of the parties, date, signature, and a declaration that the witness is aware that its testimony shall be produced in court and a false declaration constitutes a criminal offence).

The Court has full discretion to assess the value of each piece of evidence. However, facts established by documents issued by a Notary or by a Bailiff are usually beyond contestation.

In Germany, As a general rule, the party who makes the claim has to produce all the facts which support the claim and has to offer proof and evidence for these facts, unless the facts are well-known or undisputed. There are five admissible means of presenting evidence: inspection by the court, witnesses, expert witnesses, documents, and interrogation of a party. In addition the court may ex officio ask administrative bodies for information. The parties accordingly have to offer at least one of the above listed evidences for each of the facts alleged by them.

In China, "well-known" facts do not need to be proved .The admissible evidence may take the following form: documentary evidence, material evidence, audio-visual material, witness affidavits, statements of the parties, expert's conclusions, records of inspection.

All documentary evidence originating from a foreign country needs to be notarised and legalised (by the Chinese consulate) in the country of origin. This is not a requirement by law (there is no mention in the Code of Civil Procedure), but is the result of a judicial explanation. However, since 2007, for the material the authenticity of which can be proved directly and primarily, such as publication made overseas etc., no notarisation and legalisation need to be done, unless the opposite party raises serious doubts that the inducing party can not effectively refute.

PRESERVATION OF EVIDENCE

The ability to produce conclusive evidence is often the key to success or failure in a litigation. It is therefore of paramount importance to secure evidence of fact, before the legal action starts, after which the defendant could be tempted to make it disappear.

In France, the preservation of evidence is relatively easy. In an ordinary case (except for IPR cases, as mentioned below), a party may ask a Bailiff, - without having to gro through any prior judicial procedure nor having to justify its reasons to the Bailiff- to establish a statement of facts (for example describe a site, the presence of an object in a certain place etc.). The value of such statement is strong, because of the special "sworn" status of the Bailiff.

In IPR cases however, the role of the Bailiff is strictly regulated and controlled by the judge, through the procedure called *"SAISIE-CONTREFAÇON"* which is an original feature of French system. In IP cases, prior to taking legal action, the plaintiff must submit an application to the judge, containing the proof of his IP right, and the preliminary evidence of the infringement. The Plaintiff requests the appointment of a bailiff, in order to have an official statement of the infringing facts, seize samples, check accounts etc. During the performance of the seizure and verification, the IP owner may attend and be accompanied by any expert of its choice, or even a blacksmith and police if resistance is expected on the part

of the future defendant. Legal action must be taken within days of the date of performance of the *saisie-contrefaçon*.

Provided that the plaintiff submits sufficient evidence of his IP right, and some preliminary evidence of the occurrence of the infringement, requests for a *saisie-contrefaçon* are always granted.

In Germany, before starting a legal action, the future plaintiff may first apply for evidence preservation in form of ordering a memorandum of an expert witness even without the consent of the potential defendant. This procedure is widely used in potential disputes concerning construction matters, especially when it will be difficult to produce the evidence after the progress of the construction.

As far as all other means of evidence are concerned, the preservation of evidence however is possible with the consent of the potential defendant, i.e. not in a procedure *ex parte*.

German law does not provide for an equivalent of the French *saisie-contrefaçon*. However, some courts are applying the provisions for preservations of evidence rather generously, particularly in IPR cases. Some courts are granting decisions for the preservation of evidence also ex parte and allow the IP-holder to inspect the stated infringing device of the infringer and prepare the documentation by an expert witness.

In China, where there is a likelihood that evidence may be destroyed or lost, or difficult to obtain later, the Court may, upon request of one party, or by its own initiative, take measures to preserve such evidence. The Court may impose the payment of a financial security. It seems that the basic principle of *acceptance* also applies to requests of this kind, which means that the difference between non-acceptance and refusal to grant (an accepted) request is not clear.

In IPR matters, the IP owner or of his agent (who needs to show a Power of Attorney) could request a Notary Public for a notarisation which is also a means of evidence preservation of an infringing product. Furthermore, the Notary Public has very limited powers of investigation and basically, can only perform a "notarised purchase".

PRESERVATION OF ASSETS

There is not much value in obtaining a favourable judgement – in particular when the decision aims at obtaining payment of a sum of money – if the judgement cannot be effectively enforced against the defendant. It is, therefore, of the utmost importance to be able to "freeze" and preserve some assets of the Defendant, in advance.

In France, the preservation or "attachment" of assets – in particular bank accounts – is extremely common in litigations related to debt collection. Upon request by the plaintiff, the president of the Court (or a judge appointed by him) may issue an order for the preservation of assets before the law suit is started. This applies to assets that are in the possession of the Defendant, but more often, to assets that are in the possession of a third party (such as a bank account). The order is served by a Bailiff, both on the Defendant and on the third party. There is no legal obligation for the plaintiff to provide security, but the judge may require it (rare). *The order of the Judge authorising the conservatory measure (an attachment on a bank account for instance) will become void if such measure is not executed within 3 months from the date of the order.The plaintiff shall start a legal action within the month following the enforcement of the conservatory measure (otherwise, the attachment will become null and void).*

The defendant may challenge the decision and ask for a review by a specialised judge of the Court, called *Juge de l'Exécution (judge of enforcement);*

In Germany, there is no general attachment order like in France. Measures preserving assets may be obtained, however, if there is a risk of deterioration, or to preserve monetary claims, or if the judgement is to be enforced abroad.

In China, the Court may order asset preservation measures, upon request of the plaintiff. If the claim is "accepted", the judge may decide to grant the request, provided that the Plaintiff pays a security, fixed by the order. The Plaintiff must start the legal action within 15 days of the order (30 days for cases involving foreign elements). The Court may also, during the course of the litigation, take a similar order upon request of one of the parties (within 48 hours of the application), and may impose the payment of a security.

Urgent Procedures – Preliminary Injunctions

URGENT PROCEDURES

In France, besides the ordinary civil procedure, that may develop quickly or slow, there exists another type of procedure, which constitutes one of France's specific and original features. Such procedure is called the ***"référé"*** and is a fully "inter partes" and contradictory procedure, the main difference with an ordinary procedure being the speed. In such procedure, the date of the oral hearing is already mentioned in the complaint (the plaintiff's attorney having secured such date in advance with the Court) and the hearing takes place on such date before the President of the Court (or a judge appointed by him). The time between service of the complaint and the hearing date is usually not more than 3 weeks, but can even be shortened in very urgent cases. The president of the Court has the power to decide on urgent matters where damage is imminent (order the defendant to perform or not to perform a certain act), or on claims that cannot be seriously contested (which can be paying a monetary debt). A decision can be made on the spot. The decision, called an "order" *("Ordonnance")* is subject to appeal.

In Germany**,** there is no equivalent to the French "référé".

In China, a simplified procedure is available to the Basic People's Courts, in simple civil matters that do not require the attention of a panel and may be decided by a single judge.

PRELIMINARY INJUNCTIONS

In France, it is also possible to obtain, upon request *ex parte*, an order from the judge enjoining the (future) Defendant to stop doing the disputed acts. This applies, in particular, to IP related conflicts, as an additional measure to the preservation of evidence described above in the *Saisie-Contrefaçon*,. This can also be obtained *inter partes* from the judge during the preliminary phase of the civil proceeding.

In Germany**,** "Preliminary injunctions" may however be obtained, to defer the defendant from continuous infringements of the plaintiff´s rights. These cases are common in unfair competition matters as well as infringement of IP-rights and the like. A court may grant a provisional order before the main court action is started in order to preliminary stop infringing acts. These injunctions are only granted in cases of urgency and have to be applied for within 4 weeks of knowledge of infringing act and infringer. Therefore, they are usually only available for “new” infringements but not for an infringement which is already subject to a pending main court action.

In China, in civil cases, and in particular in IPR cases the judge may, upon request of the plaintiff, issue a pre-trial injunction prohibiting the alleged infringer to stop immediately infringing acts (subject to a financial guaranty being paid). In the course of the proceeding, the judge may also issue urgent provisional injunctions, upon request of the parties.

Complaint: formal requirements, acceptance, service

FORMAL REQUIREMENTS

In the three countries, a complaint must be made in writing (however, in China, a complaint may be made orally, usually before a lower court, if the plaintiff is illiterate).

The requirements are basically the same.

In France, the complaint must contain the name and address of the plaintiff and the same information for the defendant, the name and address of the plaintiff's lawyer, the indication that the exhibits grounding the complaint are listed in Annex to the complaint and the address of the court and the date and hour of the hearing (if the action is brought before any other first level court than the Tribunal de Grande Instance) as well as some additional mentions introduced by the Decree dated October 1, 2010 (which will enter into force on December 1, 2010). It must include a written reminder to the defendant that he/she must appoint a lawyer to appear on his/her behalf, (or another person having a power of attorney in cases where the appointment of a lawyer is not mandatory), adding that in case of failure to appear, a judgement could be rendered on the sole basis of the facts and arguments stated in the complaint.

The complaint must state the facts, the legal grounds of the claim, and finally, the specific relief requested from the Court.

In Germany, the complaint must contain the name of the parties, the statement of the fact and the specific relief requested.

In China, the complaint must contain name, occupation, working unit of the plaintiff and names and addresses of the defendant. It must also state the facts and grounds on which the lawsuit is based, and mention the evidence, as well as names and addresses of witnesses, if any. If a plaintiff is truly incapable to write a motion of complaint, he may file his complaint orally, and the court shall record his complain in the transcript and inform the other party.

ACCEPTANCE

This issue is not applicable to France, a pure formality in Germany and a serious issue in China.

In France, the complaint is served to the defendant before it is recorded with the Court (see below). The clerk of the Court only collect the registration fee when the copy of the complaint is files, but does not make any decision as to whether the complaint will be considered as valid or not by the Court. The case is registered and the procedure begins.

In Germany, the Court could reject a claim if an essential element is missing, but it will give the Plaintiff a chance to rectify the formal deficiency. The verification is purely formal.

In China, the Court decides, within 7 days, whether it accepts the lawsuit or not. This preliminary stage is called in Chinese "*Li An*". In this preliminary examination, the Court verifies the points stipulated in article 108 of the Code of Civil Procedure: whether the Plaintiff is a citizen, legal person or another organisation having a direct interest with the case, whether there is a specific defendant, whether there is a concrete claim, a factual basis and a cause for the lawsuit, and whether the lawsuit is within the scope of civil lawsuits that may be accepted by the People's courts and within its jurisdiction. Therefore, some issues, that might be controversial and deserve a debate between the parties, can be decided in advance, before the procedure can even start.

Appeal of a rejection decision is possible (but rare).

SERVICE OF THE COMPLAINT AND STARTING POINT OF THE PROCEDURE

Germany and China follow a different system than France, where the procedure, from the very starting point – the service of the complaint by the plaintiff to the defendant(s) – is very much under the control of the parties, while in Germany and China the staff of the Court plays a more active part.

In France, the complaint is served by a Bailiff retained by the plaintiff's attorney. A copy of the complaint is left with the defendant, and the Bailiff returns to the plaintiff's lawyer two original copies of the complaint plus the evidence that it has been served.

The Court only becomes informed of the case, and the case placed on the docket, when one original copy of the complaint, with evidence of its service, is filed with the court's clerk (which is usually made by the plaintiff's attorney, but may also be made by the defendant's attorney). *Before the Tribunal de Grande Instance* the filing must be made within 4 months of its service (otherwise the complaint becomes void). Within 15 days (this is only in principle) , the Defendant selects an attorney (registered at the Bar within the jurisdiction of the Court) who notifies his/her appearance to the plaintiff's attorney. A copy of such notification is filed with the Court, who will thereafter communicate directly, by way of written notifications, with both attorneys.

Before other lower courts (such as the Tribunal d'Instance or the Commercial Court), the filing of the complaint shall be made at the latest 8 days before the hearing (otherwise the complaint becomes void).

A copy of such notification is filed with the Court, who will thereafter communicate directly, by way of written notifications, with both attorneys.'

In Germany, the complaint is, first, filed with the Court and then served by the Court to the defendant, with a request to appoint an attorney.

In China, the complaint is also filed with the Court and, once "accepted", it is served by the Court upon the defendant, within 5 days.

Objections to Jurisdiction

In the three countries, it is possible to challenge the jurisdiction of the Court, and such objection needs to me made immediately and in writing.

In France, objections must be raised BEFORE any defence on the merits. The Court may decide to render a judgment only on the jurisdiction issue or, to make a single judgment on

the jurisdiction issue and on the merits (after inviting both parties to file their written arguments on the merits). If objection is sustained (decision subject to appeal), the case is transferred to the other designated jurisdiction. The Court may also raise *ex officio* an objection to jurisdiction.

In Germany, the defendant may raise procedural exceptions, and should do this at the first possible moment, i.e. in the statement of defence. If the objection to jurisdiction is granted, the case is transferred to the other Court. This decision cannot be appealed.

In China, the time limit to file a written defence is 15 days from notification of the complaint by the Court. As mentioned above, such a written defence is not an obligation. However, if the defendant wishes to challenge the jurisdiction of the Court, it must do so in writing within the above time limit. If the objection is sustained, the case is transferred to the other designated Court. The decision is subject to appeal.

Progress and Timing of the Proceeding

From this point of the procedure, the roads followed by France and Germany diverge significantly from that of China. France and Germany adopt similar solutions based on the possibility for the Court to choose between a fast or a slower track, depending on the complexity of the case. China does not provide for such possibility.

Under this chapter, we may also look into the possibility, in certain circumstances, to use a faster "summary"procedure.

In France, the two "tracks" operate as follows:

The president of the Court decides to handle the case. He convenes with the attorneys as many times as he deems necessary to ensure that the case will be in order to be tried in oral hearing, after all evidences and written arguments (there may be several, the latest always superseding the previous ones) have been filed and exchanged between attorneys (they do this directly, without any interference of the Court, and simply keep the Court informed of the progress made) in accordance with the law. Once the case is ready for trial, the president declares the preparatory phase of the procedure to be "closed", and fixes a date for the oral hearing. After the closure date, no evidence or written pleadings are admissible.

Or, the president of the Court may also appoint one of the judges of the Court to perform the same preparation work as above with the attorneys, which may include intermediary hearings, and intermediate rulings, on procedure difficulties. Eventually, when the case is ready, closure of the procedure is declared and a date is fixed for the oral hearing.

In both cases, the Court decides on the dates of meetings and hearings, but always does so after discussing with the attorneys and taking into consideration their own agenda, the specific circumstances of the case (urgency, complexity etc.) and, of course, the agenda of the Court. Dates and time granted for performing of procedural steps are always extendible, upon request of either attorney, but eventually at the Court's discretion.

In Germany, the Court decides, at the beginning, between an "early oral hearing" or a "written preliminary procedure".

Early oral hearing are used where the Court is satisfied that there are no serious facts which would need taking evidence, and where, for example, only points of law arise between the parties. In such case, the Defendant has only one chance to state his arguments in writing

before the oral hearing. If the Court decides for an early oral pleading, the written defence must be files "well ahead" of the hearing, or within a specified time limit indicated by the Court.

Written preliminary proceedings are used for more complex cases where the parties will need time to build their case and arguments. If the Court decides for a written preliminary pleading, the Defendant must indicate, within two weeks, whether the action will be contested. If so, a written statement of defence must be forwarded within another two weeks. Only the latter term is extendible.

In order to ensure that justice is rendered in a timely manner, the basic rule is that the party which does not perform a procedural act within the given time limit will be precluded from making up for it at a later stage. This applies in particular to explicitly denoted statutory deadlines. But even where these time limits are missed it is still possible to make within two weeks a move for a restoration to one´s original position (reinstatement in the status quo ante) if the party without his or her fault was prevented to observe the time limit.

In China, no such choice exists. Filing a written defence is not an obligation. The written defence, if any, should be filed within 15 days of the date of service of the complaint. The defence is filed with the Court, who notifies a copy to the Plaintiff within 5 days. Other written statements of attorney may be filed to the Court after the oral hearing. They are not necessarily notified to the other party.

Administration of Evidence

In the administration of evidence, it appears that Germany and China have similarities, and follow a more strict system than France.

In France, evidence must be produced "spontaneously" by each party. Such obligation is expressly stipulated in the law, and constitutes also one of the main ethical rules of the profession of attorney. In practice, each attorney sends a photocopy of each document to the other attorney, and keeps a list of the numbered evidence. A copy of the list is attached to the written pleadings so that the court who can verify that the documents on which a lawyer relies in his pleadings have been communicated to the other lawyer.

There is no "discovery" procedure, like in Common Law countries, but it is possible to ask the court to enjoin a party (if the attorney is reluctant to do so) to produce the evidence that it intends to rely upon or, more precisely, certain documents that are in possession of his client.

Documents opened to the public, such as published court decisions (precedents), books, scholar studies and researches, etc… are not considered as evidence and do not need to be produced to the other party. However, out of professional courtesy, attorneys usually do send copies of such documents, or at least, provide their precise references so that the other attorney can easily find them.

The court may appoint an expert (there is a list of experts in each field of technical knowledge, including accounting, that is kept by each court of appeal), in order to conduct an investigation, establish facts and give technical (but not legal) advice. The court decides on the remuneration of the expert, and such remuneration is paid by the plaintiff (if the case is decided in favour of the plaintiff, the amount of the fees will eventually be borne by the defendant). The report of the expert(s) is filed with the court, prior to the hearing date, and the lawyers may comment. The report is not binding on the court.

The court may also conduct in person its own investigation, but this is rare.

In Germany, the evidence will only be taken by the court if the fact is contested by the other party. Therefore, all facts are regarded as true which are either admitted by the other party or, if contested, considered as probable after (discretionary) evaluation by the Court at the end of the hearing of evidence. Usually, the court decides on whether to take evidence or not after a (preliminary) oral hearing, where the court discusses with the parties whether certain facts need to be proved, which is only necessary if the facts are contested by the other party and if they are really decisive for the claim or defence. Then, the court issues an *order to take evidence*. This order lists the facts to be proved, the evidence to be produced and indicates which party bear the corresponding burden of proof.

The taking of evidence is done directly in front of the whole court. Exceptionally a member of a panel can be authorised to take the evidence as a commissioned judge.

A witness, being properly summoned, is obliged to appear at the hearing, to make a deposition and even to make an affidavit. The taking of evidence is done by the judge who poses the questions to the witnesses, and only after that the parties are allowed to ask additional questions. However, German law does not provide for cross-examination (like in Common Law systems).

In the case of documentary evidence the parties of the proceeding are obliged to produce the documents in actual possession that are necessary as evidence for the party bearing the burden of proof.

Under special circumstances, the court is also entitled to take evidence *ex officio*, i.e. without any offer of one of the parties. This however is limited to depositions of the parties, expert witnesses, documentary evidence and inspection by the court.

In China, the procedure for producing and analysing the evidence is quite strict. The Court serves on the parties a *Written Notice to Adduce Evidence* and a *Written Notice for Response* mentioning a specific time (no less than 30 days, or by agreement between parties ratified by the Court). Failing to produce evidence within such time limit equals to forfeiting the right to produce evidence, and if evidence is produced beyond time limit, the Court shall not organise the examination of such evidence unless the other party agrees. However, it is possible to apply to the Court for extension of time, which may be granted twice only, at the discretion of the Court.

The Court organises the exchange of evidence between the parties, or for complex cases, the exchange takes place during a special hearing, after the time limit for filing the written defence and before the oral hearing.

No evidence can be produced after the expiration of time, or exchange hearing. However, a party is allowed to produce evidence of a new fact, occurred after the time limit or evidence exchange hearing, or any other evidence that it could not have produced in time, for objective reasons.

Evolution of the case – Introduction of additional parties – Disjoining issues

ADDITION OF THIRD PARTIES

It is very common, in litigation, that a defendant, even though it is in the first line of attack from the plaintiff (because, for instance, it supplied defective goods), needs to turn against a third party (for instance its own supplier).

In France, such evolution is extremely common and easy. The Defendant serves a complaint against the third party, with a summon to appear in the pending case, and the same procedural process applies as for the principal case, which thereupon includes three parties.

It is also possible for a third party to join a pending case out of its free will, by filing written arguments to that effect.

In Germany, the law provides for a third party notice procedure, i.e.: The defendant may serve a third party notice on his supplier, which is mediated through the court, whereupon the supplier becomes also party of the pending case.

A third party may also become party of a pending case by intervention in support of the plaintiff or defendant.

In China, the lawsuit initiated by the defendant against the third party would be considered as a separate case. The addition of a third party cannot be decided by the parties themselves (the court should especially agree or request).

DISJOINING ISSUES

It may also happen in cases, where several parties are involved, or where issues of a different nature are at stake, that the Court wished to push forward one part of the whole case, and the procedure continue its course on the other issue(s).

This is possible under French and German law, and not uncommon. The situation rarely occurs in China, since the practice tends to split issues and defendants, in different cases from the start.

Oral hearing

The organisation of oral hearings – the ultimate event of the whole procedure, before the judgement is rendered - reflects the general perception of procedure by the country's system. In France, the Court listens to the oral explanation, sometimes asks question but never makes comments, in Germany the Court openly discusses all the aspects of the case, and in China, the Court organises a very formal sequence of events.

In France, *except for high emergency proceedings ("référé d'heure à heure"),* the hearing date is fixed a long time in advance, so that the attorneys have time to prepare. In average, the court can hear half a dozen cases in one (half day) session. An average hearing time, for one case, could be between half an hour to two hours or more, depending on how many parties are present in the case, or whether it is a simple or complex case, or simply whether the lawyers make long or short speeches. At the beginning of each case, the reporting judge

(or the president) gives a brief summary of the case and then, asks the attorney for the plaintiff to present his/her oral observations. Then, the defendant's attorney does the same. At the end of the oral explanations, each attorney hands over to the court a file containing their evidence, presented in such a way as to illustrate each step of their written pleadings. Questions may be asked by the court, but not necessarily and it is at the discretion of the judge.

If the parties themselves wish to add comments and be heard by the Court, they may ask the Court. Such requests are more and more often granted.

The Court does not attempt to invite the parties to settle the case. It is not in its power.

In principle, no additional comments or pleadings may be sent to the court by the lawyers, after the hearing, unless the court expressly asks them to do so, for example, to bring further explanation to a specific point that was raised orally.

Hearings are open to all public, and any one may enter the court room and listen, at any time without having to register and obtain clearance.

In Germany, the main oral hearing may directly be continued after the taking of evidence. At the outset of the hearing the court summarises the factual and legal issues and the arguments of the parties by referring to their respective written submissions. Subsequently it has to discuss all details of the case, which are decisive for the final judgement, even if the parties did not raise some issues in their written submission. If evidence has been taken by the court, it should also discuss the outcome of the evidence with the parties.

Within the oral hearing the judge is also under the obligation to attempt a settlement between the parties. This usually happens in a preliminary hearing. However, it is not uncommon that the court will quite frankly discuss the outcome of the case even after taking evidence and sometimes strongly recommend a settlement also at the main oral hearing.

If the parties do not agree to settle the case, the court may immediately deliver a judgement, which terminates the lawsuit. But in practice it is more likely that the court sets a date, usually within about three weeks for the reading of the judgement.

In China, the hearing is divided in three distinct phases, organised strictly and in detail by the Court: the investigation, the debate and the final conclusive remarks. During the “investigation”, the Court and the Attorneys go through the whole series of evidence (which is more or less a repetition of what was done during the previous exchange of evidence hearing). During the debate, each attorney develops the arguments, on each factual and legal issue. Finally, after each attorney has delivered his conclusive oral remarks, the Court asks the attorneys if their clients wish to settle.

After the hearing, the attorneys often submit to the Court written arguments. Such arguments are not necessarily communicated to the other side, but if the other lawyer knows about the existence of such additional written argument, he may consult the same at the Court. .

Judgement

In France, the judgment is rendered, in average, one month after the hearing (however, the court has no obligation of time). A copy of the judgment is delivered to the attorneys, through the court's clerk.

The judgment contains the name and address of the parties, the names of the attorneys, the names of the judges (who must be the same as those who heard the case at the hearing), the date of the hearing. The judgement recites the facts, the claims and arguments developed by the parties, and the Court may not base its decisions on evidence or arguments that were not expressly mentioned in the judgment. Then comes the main part, which is the rationale for the decision, and finally, the decision itself on the claims. The Judgment is signed by the president of the court and the clerk.

The judgment is notified by the Court to the attorneys but the time for appeal only starts upon service of the judgement by a bailiff, upon request of a party, to the other party.

In Germany, the judgement is rendered rapidly, sometimes immediately after the hearing (rare) or three weeks after. The judgement lists the parties and their attorneys, usually with their profession, domicile and procedural status as parties. It mentions the names of the participating judges and the date of the last oral hearing.

Then follows the operative part of the judgement: the decision on the claim, the costs of the proceedings and the provisional enforceability of the judgement.

The facts of the case have to contain all factual details and motions forming the basis of the court decision. Thus, the court may not base its decision on facts that are not being written down in the judgement. Finally, the reasons for the decision give a summary of the deliberations in respect of the legal points and evidence that lead to the judgement.

The participating judges have to sign the document. Only with the signature of all judges of the panel does the draft of the judgement acquire full power and authority.

The judgement is served by the Court *ex officio* to the parties or by the prevailing party on its own motion.

In China, the time constraint does not apply specifically to the time between the hearing and the issuance of the judgement, but to the entire length of the procedure, which, in domestic cases should not exceed 6 months. However, there is no time limit for cases involving a foreign element. The judgement contains the names and addresses of the parties, and of their attorneys and follows with a statement of the facts, the arguments of both sides, the rationale for the decision and finally, the decision on the claims.

The judgement is notified by the Court to the parties or their attorneys.

Interruption – Suspension – Extinction of procedure

In France, the Court may decide to *suspend* a case while waiting for the result of another case, or event, which would have an impact on its decision. The Court may also *strike off* the case from the agenda, if both parties do not keep up with the time frame given to them by the Court. But this does not mean that the case is over: it may be re-instated on the agenda at any time, upon simple request from either party. A case may also be terminated if none of the parties has taken any procedural step for more than two years (the plaintiff can still re-start a new case from the beginning).

In Germany, it is possible to interrupt or suspend proceedings, either upon request by the parties or according to law. The court cannot extinct cases ex officio but if (one or both of the) parties do not appear to a scheduled hearing, the court can decide and reject the case or grant the relief sought.

In China, a lawsuit may be suspended for reasons specific to one of the parties (deceased and need to wait for successors to decide whether they wish to continue, loss of capacity to engage in legal action and need to wait for appointment of a representative, termination of a legal entity, force majeure making impossible for one of the parties to participate in the proceedings, and finally, the case where the decision on the case is dependant on another pending lawsuit). If a deceased party has no heirs, or they refuse to take over, the case may be declared extinct.

Default proceedings

In France, If the defendant does not appear, or is not represented, the plaintiff may at its initiative, or the Court may order the plaintiff to serve again the complaint to the defendant, if the first one had not been served to the person. If the defendant still does not appear, the Court may render a judgment, if it considers the claim is founded.

The judgment is considered *by default* if no appeal is possible (small case) or if the defendant could not be reached by the complaint. In such case, the defendant may, later, file an *opposition* against the judgment and ask for a re-trial of the case.

If the judgment is subject to appeal, or if the defendant had indeed received the complaint, but neglected to appear, the defendant may only lodge an appeal.

In Germany, if the defendant, after appropriate service of the complaint or an appropriate summons to attend the oral hearing does not appear, does not file a written defence within the given time or is not properly represented, the plaintiff may apply for a default judgment.

A special appeal is provided to the party in default, which has to be filed within two weeks after service of he default judgment, and which brings the procedure back to its ordinary route as if there were no default.

In China, the Court may render a default judgment if a defendant, having been served with a legal subpoena by the Court, refuses to appear or walks out during the court session without permission of the court. The same applies to a plaintiff who does not appear or walks out without permission: he is deemed to have withdrawn its complaint, but if the defendant had filed a counterclaim, the Court may render a default judgement.

Appeal

In France, *all judgements are in principle subject to appeal, unless they fall below a monetary threshold fixed from time to time by decree of the Government. The standard delay available to lodge an appeal is 30 days from the date of service of the judgement by the Bailiff (+ 2 months for overseas litigants).*

The appeal is lodged through a declaration filed with the Court.

A Decree n°2009-1524 dated December 9, 2009 (entering into force on January 1, 2011) states that as from January 1, 2011, such declaration of appeal and the "constitution" of avoué" shall be filed to the Court by electronic means (otherwise, the declaration of appeal will become null and void), except if the transmission by electronic means is impossible for a cause not attributable to the sender of the procedural acts.

Prior to such decree, the declaration of appeal and "constitution of avoué" were made on paper documents. As regards the other acts of procedure (e.g. briefs), the communication by electronic means will become effective at the latest on January 1, 2013.

Both parties may appeal, and an appeal may be withdrawn at any time (however, if the other party has filed a counterclaim, its withdrawal would be subject to the other party's approval).

Litigants, before the Court of Appeals, shall be represented by a special type of lawyers called "avoués" (except for labour law matters where the appointment of an avoué is not necessary), in whose name the written pleadings are filed with the Court.

This specific profession ("avoué") is expected to disappear and merge with the profession of lawyer as of January 1, 2012. Until that date, the "avoués will implement the new appeal procedure requirements (notably the communication of procedural acts through electronic means).

With regard to appeals lodged as from January 1, 2011, the appellant has three months to file its brief (otherwise its declaration of appeal will become null and void) from its declaration of appeal. The respondent will then have two months as from the filing of the appellant's brief to submit a brief in reply and possibly lodge an incident appeal (otherwise its brief will become null and void). In case a third party is summoned to intervene before the Court of Appeals, the intervening party will have three months to file its brief from the date upon which it has been notified to intervene (otherwise, its brief will be declared null and void).

The Court of Appeal hears the case, all over again, which means that new evidence, not produced in the first instance, may be submitted (the party is under no obligation to justify why it did not mention a fact or produce an evidence before), and new arguments may be developed, provided however that they tend to support the same claims as in the first instance.

The detailed procedure is very similar to that of the first instance. In the end, the Court makes a judgment, which can either be a confirmation (entirely or partially) of the first instance decision, or an entirely new decision. The case is never returned to the first instance tribunal, unless the decision subject to appeal was only on a pure procedural issue (such as jurisdiction), in which case the procedure simply continues before the relevant first instance court. However, it may also happen that the Court of Appeal decides to take up such case directly and, after inviting the parties to file their written arguments on the merits of the case, to hear the case and render a judgement.

In Germany, an appeal may be filed against judgements of the first instance courts within one month starting from the formal service of the full judgement with the complete reasoning in writing.

The appeal is admissible, if either the amount in controversy exceeds EUR 600,-- or if the first instance court explicitly allowed the appeal. The first instance courts have to allow the appeal in cases of fundamental legal questions or for maintaining uniformity of jurisprudence in questions of law.

The appeal has to be filed in writing and must be substantiated within a two months-term starting from the service of the instance judgement.
Within the appeal procedure new facts can only be introduced if there was no chance to present it earlier or if the presenting party sufficiently excuses and justifies not having brought it in due time at first instance.

The appeal procedure is very similar to the first instance procedure, including the written submission of the parties, the taking evidence and the oral hearing. The appeal judgement however is different from the first instance judgement, because it does not refer to the factual details and motions entirely, but only insofar as the facts differ from the finding of the first instance court. Accordingly, also the reasoning of the appeal judgement will only refer to those issues, which deviate from the first instance judgement.

The operative part of the appeal judgement may either entirely or partially refuse the appeal, i.e. confirm the first instance decision or cancel the first instance decision substituting it by a new decision rendered by the appeal court itself. Only in very rare cases, the appeal court may also return the case to the first instance court, e.g. if the first instance court issued only a procedural judgement.

In China, an appeal is admissible for all cases. The time for appeal is 15 days from the date of service of the judgment (10 days for a procedural "order" or "ruling"), and 30 days for overseas parties. No extension of time is possible.

An appeal may be withdrawn, except if the appeal court considers, itself, that the first instance judgment was wrong, or if there was malicious conspiracy causing damage to the state, to the society or to a third party.

The appeal is limited to the points raised by the appellant, but the court may also modify the judgment if it finds that it was wrong, even if the party concerned did not raise the point. The parties are not allowed to produce new evidence, unless they refer to facts that occurred after the evidence exchange hearing in the first instance procedure.

Normally, a panel is formed to hear the appeal, but the court may also decide not to conduct a trial and make a judgment (on the merits) or a ruling (on procedure matter) directly.

The time limit to make a judgment is 3 months, but there is no time limit for a case involving foreign elements.

The court can make several sorts of decisions: confirm the first instance decision, return the case to the first instance court for retrial it the facts are not clearly ascertained, or if there was a violation of the legal procedure which may have affected the decision, investigate and clarify the facts and amend the first instance decision accordingly, amend the decision if it considers that the facts are clear but the application of the law was incorrect.

In case of retrial before the first instance court, the new decision is subject to appeal.

The decision is pronounced by the court of appeal itself, or, subject to authorisation, by the first instance court, or by the court where the appellant has its domicile.

Supervision

In France, if dissatisfied with the decision of the court of appeal, the parties may, within 2 months from service of the Court of Appeal judgement, refer the decision to the Supreme Court *"Cour de Cassation"* (only one, in Paris).

The parties are represented by another category of lawyers specially admitted to represent litigants before the Supreme Court. The procedure is only made in writing (no hearing nor oral explanations by lawyers, unless the lawyers file a special request for a hearing and such request is granted by the Court).

The Supreme Court's role is to verify that the law has been correctly interpreted and applied to the facts, and not to retry the whole case (in particular, facts established by the court of appeal cannot be contested).

If the Court confirms the decision of the court of appeal, the case is closed. If it decides that, for some reason, the case has to be tried again, the case is referred to another court of appeal, who will make a new decision.

Such decision of the other court of appeal can be referred, again to the Supreme Court (extremely rare), and in such case, the Supreme Court will make a judgment, in full collegial formation. If it disagrees, again, with the judgment of the second court of appeal, the case is referred to a third court of appeal, which has no alternative but to follow the direction shown by the Supreme Court.

In Germany, A second appeal is admissible, before the Federal Supreme Court, but only if allowed by the Court of Appeal. The deadline is one month to file the second appeal and a further month to substantiate by written pleadings. Term extensions for substantiation are possible and usual. If the Court of Appeal did not allow a second appeal, the defeated party may file an application to the Federal Supreme Court for obtaining allowance to file the second appeal.

The parties are represented by special attorneys.

The Federal Supreme Court does not re-try the case, and facts are considered as established. The court only verifies points of law. The Federal Court may dismiss the second appeal or send the case back to another senate of the *same* Court of Appeal where the procedure is continued, but this time on the basis of the Federal Court's reasoning. Only in exceptional cases, the Federal Court makes a final decision itself.

In China, the possibilities for retrial are wide and open. First, the president of the Court which rendered the judgement, or a court of a higher level, or the Supreme Court itself find, at any time, some definite error in a legally effective judgement, and deems necessary to have the case retried, the case may be retried, by the same court or by a court at a higher level. This power to ask for retrial is also opened to the People’s Court Procuratorates.

The parties themselves may apply to the next higher level above the Court that made the judgement for retrial, within 2 years. The circumstances allowing a retrial are listed (13 items) in article 179 of the Code of Civil Procedure and cover a large area of facts. Such circumstances include new conclusive evidence, insufficiency of the main evidence retained by the Court, forgery of evidence, failure by the Court to investigate and take evidence, error in the application of the law, violation of the law, right to debate freely violated, omission of claims, cancellation of a legal document having served as a basis for the judgement.

After the expiration of the two year period, if the legal document on which the original judgment or ruling was made is cancelled or revised, or where the adjudicating personnel were involved in any conduct of embezzlement, bribery, practicing favouritism for himself or relatives, or twisting the law in rendering the judgment, the party may apply for retrial within 3 months after it has known or should have known the situation.

The Court serves the application for retrial to the other party within 5 days, and the other party should submit its written explanation within 15 days. Within 3 months, the Court decides whether the retrial should take place or not. If decided, the case is retried by a court at a higher level above the court that rendered the judgement (the court that decided on the retrial issue, or another court, or even by the court that originally heard the case).

If the case so retried was handled by a first instance court, the new judgement is also subject to appeal.

Effective settlement obtained through mediation may also be subject to retrial of the case if it is found that they violate the law.

A re-trial suspends the enforcement of the related judgement.

Enforcement

Enforcement is the ultimate step of a lawsuit. The efficiency of the enforcement is, therefore, essential.

In France, enforcement can be performed immediately after service of the judgement, but only if expressly allowed by the Court (the judgment provides that it can be enforced “by provision”). Otherwise, the decision only becomes final and enforceable if there is no appeal within the 30 days period following the service of the judgement on the other party. Orders made in the above-mentioned urgent procedure “référé”, are always immediately enforceable.

In case of appeal, the enforceability of the judgement (as the case may be) is not suspended, but it is possible to apply, before the president of the Court of Appeal, for suspension of the enforcement.

The enforcement is performed by a bailiff acting upon the request of the party who wishes to enforce the judgement. For debt collection, it is common for the plaintiff, to secure before starting the case, a court order allowing to freeze property of the defendant, sometimes in the hands of a third party (such as a bank account). When the judgement confirms the credit, the provisional attachment is be transformed into an actual seizure, and the Bailiff may obtain payment out of the frozen account. The Bailiff may also directly seize assets and arrange their sale by auction. (There are special rules for enforcement on real estate).

Disagreements on any enforcement measures are dealt with before a specialised judge called "*Juge de l'Exécution".*

In order to put pressure on the defendant to perform an injunction to do, or to cease and desist from doing (for example infringing, the judge may add in the judgment a penalty called "*astreinte*" whereby the party concerned would be exposed, in case of failure, to paying to the other party, a compensation such as a fixed amount per day (of delay, if the injunction is to do something) or per piece of infringing product (if the injunction is to stop infringing). In case of failure to perform, the interested party may start a new lawsuit, before the same Court, in order to obtain the “liquidation” of the penalty i.e., a judgement condemning the other party to pay a sum of money equivalent to the accrued penalty.

In Germany, if the operative part of a judgement has become legally valid, the prevailing party may go ahead with the enforcement of that judgement. Enforcement is performed either by a court or by a bailiff. Jurisdiction for the enforcement lies with the municipal court called “enforcement court”, in whose district the actual enforcement should take place or with the local bailiff there. Before any enforcement can take place the registrar of the court which rendered the judgement issues a certificate of enforcement which has to be presented to the enforcement court or to a bailiff.

Before finally going ahead with the enforcement through the bailiff, the full judgement had to be served, either ex officio by the court or by the prevailing party.

Thereupon, the bailiff has the right to cease property and money at the defeated party. Furthermore, it is possible to attach money claims of the debtor and claims for the recovery or delivery of movable and unmovable goods and other property rights with the help of the court of execution.

Separate rules apply for the enforcement against unmovable (real) property, including registered ships. In such cases, a mortgage can be entered in the land register on application of the creditor by way of execution. Furthermore, a sale by court order and sequestration with an administrator appointed by the court in order to receive the rents and profits thereof are possible.

Judgements for an injunctive relief has to be enforced by establishing a new procedure at the competent court of first instance applying for fixing a fine to the defeated party, which is not complying with the injunction.

In China, the enforcement is administered by a specialised section of the Court, upon request of the prevailing party, in case the losing party fails to comply with the decision. The time limit to apply for enforcement is two years. Upon receipt of an application, the enforcement officers issue an enforcement notice to the party concerned, with instruction to perform within a given time limit. If the party concerned still fails to comply, the enforcement officers may take compulsory measures.

The party concerned must report its property, as of the day of the enforcement notice back to one year. Failing to do so may entail detainment decision from the Court. The Court has the power to inquire with third parties, such as banks, and may decide to freeze, and appropriate such assets and to seize, detain and auction part of the property.

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