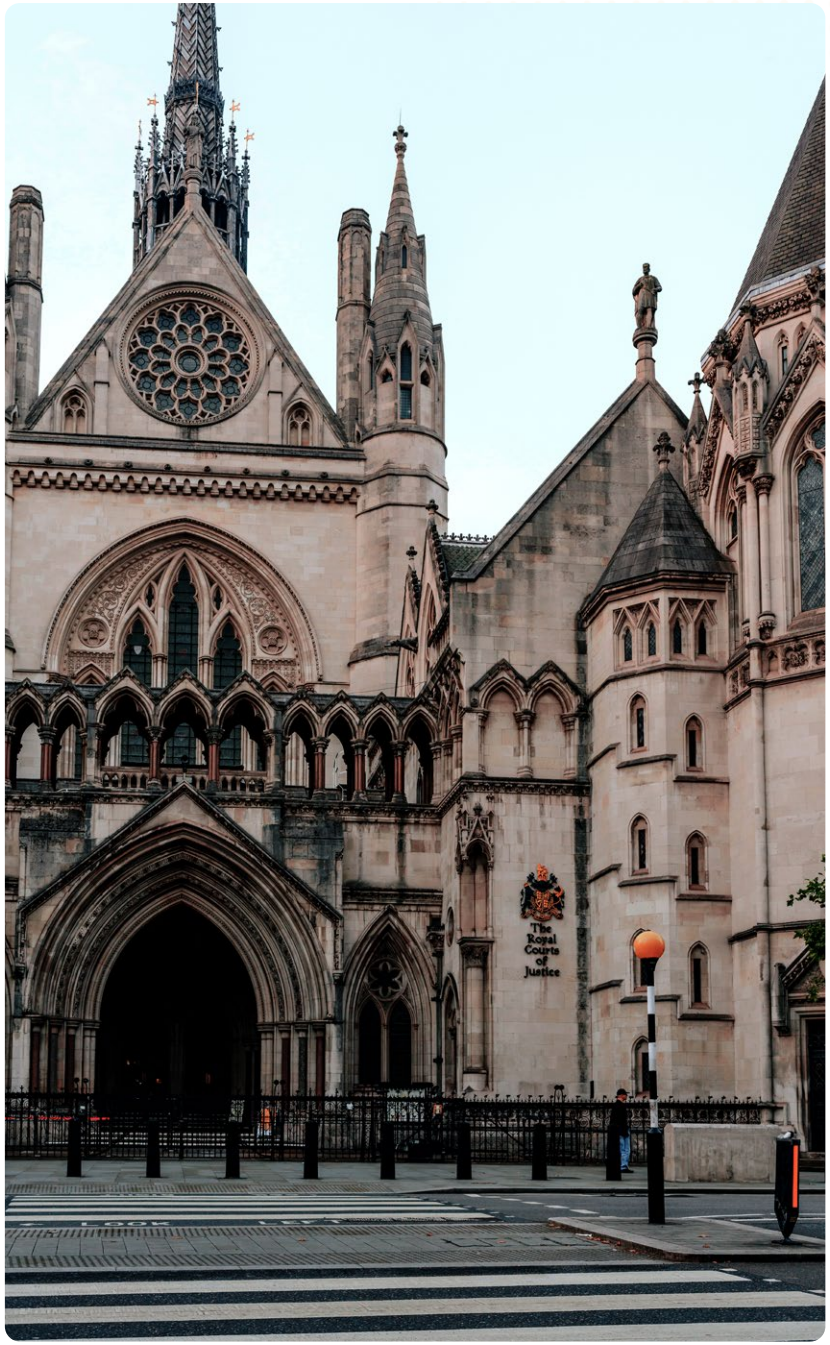

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Market Intelligence

DISPUTE RESOLUTION 2023

Global interview panel led by Seladore Legal

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About the editor

Simon Bushell
Seladore Legal

Simon Bushell of Seladore Legal is described as a forceful, determined and clear-sighted litigator and has consistently been ranked in Chambers UK from the early days of his career. He is frequently lauded in The Legal 500, having been recently inducted into its Hall of Fame for civil fraud expertise and praised as a Leading Individual in commercial litigation. Simon acts for a broad range of clients, including large corporates, private equity houses, financial institutions, banks and ultra-high net worth individuals, in addition to foreign government agencies and state-owned companies. He has undertaken investigations into complex, worldwide frauds, conspiracies and insolvencies, and has wide experience in coordinating parallel cross-border disputes. Prior to founding Seladore Legal with Gareth Keillor, Simon was a partner at Herbert Smith Freehills from 1997 to 2013, whereupon he joined Latham and Watkins and became chair of its litigation department in London. Simon has more than 30 years' experience in high-stakes commercial litigation.

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France

Clémence Lemétais d'Ormesson is a partner in the litigation and arbitration department at UGGC Avocats. Clémence has extensive trial experience before civil and commercial courts. Clémence also has an important practice in commercial arbitration (both domestic and international, ad hoc and institutional). She advises her clients on the implementation of pre-litigation and litigation strategies, in particular in post-M&A disputes, in disputes related to the performance or termination of commercial contracts, in disputes between shareholders, in disputes related to the liability and dismissal of managers and, more generally, in commercial and corporate litigation. In addition, UGGC Avocats is a sponsor of the Paris Arbitration Week.

Laure Assumpçao is a senior associate in the litigation and arbitration department at UGGC Avocats. She is a registered attorney in both Paris and New York. Laure handles complex cross-border litigation and arbitration cases and assists clients in commercial disputes. Laure has developed an important practice in art law in which she regularly resorts to ADR methods, in particular mediation. She has recently been recognised as a rising star in Art Law by The Legal 500 2023 ranking of French law firms.

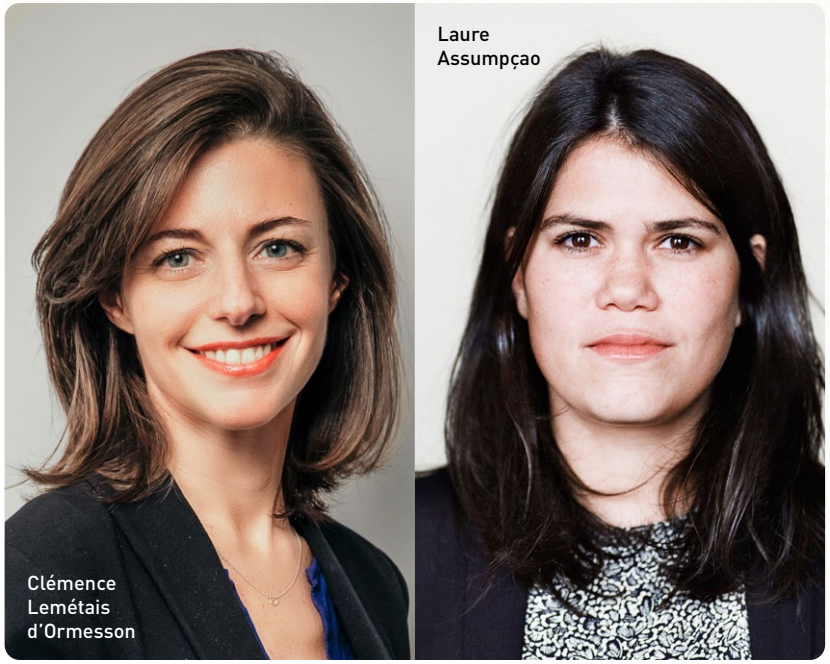
QUESTIONS

1 What are the most popular dispute resolution methods for clients in your jurisdiction? Is there a clear preference for a particular method in commercial disputes? What is the balance between litigation and arbitration? What are the advantages and disadvantages of the most popular dispute resolution methods?

The three main dispute resolution methods that are commonly used in France are state judicial proceedings, mediation and arbitration. The collection of data for ADR methods is often uneasy as there is no common statistic tool. But general trends can be established, and the preference for a dispute resolution method varies depending on the type of dispute.

In domestic civil and commercial disputes, the jurisdiction of the French courts continues to be the most resorted to dispute resolution method. There is, however, in parallel a significant growing trend in favour of mediation as a prior step to bringing an action before the state courts, which is more and more successful and constitutes an effective alternative to state proceedings. In addition, French law has recently been amended to provide a strong incentive for parties to ongoing litigation to attempt mediation. Thus, since 2022, a French judge can order the parties to set up a first meeting with a mediator to get information on the benefits and the conduct of mediation. However, parties remain free to enter into mediation or not. This alternative to judicial proceedings and the willingness of parties to avoid long and random proceedings explain a tendency for fewer actions being brought before the French courts over the course of the past few years.

In international commercial disputes, arbitration is favoured by litigants for the usual advantages it offers (ie, flexibility, independence, impartiality, confidentiality and speedy solutions). The main drawback of the French judicial system is the duration of the proceedings, which tend to be longer before the civil courts. However, this disadvantage



of the length of the proceedings has become much less true before the commercial courts in recent years, as the average length of proceedings before these courts has been greatly reduced. Thus, the comparative advantage to arbitration of a speedy resolution must be put in perspective.

2 Are there any recent trends in the formulation of applicable law clauses and dispute resolution clauses in your jurisdiction? What is contributing to those trends? How is the legal profession in your jurisdiction keeping up with these trends and clients' preferences? What effect has Brexit had on choice of law and jurisdiction clauses?

In domestic disputes, there is a general trend to stipulate in-jurisdiction clauses for a prior attempt at an amicable settlement

> "As regards costs, France is a litigation-friendly place because French court proceedings are almost free. The French legal system is thus very attractive in particular for clients from common law countries."

of the disputes through mediation. Failure to exactly comply with the amicable process provided in dispute resolution clauses renders a court claim inadmissible. Practitioners thus tend to be more and more specific in the dispute resolution process that must be set up prior to an action being brought before judicial courts.

In international disputes, the main innovation that has greatly impacted the formulation of dispute resolution clauses is the creation, in 2018, of the international commercial chambers of first instance and appeal in two cities, Paris and Nanterre. These chambers were created as a serious alternative to arbitration with an adjustment of the usual rules of French civil procedure to international disputes. These rules are strongly inspired by rules applicable in common law systems and arbitration proceedings and aim to offer foreign companies an appropriate procedure for international disputes. Thus, before these international commercial chambers, the parties have the possibility to use a foreign language, to be represented by a foreign attorney, to request the production of documents from the other party and to request the appearance of witnesses and experts in a discovery-type like procedure, which is very different from what French courts typically know.

Brexit has not impacted choice of law clauses since the applicable law is determined under French law in application of the EU Regulation Rome I, which has a universal application, irrespective of whether the law designated is one of a non-EU member state. In terms of jurisdiction, however, London as place of arbitration is losing importance notably to the benefit of Paris and Geneva.

3 How competitive is the legal market in commercial contentious matters in your jurisdiction? Have there been recent changes affecting disputes lawyers in your jurisdiction? How is the trend towards 'niche' or specialist litigation firms reflected in your jurisdiction?

The Parisian legal market is very competitive, with many law firms of different sizes. There are approximately 70,000 attorneys in France of which 30,000 are registered with the Paris Bar. There are numerous big US and UK firms with offshoots in Paris. There are also many multi-service French law firms of significant size and a growing number of boutique law firms with very specialised sectoral areas of expertise.

Paris is a renowned place on the international legal scene, in particular as the seat of the International Chamber of Commerce under the aegis of which many international commercial arbitrations are held. Several institutions work at enhancing Paris as a major international legal forum, such as Paris Place de Droit and Paris Place d'Arbitrage. Paris is also the backdrop of a major event in the arbitral world, gathering attorneys from around the globe for the Paris Arbitration Week (commonly known as the PAW), which takes place every year in March.

In addition, France has set up international chambers within the commercial courts of Paris and Nanterre (which is the court for many companies headquartered in that jurisdiction) and the Paris Court of Appeal to demonstrate its capacity to judge international disputes and to offer foreign companies an effective alternative to arbitration.

4 What have been the most significant recent court cases and litigation topics in your jurisdiction?

In commercial disputes, there are several recent precedents that have asserted new solutions and modified classic and old case law in the field of corporate litigation.

In 2023, the Court of Cassation rendered a key decision in corporate litigation. At the origin of the dispute, a shareholder unilaterally terminated a shareholders' agreement that had been entered into for the duration of the company (ie, 99 years). This termination was challenged in court on the basis that a party cannot unilaterally terminate a fixed-term contract. The defendant claimed that the duration of the shareholders' agreement violated the French core principle that prohibits perpetual commitments. The French Court of Cassation ruled that the shareholders' agreement was a fixed-term contract as it was limited to the lifetime of the company and consequently that it could not be unilaterally terminated before its term.

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5 What are clients' attitudes towards litigation in your national courts? How do clients perceive the cost, duration and the certainty of the legal process? How does this compare with attitudes to arbitral proceedings in your jurisdiction?

As regards costs, France is a litigation-friendly place because French court proceedings are almost free. The French legal system is thus very attractive in particular for clients from common law countries, where judicial proceedings are quite expensive. In addition, attorneys' fees tend to be much less high in France than in common law countries.

As regards duration of proceedings, the average duration of most first instances cases is around two and a half years and on appeal between two and three years. This is less true before the commercial courts where the average duration of a first instance proceedings is around 10 months, which is very much appreciated by clients. However, in the case of appeal, the duration of court proceedings can be an important

"Civil procedure has been the object of a recent reform in a holistic intention to modernise, simplify and improve the efficiency of the French judicial system. This reform has been drafted as a first step towards incentivising litigants to have recourse to alternative dispute resolution methods with the express objective to unclog state courts."

drawback for companies, which may prefer to use alternative dispute resolution such as mediation or arbitration.

The choice of alternative dispute resolution methods by parties in France is thus not driven by cost considerations. For instance, in international disputes in particular, arbitration tends to be much more expensive than state court proceedings.

6 Discuss any notable recent or upcoming reforms or initiatives affecting court proceedings in your jurisdiction.

Civil procedure has been the object of a recent reform in a holistic intention to modernise, simplify and improve the efficiency of the French judicial system. This reform has been drafted as a first step towards incentivising litigants to have recourse to alternative dispute resolution methods with the express objective to unclog state courts. So far, only the smallest disputes are affected by the legal obligation to resort to a prior conciliation process.

The clearly stated objective of the French legislator is to encourage parties to attempt mediation, in particular in commercial disputes. We observe in these disputes an almost systematic tendency of the judge seized to order the parties to devote three months to try to find an agreement under the aegis of a mediator.

7 What have been the most significant recent trends in arbitral proceedings in your jurisdiction?

Arbitration law is based on the fundamental principle of independence and validity of the arbitration agreement enshrined in 1993 by the French Court of Cassation in the *Dalico* case. Since this judgment, it is known that:

by virtue of a substantive rule of international arbitration law, the arbitration clause is legally independent of the main contract which contains it directly or by reference, and its existence and effectiveness are to be assessed, subject to the mandatory rules of French law and international public policy, on the basis of the common will of the parties, without it being necessary to refer to a State law.

This material rule has been endorsed over time since 1993. In 2022, the French Court of Cassation ruled explicitly that the parties have the right to choose the law applicable to their arbitration agreement, which can be different from the law applicable to the contract.

However, the conditions required by the French Court of Cassation to consider that the parties have chosen the law applicable to the arbitration law are very restrictive: choice of applicable law must be 'express', and the wording of the clause most be very clear on the fact that the parties have expressly decided to submit the arbitration clause to a specific law. This solution is an illustration of the French approach, which is quite different from that of the English judges since it gives primacy to the French substantive rules whereas the English judges give primacy to the law of the contract that contains the arbitration clause.

8 What are the most significant recent developments in arbitration in your jurisdiction?

The most significant developments in arbitration law rise from important case law of the Commercial Chamber of the Paris Court of Appeal and the Court of Cassation, particularly regarding the independence and impartiality of the arbitrator.

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We particularly note the phenomenon of contractualisation of the arbitrator's independence regime. This phenomenon was illustrated in the *Couach* decision of the Paris Court of Appeal, which ruled on the fact that the undisclosed elements were included in those that should have been disclosed according to the ICC Guidance Note on conflict disclosures by arbitrators. In other words, from now on the state judge will control the independence and impartiality notably under the ICC rules.

We note other developments, in particular on the criterion for setting aside an international arbitral award contrary to international public policy. Courts have set up a new standard for breach of international public policy. The criteria for the violation of international public policy is no longer its 'flagrant, effective and concrete' violation but its 'characterised violation'. The solution constitutes the new positive law and applies to all criminal offences, foremost among which is corruption.

9 How popular is ADR as an alternative to litigation and arbitration in your jurisdiction? What are the current ADR trends? Do particular commercial sectors prefer or avoid ADR? Why?

Mediation is gaining growing recognition and attention in the French procedural world. Civil and commercial judges are increasingly ordering parties to meet with a mediator to attempt at agreeing on setting up a mediation process.

Similarly, attorneys are more and more open to the idea of mediating cases than they used to be even just a couple of years ago.

10 What is the position in relation to litigation funding in your jurisdiction? Is funding available? Have there been any significant developments in this area in your jurisdiction?

Under French law, both litigation and arbitration (domestic and international) can be funded by a third-party funder. More and more foreign third-party funders are coming in to sell their services to French parties.

However, very few court proceedings are funded by third party funders because: (1) the costs of a court proceeding are not as high as in common law systems, which means that companies are generally able to afford the proceedings costs; and (2) French law prohibits punitive damages. Therefore, the amount of the damages that the claimant can obtain from the judge is limited to the amount of the loss.

To our knowledge, there have been a few instances of litigation funded by third-party funders. These are court proceedings brought by victims of antitrust practices following decisions of the antitrust authority, which has recognised the existence of antitrust practices (follow on actions).

Thus, the third-party funding market in France is mainly arbitration proceedings.

Clémence Lemétais d'Ormesson
c.lemetais@uggc.com

Laure Assumpçao
l.assumpcao@uggc.com

UGGC Avocats
Paris
www.uggc.com

Read more from this firm on Lexology

QUESTIONS

The Inside Track

What is the most interesting dispute you have worked on recently and why?

A dispute between two companies that jointly created several asphalt production factories. When the parties decided to dissolve the joint venture, a dispute arose between the parties regarding the allocation of the costs of demolishing one of the factories and cleanup of the site. When the dispute arose, we suggested our client go to mediation. This proposal was refused because the amicable discussions had not led to a settlement agreement.

The Paris Commercial Court upheld all of our client's claims. On appeal, the Paris Court of Appeal invited the parties to attempt to mediate the case. Encouraged by their lawyers, the parties agreed to try this mediation, which enabled the parties not only to re-establish dialogue between them but also to reach an agreement.

This mediation was extremely beneficial to both parties, and it not only ended the dispute but also settled another dispute that was about to arise between the same companies over another factory in which they were operating together. Mediation allowed creative solutions to be found, which would not have been possible before state courts. Thanks to mediation, the parties – which operate in the same market – were able to maintain good relations and to keep their disputes confidential.

What do you consider to have been the most significant legal development or change in your jurisdiction of the past 10 years?

The creation of the international commercial chambers within the Commercial court of Paris and Nanterre and the Paris Court of Appeal in 2018 is the main event that changed the procedural scene in France.

What key changes do you foresee in relation to dispute resolution in the near future arising out of technological changes?

The exchanges between attorneys and the tribunal are already entirely virtual. The legislator is investing more and more money into digitalising proceedings. Virtual hearings are quite common in arbitration proceedings and were implemented during the covid-19 pandemic.