



FRANCE

REMEDIES THAT CROSS BORDERS

The Legal System Generally

France is a civil law country and the primary sources of laws are statutes and written rules. Case law is not binding precedent, but it can be persuasive to judges because judges must justify their decisions. There are no juries in French civil courts. Although the country is based on civil law, the process is adversarial and judges will decide claims based on the information presented by the parties but they do have the power to order additional investigative measures if they deem it appropriate. There is no right to a jury trial and most civil liability cases are tried by either one or a panel of three judges, depending on the amount at stake and the complexity of the matter.

Class/Collective Actions

There is no system for class actions in France as there is in the United States because a principle of French law is that each person must bring their own claim. Even when actions are grouped together for purposes of convenience, an individual generally must still present their own arguments and evidence and the judge will issue a separate judgment in respect to their individual claim. French law does, however, provide a few different mechanisms for initiating group actions that still adhere to these principles. These mechanisms are joinder, consolidation, action taken in a collective interest, and joint representative actions.

Joinder

When there is a common question of law or fact or multiple claims arise from the same event, multiple plaintiffs may join together in one action. When a case is brought by several joint plaintiffs, the plaintiffs are typically represented by one attorney and the proceedings will be the same as in the case of only one plaintiff. Unlike a class action, the court will assess each individual plaintiff's loss and decide upon remedies separately. This type of action is most frequently used in mass tort or consumer protection cases.

Consolidation

Consolidation is not truly a mechanism for effectively bringing a group action because the parties' litigation expenses are not shared and the parties do not

proceed with any joint litigation strategy. In fact, in consolidation actions, plaintiffs have typically all filed individual lawsuits. A court may then, either upon its own motion or upon motion by a party, consolidate several claims that have been brought by different plaintiffs. Courts will only consolidate claims where it is in the interest of justice to rule on them jointly. In consolidation claims, each plaintiff continues to act separately and through their own attorney but the actions of one plaintiff (e.g. in moving to postpone or scheduling a hearing date) will affect all other plaintiffs.

Action taken in a collective interest

Actions may be brought by associations in the “collective interest” of its members. For an association to qualify to bring a collective action, it must be an organization that is authorized by a ministerial decree as a nationwide representative of its constituents. In order to pursue a collective interest action, the association must prove there is an interest that is both different from the individual interests of represented persons and the interest of the public. Associations cannot recover compensation for individual damages that have been suffered and generally the proceedings are utilized for injunctive relief (e.g. banning the use of a particular provision in a contract).

Joint representative actions

An association may also act on behalf of identified individuals when damages arising from the same facts have been suffered by the individuals (investors or consumers). In order to pursue a joint representative action, an approved and nationally recognized association must be instructed by at least two individuals (investors or consumers) to initiate a lawsuit. Joint representative actions may be brought in consumer cases, investor claims, and environmental claims. Unlike an action taken in the collective interest, a joint representative action may seek compensation for the damages suffered by each individual. Essentially, a joint representative action consolidates all claims that could have been brought individually in French courts.

While a joint representative action might appear to be the French version of a class action, the procedure is limited in the following ways: 1) only approved associations can bring an action; 2) an association cannot initiate a claim on its own and must instead be instructed in writing by at least two individuals; and 3) associations have limited means of soliciting others to join in a claim. Advertising is strictly prohibited. An association may not use TV or radio or distribute flyers or personal letters. Violating the prohibition on advertising could potentially have serious consequences in that a claim may be held inadmissible if there is evidence the association solicited claims improperly. The only exceptions to the strict regulations on advertising arise in relation to claims brought by investor associations. In investor claims a judge may authorize the association to use other means of advertisement.

Costs of Litigation

France is a “loser pays” system. Unavoidable legal costs (such as court costs, cost of translation of documents, and factual witnesses) are typically paid by the losing party. The judge has discretion to apportion costs differently based on the financial circumstances of the parties and the merits of the case and as

a matter of practice, the losing party rarely has to pay the full amount of costs to the other party.

Generally each party pays its own lawyers' and expert witness fees, but the court may order the losing party to pay the other party a fixed amount on the basis of costs paid.

The loser pays rule almost never applies to plaintiffs or associations when they bring a case against a corporate defendant. The loser pays rule almost exclusively applies to corporate plaintiffs or defendants.

Contingent attorney fees are illegal in France. A French attorney may be disbarred for agreeing to represent a client on a pure contingent fee. French law does, however, allow for the inclusion of a complementary fee depending on the result obtained or the quality of service rendered. In a fee agreement containing a complementary fee, a written fee agreement with a client will include a provision for remuneration of the services performed and the addition of other fees, a sort of bonus, based on the result obtained.

Although attorneys are prohibited from representing clients on a contingent basis, third party funding is theoretically possible. The third party, however, may not remit payments directly to the attorney because attorneys may only be paid by a client or the agent of a client.

Kessler Topaz's Experience in France

Kessler Topaz represents twenty European and U.S. institutional investors in a direct action venued in Paris, France, against Vivendi Universal, S.A. and Jean-Marie Messier (Vivendi's former CEO) arising from the facts tried in the securities class action *In re Vivendi Universal Securities Litigation* in the Southern District of New York. The Paris suit represents investors who purchased Vivendi's securities on the Paris Bourse and whose claims were excluded from the U.S. litigation due to the U.S. Supreme Court's 2010 Morrison ruling. Kessler Topaz has been actively involved in strategizing with the local French counsel and assisting its U.S. and European institutional investor clients with the gathering, organization, and French translation of documents which were required to be produced.