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Evidence in Civil Law - France

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MARTIN OUDIN

ABSTRACT The French Law of evidence is at the crossroad between procedural law and civil law.

As part of the procedural law, it is governed by general principles set out by the *Code de procédure civile*, such as the contradictory principle, the principle of public hearing or the free disposition principle, which means that the parties define the framework of the proceeding and that the judge cannot base his decision on facts that were not put forward by the parties themselves. It is also the *Code de procédure civile* that organises the respective roles of the judge and the parties for the taking of evidence: since 1976, it imposes a – rather complex – balance between adversarial and inquisitorial principles.

Other general principles were set by case law, *e.g.* the principle that no one can pre-constitute evidence in his own favour or the principle of fair evidence.

On the other hand, more substantive rules are to be found in the *Code civil*. These rules mix two systems, the system of the *preuve morale*, applicable in some specific litigation, and the system of the *preuve* légale, which is clearly dominant in civil litigation. In the first system, evidence is in principle free, which means not only that any mode of proof is admissible, but also that assessment of evidence by the judges is free. In the second one, only determined means of evidence are admissible and their probative force is often set out by law. A majority of evidence rules derive more or less directly from this *summa divisio*. In fact, the predominance of the *preuve légale* system has made the French system of evidence rather rigid, in particular regarding the exaggerated importance of written evidence.

KEYWORDS: • adversarial principle • burden of proof • contradictory principle • fair evidence • free disposition principle • inquisitorial principle • *iura novit curia* • orality • standard of proof • testimonial evidence • written evidence

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He worked two years within the Secretariat of the International Institute for the Unification of Private Law (Unidroit), in Rome, and three years as an assistant to the Public Prosecutor at the Court of Appeal of Versailles.

On obtaining his PhD in 2000 with a thesis on the comparative law of contract, he became *Maître de conférences* at the University of Tours, where he teaches international and comparative law, competition law and distribution law. He also teaches in Poland and Spain.

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Introduction

***Substantive and procedural evidence rules.* –** Although the practice of evidence may be extra-judicial, the law of evidence is necessarily judicial or procedural law[2]. As a consequence, it would be logical to deal with legal aspects of evidence within procedural legislation. However, French law has taken a different approach.

On the one hand, many evidence rules are considered to be substantive – or material – rules, because they are closely connected with the substance of the parties' rights. This applies to the rules dealing with burden of proof, subject of evidence, means of proof and their admissibility. Therefore, such rules are primarily dealt with in the *Code civil* (art. 1315 ff. C. civ.)[3].

On the other hand, some rules primarily relate to the role of the judge in evidence taking – what French law calls *l'administration de la preuve.* Since they are procedural evidence rules, they are dealt with in the *Code de procédure civile* (art. 9 to 11 and 143 ff. CPC)[4]. Among these rules, another distinction may be drawn: some refer to evidence taking by the parties themselves, as controlled by the judge, others to interventions of the judge in the process of evidence taking (such as hearing of witnesses, personal verifications or appointment of an expert). Those interventions are called "*mesures d'instruction*", an expression often translated "investigation measures".

***Instruction.* –** The *instruction* is a major step of the civil trial. It is the period during which procedural formalities are accomplished, the parties determine the subject of the dispute and communicate to each other and to the judge the elements of fact and evidence on which their pretentions are grounded.

The procedural organisation of *instruction* and evidence taking differs according to the kind of court before which the proceedings take place[5]. A major distinction must be drawn between the *tribunal de grande instance* (regional court), which is the ordinary first instance court in civil matters, and the special courts, principally the *tribunal d'instance* (district court) and the *tribunal de commerce* (commercial court). In broad

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[2] See M. Oudin, Juris-Classeur de droit civil., Art. 1315 et 1315-1, fasc. 10, Preuve – Règles générales (Lexis Nexis 2005), pt. 2.

[3] This strong connection between evidence and substantive rules is further illustrated by the presence of provisions dealing with evidence in specific codes. For instance, article L 110-3 of the Commercial Code lays a general principle of freedom of evidence in commercial matters.

[4] See. F. Ferrand, Rép. pr. Civ. Dalloz voc. 'Preuve' (2006), pt. 10.

[5] For a complete presentation, see S. Guinchard, C. Chainais and F. Ferrand, Procédure civile, Droit interne et droit de l'Union européenne, 31st ed., Dalloz, 2012.

terms, procedure is simpler, faster and cheaper before special courts (not least because representation by a lawyer is not mandatory).

The procedure before the *tribunal de grande instance* is essentially written and consists of two phases. The first phase is that of *instruction* or *mise en état*. During this phase, the parties exchange their submissions and the supporting documents. When the case requires a thorough *instruction*, this phase is conducted under supervision of a judge, the *juge de la mise en état* (sometimes[6] translated pre-trial judge). According to article 770 CPC, "The pre-trial judge has the authority necessary to order the transmission, delivery and production of documents". He can order the taking of evidence, such as designation of an expert[7]. He can also punish a party who would not communicate in due time or who would not respect the contradictory principle. The aim of the *instruction* phase is to have the case *en état*, i.e. ready for hearings. When the judge[8] considers this is the case, he renders an *ordonnance de clôture* (order for termination) and the phase of hearings (the *audience*) can begin. In the second phase, the hearings may be very simple. Sometimes the lawyers only file their closing briefs, although authentic pleadings can take place. After this second phase, the court can finally deliberate.

The procedure before the *tribunal d'instance* is quite different. It is in principle oral[9] and less formal, more oriented towards conciliation. Representation by a lawyer is not necessary. As a consequence, the *mise en état* phase does not exist. In principle, the instruction of the case takes place during the *audience* itself: during the hearings, the parties can submit their claims and arguments, as well as evidence, on their own and orally. In practice however, they are often represented by lawyers who make submissions in writing. Yet, such submissions are valid only if they have been mentioned orally during the hearings.

Before the *tribunal de commerce* as well, procedure is in principle oral[10]. Writings are not compulsory, although very common in practice. A judge within the *tribunal de commerce*, the *juge rapporteur*, plays a role similar to that of the *juge de la mise en état*, although his prerogatives are less important.

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[6] See the translation of the *Code de procédure civile* available on the French law official website, Legifrance: http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations.
[7] CPC, art. 771.
[8] I.e. the ordinary judge or the *juge de la mise en état*, if any.
[9] Art. 846 CPC.
[10] Art. 860-1 CPC.

Contents

Part I

1 Fundamental Principles of Civil Procedure

1.1 *Principe dispositif* (Free Disposition Principle)

French law is governed by the free disposition principle, known as the *Principe dispositif*. Actually, the *Principe dispositif* has two different meanings.

Firstly, it means that the parties define the framework of the proceeding. Article 4 CPC states in this regard that "the subject-matter of the dispute is determined by the respective claims of the parties". The court has no possibility to modify this framework: it must "rule upon all what is claimed and only upon what is claimed" (art. 5 CPC). In other words, it is forbidden to decide *extra et ultra petita*.

Secondly, according to the adage "*da mihi factum, tibi dabo ius"*, the *principe dispositif* means that the judge cannot base his decision on facts that are not in the debate, i.e. facts that were not put forward by the parties themselves. This rule is provided at article 7 CPC.

A consequence of this rule is that in principle the judge can not *ex officio* order the production of an evidence if a party has not asked for it. In fact, according to article 11§2 CPC, "where a party holds evidence material, the judge may, upon the petition of the other party, order him to produce it, where necessary under a periodic penalty payment. He may, upon the petition by one of the parties, request or order, where necessary under the same penalty, the production of all documents held by third parties where there is no legitimate impediment to do so.[11]" This tempers the inquisitorial powers recognised to the judge by article 10 CPC[12].

When a specific *instruction* phase exists, as it is the case before the *tribunal de grande instance*[13], new facts or evidence cannot be introduced after the end of this phase. The introduction of new facts or evidence after the *ordonnance de clôture* violates the contradictory principle. Such elements would be declared inadmissible *ex officio*[14]. Late introduction of facts or evidence, for instance the very day of the order or only a few

[11] On Article 11 CPC, see *infra*, § 3.9.
[12] See *infra*, § 1.2.
[13] See *supra*, introduction.
[14] Art. 783 CPC.

days before, may also be rejected on the basis of articles 15 and 135 CPC[15]. The first of these articles sets out the contradictory principle[16]; According to the second one, "the judge may exclude from the debate those documents which have not been served in due time". The judge can make such a decision *ex officio*, provided that the contradictory principle has actually been violated, i.e. that the other party had insufficient time to answer[17].

1.2 The Balance between Adversarial and Inquisitorial Principles

Whereas the 1806 Code of Civil Procedure had favoured a liberal, adversarial, approach of civil litigation, the new *Code de procédure civile* adopted in 1976 tries to settle down a middle path between the adversarial and the inquisitorial principles (known as *principe accusatoire and principe inquisitoire*). The current civil procedure is a mix of adversarial and inquisitorial rules, conceived as a cooperation between the parties, their lawyers and the judge. It has been compared with the system retained by the ALI-UNIDROIT Principles of Transnational Civil Procedure[18]. In particular, article 14.2 of the Principles states that "To the extent reasonably practicable, the court should manage the proceeding in consultation with the parties".

Two articles of the *Code de procédure civile* convey this search for balance in French procedural law.

Article 9 first states that "each party must prove, in accordance with law, the facts on which his claim is grounded". This clearly derives from an adversarial approach of evidence and is closely linked to the *principe dispositif*.

However, immediately after, article 10 empowers the judge to order *ex officio* any legally admissible taking of evidence: "the judge has the authority to order *ex officio* any legally appropriate investigation measures (*mesures d'instruction*)". This prerogative is re-affirmed by article 143[19].

Those *mesures d'instruction are* very extended: the judge may make some personal verifications, in court or *in situ*; order the parties, or one of them, to appear in person; hear witnesses; appoint an expert.

However, the judge cannot substitute the parties in the taking of evidence. In fact, article 146 CPC clearly states that such measures may be ordered only if the party who alleges a fact has no sufficient elements to prove it, and that under no circumstances

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[15] Cass. ch. mixte, 3 févr. 2006, n° 04-30592; Bull. mixt. n° 2; D. 2006. 1268, obs. Bolze; RTD civ. 2006. 376, obs. Perrot.
[16] See *infra*, § 1.3.
[17] Cass. 1ère civ., 20 févr. 2008, n° 07-12.676; Bull. civ. I, n° 57; D. 2009 p. 53, obs. Douchy-Oudot; RTD civ. 2008. 354, obs. Perrot.
[18] F. Ferrand, *op. cit.*, pt. 290.
[19] "The factual circumstances upon which the resolution of the dispute depends, may, at the request of the parties or *ex officio*, be subjected to any legally permissible investigation measure".

they can be ordered "to compensate for the deficiency of the parties". Thus, the introduction of an inquisitorial dimension in French civil procedure has not freed the parties from their duty to prove the facts they allege. In other words, the judge must help and stimulate the parties in the taking of evidence, but he must not substitute them if they keep inactive[20].

Yet, it may be quite difficult to decide when the judge can validly order a *mesure d'instruction* and when this would mean improperly substituting the parties. As a general rule, the judge cannot order a measure when the allegation of a party is supported by no precise element that would enable the court to appreciate its plausibility[21]. On the other hand, if a party has proved that his claim was founded, the judge can't refuse to order the *mesure d'instruction* requested[22].

This division of roles between the judge and the parties is largely extended in civil litigation. However, there are some exceptions. The most significant one concerns proof of parentage.

In 2000, the Supreme Court has ruled that "biological expertise is a right in the field of parentage unless there is a legitimate reason not to order it"[23]. The first judges had refused a biological expertise on the grounds that the party requesting it had not previously proved that the existing declaration of paternity was inaccurate. Thus, they applied rather strictly article 146 CPC. The *Cour de cassation* considers that they violated that provision, as well as two articles of the *Code civil*, since the parties are entitled to ask for a biological expertise. However disputable this decision may seem, the result is that art. 146 § 2 CPC has nearly become irrelevant in parentage matters: the right to an expertise is nothing less than a right to evidence[24]. As a consequence, parentage proceedings are very close to the inquisitorial model.

1.3 The Contradictory Principle

The contradictory principle[25] is one of the general principles for the conduct of proceedings set out in articles 4 ff. of the *Code de procédure civile*. It is usually divided

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[20] Cass. soc., 7 oct. 1982, Bull. civ. V, n° 540. – Cass. 1ère civ., 9 juill. 1985, Bull. civ. I, n° 216.

[21] Cass. 1ère civ., 4 nov. 1982, Bull. civ. I, n° 316. – Cass. soc., 2 mars 1983, Bull. civ. V, n° 128. - Cass. 1re civ., 24 mai 1989, Bull. civ. V, n° 389. – Cass. 1ère civ., 26 juin 2001, Bull. Civ. I, n° 191.

[22] Cass. ch. mixte, 6 juill. 1984, Bull. civ. ch. mixte, n° 1. In this case, the claimant had proven that he was victim of counterfeiting and asked the court to appoint an expert in order to determine the amount of damages. The *Cour de cassation* held that such measure could not be refused.

[23] Cass. 1ère civ., 28 - , D. 2001, somm. 976, obs. F. Granet, JCP 2000. II. 10409, concl. Petit, note Monsallier-Saint-Mieux.

[24] F. Ferrand, *op. cit.*, pt. 365. This does not mean however that biological truth always prevails in family law. For instance, the concept of *possession d'état* leads to take into consideration a »sociological truth« rather than the biological one.

[25] See S. Guinchard, C. Chainais and F. Ferrand, Procédure civile, Droit interne et droit de l'Union européenne, 31st ed., Dalloz, 2012, p. 545 ff.

into two complementary rules: the right to be heard or called, on the one hand, and the right to discuss the arguments developed by the opposite party, on the other hand.

1.3.1 The Right to be Heard or Called

Article 14 CPC states that "a party may not be judged without having been heard or called". This is a mandatory rule: the judge has the obligation to raise *ex officio* its violation[26]. Such violations occur most frequently in those procedures in which representation by a lawyer is not mandatory.

There is *défaut* (default) when one of the parties does not appear before the court. The *Code de procédure* civile makes a distinction between default of the claimant and default of the defendant.

Default of the claimant is rather exceptional and may lead to a judgement said to be adversarial. According to article 468 CPC, "if, without a legitimate reason, the plaintiff does not appear, the defendant may request a judgement on the merits of the case that will be adversarial, although the judge has the power to defer the matter to a later hearing". The judge also has the possibility to declare, even *ex officio*, that the citation has lapsed[27].

There is default of the defendant when he does personally appear or appoint a lawyer in due time. It must be noted that in oral proceedings, the defendant must appear in person: the filing of written submissions is not equal to personal appearance. Since such default must not prevent the claimant from obtaining a judgement, article 472 CPC provides that "if the defendant fails to appear, a ruling will nevertheless be made on the merits of the case. The judge will uphold the claim only to the extent that he considers it valid, admissible and well-founded". Yet, another distinction must be made at this stage.

If the judgement rendered is not subject to ordinary appeal (*jugement rendu en dernier ressort)*, it is given by default[28]. It is then subject to a specific appeal named *opposition*[29], which is brought before the same court that issued the judgment. In an *opposition* procedure, the entire case is re-examined and the contradictory principle is hence re-introduced.

If the judgement is not rendered *en dernier ressort*, it is subject to ordinary appeal and the *opposition* procedure is not available. Such judgements are deemed to be adversarial[30]. The same occurs when the citation has been served personally on the defendant[31].

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[26] Cass. 2ème civ., 10 mai 1989, Bull. civ. 2, n° 105.
[27] CPC, art. 468.
[28] CPC, art. 473.
[29] CPC, art. 476. See M.-E. Boursier, Rép. pr. Civ. Dalloz voc. 'Opposition' (2005).
[30] CPC, art. 473.
[31] *Ibid.*

1.3.2 The Right to Discuss the Arguments Developed by the Opposite Party

Each party has to enable the other one to organize its defence against his own arguments. According to article 15 CPC, "parties must disclose in due time to one another factual arguments supporting their claims, the means of evidence they produce and the legal arguments they rely upon so that each party may organise his defence".

This does not mean that the parties must actually discuss the means of evidence that are produced: it is enough that they are given the possibility to do so[32]. Thus, if a party does not question a document duly served to him, such document is opposable to him[33].

The contradictory principle is satisfied when the evidence can be discussed, although it was not initially established contradictorily. For instance, if one party has obtained on his own (i.e. non-contradictorily) a bailiff's report, it is an admissible evidence so long as the opposite party has been able to discuss it[34].

On the other hand, the principle is not satisfied when the parties were not given sufficient time to examine and discuss the means of evidence put forward[35].

Articles 132 to 138 CPC govern the service of documents between the parties. Article 132 recalls that "the party who relies on a document is bound to disclose it to the other party to the proceeding. Service of documents must be spontaneous". If the service is not carried out spontaneously, articles 133 ff. CPC set out the powers of the judge in relation to it. The judge may, without any formality, be requested to order such service[36]. He sets a deadline to disclose the documents, under a periodic penalty payment if necessary[37]. He may as well exclude from the debate those documents which have not been served in due time[38].

As far as the judge is concerned, he must not only enforce the contradictory principle as between the parties, but also respect it himself. As stated by article 16 CPC, "In all circumstances, the judge must supervise the respect of, and he must himself respect, the adversarial principle".

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[32] Cass. com., 27 oct. 1982, Bull. civ. IV, n° 327. - Cass. 2ème civ., 10 juill. 1980, Bull. civ. II, n° 182.
[33] Cass. 2ème civ., 10 févr. 1988, n° 86-18799, Bull. civ. II, n° 42.
[34] Cass. 1re civ., 12 avr. 2005, Juris-Data n° 2005-028002 ; D. 2005, p. 1180.
[35] For instance, allegations served only 24 hours before the *ordonnance de clôture* may be retained inadmissible: Cass. 2ème civ., 31 janv. 1996, Bull. civ. II, n° 18; Gaz. Pal. 1996, 2, pan. jurispr. p. 250.
[36] Art. 133 CPC. In such a case, the judge has the obligation to order the service of requested documents: Cass. 1ère civ., 6 mars 2013, n° 12-14488, Revue Lamy Droit Civil, n° 104/2013, obs. L. Raschel.
[37] Art. 134 CPC.
[38] Art. 135 CPC.

When enforcing the principle, the judge cannot ground his decision on elements that were not previously communicated to the opposite party[39]. This includes of course an expert's report not contradictorily discussed[40]. Yet, the *Cour de cassation* has ruled that there is a presumption of contradiction. As a consequence, the party who pretends that the principle was not respected has to prove it – which would be impossible to do for the first time before the Supreme Court[41].

Traditionally, when a court dismissed some elements because of late communication, it had to justify the specific circumstances that prevented the opposite party from discussing them[42]. Yet, since an important 2006 decision, the *Cour de cassation* no more controls such appreciation[43]. The judges sovereignly appreciate whether communication was made in due time.

Late communication might also be analysed as a case of unfairness[44]. In such case, the evidence proposed will be dismissed, regardless of the respect of the contradictory principle. It is unlawfull, for instance, to communicate a document a few moments before termination of the *instruction* phase, while the party has been in possession of it for several months[45]. More generally, deliberate delays are often retained to characterise unfairness[46].

The judge himself is bound by the contradictory principle. He cannot base his decision on information that was not previously submitted to the parties[47]. Nor can he base his judgement on a sole expert's report without making it clear that it was established contradictorily[48]. It is not necessary that the parties participate to the expert evaluation, provided that they were able to discuss his conclusions before the court's decision[49].

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[39] Cass. 2ème civ., 17 juin 1999, Procédures 1999, n° 247 obs. Junillon. - Cass. 1re civ., 25 nov. 2003, Bull. civ. I, n° 242.
[40] Cass. 2ème civ., 23 oct. 2003 and Cass. 3ème civ., 29 oct. 2003, Procédures 2004, n° 5, obs. Perrot.
[41] Cass. 2ème civ., 20 mai 1978, Bull. civ. II, n° 131.
[42] Cass. 2ème civ., 24 janv. 2002, Bull. civ. II, n° 5. Conversely, when rejecting the dismissal of elements communicated only a few days before the *ordonnance de* clôture, a *Cour d'appel* must establish that the claimant had sufficient time to discuss those elements (Cass. 2ème civ., 11 avr. 2002, Juris-Data n° 2002-013920 ; Bull. civ. II, n° 79).
[43] Cass. Ch. Mixte, 3 févr. 2006, Bull. mixt. n° 2 ; RTD Civ. 2006, p. 376, obs. R. Perrot ; D. 2006, Jur. p. 1268, obs. A. Bolze.
[44] See *infra*, §9.
[45] Cass. 2ème civ., 2 déc. 2004, D. 2005, p. 315.
[46] Cass. 2ème civ., 23 oct. 2003, Bull. civ. 2003, II, n° 326. – Cass. 2ème civ., 4 mars 2004, Juris-Data n° 2004-022584, Bull. civ. 2004, II n° 91.
[47] Cass. 2ème civ., 10 juill. 1968, Bull. civ. II, n° 206 ; D. 1969, somm. p. 25. – Cass. 2ème civ., 28 févr. 1996, Bull. civ. II, n° 47.
[48] Cass. 3ème civ., 3 avr. 2001, n° 98-15014.
[49] Cass. 2ème civ., 1er mars 1989 ; Bull. civ. II, n° 57.

1.4 Principle of Orality

Whereas administrative procedure is essentially written, in civil procedure the role of orality is traditionally more important – except before the *Cour de cassation*[50]. However, this classical distinction must not be exaggerated. In reality, even in civil proceedings, the written form tends to dominate French law[51].

It is true that the parties always have a right to an oral stage of procedure. More precisely, the *Cour de cassation* has recognized a right to an oral debate, even in written procedures such as the procedure applicable before the *tribunaux de grande instance*[52].

It is true as well that, before specific courts, the whole procedure is oral in principle, as we have already pointed out[53]. As a consequence, before those courts, the parties are free to make allegations or submit evidence without previously communicating them in writing[54] – provided that the other party is given time to take notice of them and issue a reply, in accordance with the contradictory principle.

However, orality is facing much criticism in doctrine, mainly because of its uncertainty[55]. In any event, the texts as well as common practice considerably reduce the importance of orality.

In practice, the parties, and above all their lawyers, massively favour writings. Even in oral procedures, the judge is used to take into consideration written submissions more than oral pleadings. When they occur, oral pleadings tend to become mere formalities and are too short to have a real influence on the proceedings.

At any rate, the parties can always renounce to oral debates, in written procedures[56] as well as in oral ones[57]. Furthermore, whatever the nature of the procedure, the court has the power to put an end to oral pleadings when it considers that it has sufficient information to decide the case[58]. And if a party has decided to submit oral observations on his own, the court may cut him off if "passion or inexperience makes it impossible for him to defend his case with due decency and clarity".

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[50] A. Lyon-Caen, A propos des observations orales des avocats dans les procédures écrites, *in* Mél. P. Drai, Dalloz, 2000, p. 415. – B. Potier de la Varde, Le statut juridique de la parole, Gaz. Pal., 9-10 janv. 2009, p. 29. – S. Trassoudaine, La place de l'écrit dans la procédure orale, BICC 2004.

[51] L. Cadiet et E. Jeuland, Droit judiciaire privé, 8th éd., Lexis Nexis, 2013, § 627.

[52] Ass. Plén., 24 nov. 1989, n° 88-18188, Bull. A.P. n° 3, D. 1990 p. 25, concl. Cabannes, p. 425, obs. Julien, RTDCiv. 1990, p. 145, obs. Perrot.

[53] *Supra*, introduction.

[54] Cass. 3ème civ., 30 janv. 2002, n° 00-13486 et 00-14725, Bull. Civ. III, n° 16.

[55] See S. Trassoudaine, La place de l'écrit dans la procédure orale, BICC 2004.

[56] Art. 779 CPC.

[57] Art. 446-1 CPC. Regarding in particular the *tribunaux de commerce*, see C. Bléry, La dispense de représentation devant le tribunal de commerce, JCP G 2013, n° 52, p. 2399.

[58] Art. 440 CPC.

1.5 Principle of Directness

There is no principle of directness in French law.

Under some circumstances, the judge can "delegate" the taking of evidence. For instance, according to article 157 CPC, "where the remoteness of the parties or persons who must assist with the preparatory inquiry or the remoteness of the place makes travelling too difficult or too onerous, the judge may request another court of equal or lesser level to carry out all or part of the operations ordered." The recourse to an expert may also be seen as a delegation of some of the judge's prerogatives.

However, the judge has the duty to appreciate in person any evidence produced. Any delegation of this task would be analysed as a denial of justice. As a consequence, in the specific case of experts' opinions, not only the expert cannot give a juridical opinion, but also the judge is not bound by his findings or conclusions[59].

The powers of appellate courts regarding evidence are governed by the devolutive effect of appeal (*effet dévolutif de* l'appel). According to it, an appeal challenges the already judged matter before the court of appeal so that it will be judged anew upon its factual and legal points[60]. Therefore, according to article 563 CPC, "to support on appeal the claims submitted before a lower judge, parties may raise new grounds, produce new documents or offer new evidence". By the same logic, the appellate court freely appreciates the evidence submitted to it and it is not bound by the appreciation made by first instance judges.

1.6 Principle of Public Hearing

Like the contradictory principle, the principle of public hearing (*principe de publicité des débats*) is one of the general principles for the conduct of proceedings set out in articles 4 ff. of the *Code de procédure civile*.

According to article 22 CPC, "hearings are public except where the law requires or allows that they be held in the judge's council chamber". Article 433 recalls this principle and adds that "what is provided for in this regard at first instance must be followed on appeal, unless otherwise provided". The *Cour de cassation* considers that this is a mandatory rule[61]. However, the parties protected by this principle have the possibility to renounce to it. If they do so, they will not be able afterwards to raise a violation of article 6 § 1 ECHR (right to a fair trial)[62].

Although the hearings are public, there are limitations to the possibility to record them, set by a 1881 Act on freedom of press[63]. According to article 38 ter (as modified in

[59] See *infra*, § 7.7.
[60] Art. 561 CPC.
[61] E.g. Cass. 2ème civ., 24 févr. 2000, Juris-Data n° 2000-000813.
[62] Cass. 1ère civ., 3 févr. 1998, Bull. civ. I, n° 43.
[63] Loi du 29 juillet 1881 sur la liberté de la presse.

2000), after the hearing has started, the use of any device allowing to capture, record or transmit images or words is prohibited, under penalty of a EUR 4,500 fine. The same fine is incurred by anyone who transfers or publishes any recording or document obtained in violation of this prohibition.

The law requires that the hearings be held in the judge's council chamber in various situations. This is the case in non-contentious matters[64], as well as in some litigations relating to personal status or family matters, e.g. divorce and legal separation[65] or parental authority[66].

In other cases, the judge has the possibility to decide that hearings will not be public, namely when their publicity might adversely affect individual privacy, or if all the parties so request, or if disturbances arise that may disrupt the atmosphere of the proceeding[67].

If the hearings are not held in accordance with those rules, the ensuing judgement is invalid[68]. However, nullity may not be raised by the judge *ex officio*. Thus, no nullity may be raised owing to a failure to comply with such provisions if it has not been relied upon prior to the closing of the hearings[69].

1.7 Principle of Pre-trial Discovery

There is no principle or procedure of pre-trial discovery in French law. Such procedures are readily described as unnecessarily increasing costs and delays of proceedings[70]. It is true that French proceedings, though they are not renowned for their celerity, remain rather cheap. The choice of a "useful" disclosure partly explains this.

2 General Principles of Evidence Taking

2.1 Free Assessment of Evidence

French law is rather isolated from its neighbours, a majority of which have opted for a system of freedom of evidence[71]. There is no general principle of free assessment of evidence in French Law. The rules on evidence mix two systems[72].

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[64] Art. 434 CPC.
[65] Art. 248 and 298 C. civ.
[66] Art. 1189 CPC.
[67] Art. 435 CPC.
[68] Art. 446 CPC.
[69] *Ibid.*
[70] See Le Droit de la Preuve devant le Juge Civil et l'Attractivité Economique du Droit Français, France, Angleterre et Pays de Galles, Etats-Unis, p 7, Ministère de la Justice, Service des Affaires Européennes et Internationales, 19 Novembre 2005.
[71] This situation gives rise to some criticism. See X. Lagarde, Réflexion critique sur le droit de la preuve, LGDJ (1994), n° 6, p. 17.
[72] See J.-L. Mouralis, Rép. Civ. Dalloz, voc. 'Preuve 2° (Règles de preuve)' (2011), § 4 ff.

The first system is that of the *preuve morale*, applicable in some specific litigation – for instance commercial litigation. In this system, evidence is in principle free, which means not only that any mode of proof is admissible, but also that assessment of evidence by the judges is free.

In the system of the *preuve légale* (regulated evidence), only determined means of evidence are admissible and their probative force is often set out by law.

The *preuve légale* is clearly dominant in civil litigation. Although it is less likely to allow the establishment of the truth, it is deemed to ensure simplicity and – above all – legal certainty. There is much debate in French doctrine about which of these objectives should prevail[73]. But there is no doubt that, as rule, applicable law favours legal certainty over truth. As a consequence, whenever the parties are able to pre-constitute written evidence by establishing a document agreed on by both of them, such evidence should prevail.

A distinction is therefore drawn between legal facts and legal transactions. Facts can be proven by all means, whereas legal transactions are submitted to a complex combination of rules. Article 1341 of the Civil Code sets out a general principle according to which, subject to exceptions[74], a legal transaction must be proven by written evidence. More precisely, whenever the amount of the transaction is higher than EUR 1,500, written evidence is in principle required. And where such written evidence exists, no evidence to the contrary shall be admitted[75].

When free assessment of evidence is admitted, i.e. in determined fields of litigation or with respect to determined modes of evidence, French law provides no methodological guidance to judges. Nor does it provide any formal rule. Provided that the contradictory principle is respected, the judge must rely on his intimate conviction. In principle, this is not even subject to control by the *Cour de cassation*, since the assessment of evidence by the judge is sovereign, as the Supreme Court itself has stated in numerous cases[76]. Nonetheless, the *Cour de cassation* controls the motivation of the judgment: the judge must at least explain on which evidence his decision is grounded[77]. Another exception to the sovereignty principle is the control of misrepresentation (*dénaturation*[78]): the

[73] See X. Lagarde, La preuve en droit, *in* Le temps des savoirs, n°5, 2003, p. 103 ; F. Ferrand, Rép. pr. Civ. Dalloz voc. 'Preuve' (2006),§ 23.
[74] Exceptions are, for instance, the impossibility to pre-constitute written evidence (C. civ., art. 1348) or the availability of a *commencement de preuve par écrit*, i.e. a document (like a simple letter) issued by the party against which evidence is taken and which makes the claim plausible (C. civ., art. 1347).
[75] C. civ., art. 1341.
[76] See for instance Cass. 2e civ., 15 avr. 1991, Bull. civ. II, n° 130; Cass. 1ère civ., 6 juill. 2005, Bull. civ. 2005, I, n° 308.
[77] Cass. 2e civ., 20 avr. 1972 : Bull. civ. 1972, II, n° 109.
[78] C. Marraud, La notion de dénaturation en droit privé français (1974) PUG; J. Voulet, Le grief de dénaturation devant la Cour de cassation, JCP 1970.I. 2410.

Cour de cassation may be seized when the judge has distorted the clear terms of an evidence, such as a document or a testimony[79].

The French system of evidence is rather rigid and the faith in written evidence probably exaggerated. Yet, it is tempered by the validity of agreements on evidence[80]. Since the substantive rules on evidence[81] are suppletive, the courts have always admitted that they could be dismissed or adjusted by the parties[82]. This possibility was confirmed by the *loi n° 2000-230 du 13 mars 2000* on electronic documents[83].

By such agreements, the parties can deal not only with the burden of proof[84], but also with admissible means of proof[85]. However, they must not rule out fundamental principles on evidence. In particular, the contradictory principle precludes any agreement according to which evidence would not be subject to discussion by both parties[86]. Furthermore, since an agreement on evidence often implies a renunciation by one party to an advantage or protection granted by legal rules, such an agreement cannot be made before the litigation arises[87].

2.2 Relevance of Material Truth

There is no principle of material truth in French civil procedure. Unlike in criminal law, in civil law the evidence system does not impose the search for certainty. Of course, the proceedings tend towards the establishment of the truth, as expressed by article 10 C. civ.: "any person has the duty to help the Justice in order to establish the truth."

However, as it is often pointed out, the function of the proceedings – putting an end to a dispute – limits in itself the search for truth. If a judge refuses to make a decision because the truth has not been undoubtedly established, he is guilty of denial of justice, prohibited by article 4 C. civ.

There are even some situations in which the law imposes a judicial truth that is distinct from the material truth, or which prohibits the search for material truth.

The best example is provided by the family law concept of *possession d'état*, which can be more or less translated "possession of civil status". In French family law, a person

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[79] See for instance Cass. 1re civ. 25 nov. 1992, Bull. civ. I, no 288.
[80] V. Depadt-Sebag, Les conventions sur la preuve, in C. Puigelier (ed.), La preuve, 2004, Economica, p. 13.
[81] As opposed to the procedural rules on evidence, according to the distinction previously made.
[82] See Cass. Req., 1er août 1906, DP 1909.I.398.
[83] New article 1316-1 of the Civil Code provides that, "in the absence of any valid agreement between the parties", the judge shall settle conflicts of written evidence by determining by all means which title is most plausible.
[84] Cass. 2e civ., 6 mars 1958, Bull. civ. 1958, II, n° 178.
[85] Cass. req., 13 déc. 1911, DP 1912, 1, p. 158.
[86] Cass. civ., 19 oct. 1937, DH 1937, p. 584.
[87] Cass. 2e civ., 10 mars 2004, Bull. civ. 2004, II, n° 101 ; RGDA 2004, p. 561, obs. J. Kullmann ; Resp. civ. et assur., 2004, comm. n° 20, obs. D. Noguero.

possesses a status (e.g. son or daughter of X) when he acts and is considered by others as actually having this status. For instance, the child is raised and supported by the man considered to be his father and bears his name. Such apparent situation produces various effects in family law, especially in the field of evidence. The most remarkable one is that, when a person has possessed a status for a relevant period of time, such situation constitutes a legitimate reason for the judge not to order a biological expertise[88]. Thus, the sociological truth becomes a judicial truth and prevails over the (possible) scientific truth[89].

As a consequence, there exist some "alternative" truths that make impossible the establishment of material truth in the proceedings.

Other obstacles to such establishment may be found in the protection of subjective interests or duties.

For instance, the principle of loyal – or fair – evidence[90] may hinder the production in court of documents that were obtained in disloyal circumstances.

Another example concerns professional secrecy, protected by article 226-13 of the Penal Code[91]. The *Cour de cassation* considers that a duty of professional secrecy set out by law is a legitimate impediment to the production of evidence material held by third parties under article 11 CPC[92]. This principle is frequently applied to various professionals who are subject to such a duty, e.g. accountants[93], bankers[94] or lawyers[95]. Regarding the latter, the Supreme Court has ruled that this principle was in conformity with article 6 ECHR (right to a fair trial)[96]. Some proposals were made to extend this principle to business secrecy, but so far they did not go beyond the draft legislation stage.

The protection of privacy can also hinder the taking of evidence. It is set out as a general principle by article 9 C. civ., according to which "everyone has the right to

[88] Cass. 1ère civ., 14 juin 2005, n° 02-18.654. On the right to an expertise, see *supra*, § 1.2.
[89] On the relations between scientific evidence and *possession d'état*, see M. Mignot, L'accès à la preuve scientifique dans le droit de la filiation, RRJ Droit prospectif 2003 n° 2 p. 667s; A. Milanova, Preuve corporelle, vérité scientifique et personne humaine, RRJ droit prospectif 2003 n° 3, p. 1755s.
[90] On which see *infra*, § 9.
[91] Art. 226-13 C. pén.: "The disclosure of secret information by a person entrusted with such a secret, either because of his position or profession, or because of a temporary function or mission, is punished by one year's imprisonment and a fine of EUR 15,000".
[92] Cass. 1ère civ., 21 juill. 1987, n° 85-16436. This principle has been constantly reaffirmed since this case. On production of evidence by third parties, see *infra*, § 3.9.
[93] Ex. Cass. com. 8 févr. 2005, n° 02-11044.
[94] Ex. Cass. Com., 21 sept. 2010, n° 09-68994.
[95] Cass. 1re civ., 4 févr. 2003, n° 00-10057.
[96] Cass. 1ère civ., 27 jan. 2004, n° 01-13976.

respect for his private life", and protected by the Penal Code[97]. The *Cour de cassation* infers from those texts (and also, recently, from article 8 ECRH) that in principle the taking of evidence must not violate someone's privacy. For instance, a member of the clergy can't be forced to produce in court some documents concerning facts that he was aware because of his functions and that are in relation with someone's privacy[98], and an employer can't shadow an employee and use the results to prove against him[99].

However, privacy is not always an obstacle to the taking of evidence. This is true in the relations between employers and employees[100], but most importantly in divorce cases[101]. Regarding divorce, the *Code civil* provides in fact that evidence is free, unless it has been obtained by fraud or violence[102]. It even suggests, *a contrario*, that some intrusions on privacy may be licit: according to article 259-2, "the certificates drawn up on request of a party are set aside from the hearing where there was forcible entry into the domicile or unlawful invasion of privacy"[103]. As a consequence, the judge can't dismiss letters sent by a spouse to third persons or her personal diary if it is not established that they were obtained by fraud or violence[104]. On the contrary, an man can't ask a private investigator to shadow his ex-wife in order to discover elements regarding her current lifestyle: the intrusion on her privacy is disproportionate[105]. It must be noted that such cases might as well, nowadays, be decided under the principle of fair evidence.

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[97] Art. 226-1 C. pén.: »A penalty of one year's imprisonment and a fine of EUR 45,000 is incurred for any wilful violation of the intimacy of the private life of other persons by resorting to any means of:
1° intercepting, recording or transmitting words uttered in confidential or private circumstances, without the consent of their speaker;
2° taking, recording or transmitting the picture of a person who is within a private place, without the consent of the person concerned.
Where the offences referred to by the present article were performed in the sight and with the knowledge of the persons concerned without their objection, although they were in a position to do so, their consent is presumed.«

[98] Cass. 2e civ., 29 mars 1989, Bull. civ. 1989, II, n° 88; JCP G 1990, II, 21586, note F. Bouscau; D. 1990, jurispr. p. 45, note Robine.

[99] Cass. soc. 26 nov. 2002 : Bull. civ. 2002, V, n° 352; D. 2003, p. 1305, 1308, note J. Ravanas.

[100] Cass. Soc., 23 mais 2007, n° 05-17818, Bull. civ. V, n° 84: admissibility of evidence taken by consulting the computer of the employee in order to prove he was committing acts of unfair competition.

[101] See J. Rubellin-Devichi, Juris-Classeur de droit civil., Art. 259 à 259-3, fasc. 50, Divorce – Preuve, Lexis Nexis (2010).

[102] Art 259 and 259-1 C. civ.

[103] Italics added. For an illustration, see Cass. 2e civ., 5 juin 1985, Bull. civ. 1985, II, n° 111: recording of adultery ordered by a court and therefore declared admissible as evidence.

[104] Cass. 2e civ., 29 janv. 1997, Bull. civ. II, n° 28; Dr. famille 1997, comm. 85, obs. H. Lécuyer ; JCP G 1997, IV, 615; D. 1997, jurispr. p. 296, note Bénabent; RTD civ. 1997, p. 640, obs. J. Hauser. See also in the case of SMS received by the husband on his cell phone, Cass. 1re civ., 17 juin 2009, n° 07-21.796, AJF 2009, p. 298, obs. S. David; D. 2009, p. 1758, obs. V. Egéa; Procédures 2009, comm. 323, obs. M. Douchy-Oudot; Dr. famille 2009, comm. 124, obs. V. Larribau-Terneyre; LPA 2009, n° 191, p. 3, note N. Dissaux; RTD civ. 2009, p. 514, obs. J. Hauser.

[105] Cass. 2e civ., 3 juin 2004, Bull. civ. 2004, II, n° 273.

2.3 Other General Principles Regarding Evidence Taking

Two principles regarding evidence taking have theoretical as well as practical importance.

The first one is summarized in the adage "*nul ne peut se constituer une preuve à soi-même*" – no one can pre-constitute evidence in his own favour. Although this principle is not written down in any code or statute, it is generally admitted and has long been applied in a great variety of cases[106]. For instance, a party cannot put forward before a court his own bank statements[107], invoices[108] or advertising material[109]. Nor is it possible for a company to have its own employees testify in its favour[110].

However, there are several exceptions to this broad principle, two of which may be mentioned here.

The first one relates to legal facts, which can be proven by all means[111] and to which the principle does not apply, as the *Cour de cassation* repeatedly states[112].

The second relevant exception relates to commercial disputes: subject to conditions, duly kept accounts may be accepted to act as proof between merchants in respect of commercial instruments[113].

The second principle is that of *loyauté de la preuve* (loyal or fair evidence). It will be discussed later[114].

3 Evidence in General

3.1 Hierarchy of the Modes of Evidence

The *preuve légale* system, already described[115], rests on a hierarchy of the modes of evidence, on top of which lays written evidence. Provided that this written evidence was established in a way that gives all guaranties to the parties (for instance, it must either

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[106] See M.Oudin, Juris-Classeur de droit civil., Art. 1315 et 1315-1, fasc. 10, Preuve – Règles générales (Lexis Nexis 2005), pt. 53.
[107] Cass. 1re civ., 23 avr. 1980: Bull. civ. 1980, I, n° 123.
[108] Cass. 1re civ., 20 nov. 2004: Juris-Data n° 2004-025961; Contrats, conc. consom. 2005, comm. 4, obs. L. Leveneur.
[109] Cass. 3e civ., 17 juill. 1996: Contrats, conc. consom. 1997, comm. 1, obs. L. Leveneur.
[110] Cass. 1re civ., 2 avr. 1996: Bull. civ. 1996, I, n° 170; Contrats, conc. consom. 1996, comm. 119; D. 1996, somm. p. 329, obs. Ph. Delebecque.
[111] *Supra*, § 2.1.
[112] See for instance Cass. 2ème civ., 6 mars 2014, n° 13-14295 or Cass. Soc., 19 mars 2014, n° 12-28411.
[113] Art. 1329-1330 C. civ., L 123-23 C. com.
[114] *Infra*, § 9.
[115] *Supra*, § 2.1.

be signed by all parties or received by a notary), it is considered as a perfect evidence (*preuve parfaite*), which admissibility *and* probative force are set out by law.

Two other modes of evidence follow the same pattern, namely judicial confession (*aveu judiciaire*) and decisive oath (*serment décisoire*). They also belong to the category of perfect evidence.

All the remaining modes of evidence, especially witness statements, are subject to free assessment by judges. They are therefore named imperfect evidence.

3.2 Formal Rule of Evidence

See §3.5.

3.3 Minimum Standard of Proof to Consider a Fact as Established

As already pointed out in § 2.1, the French system combines legally binding evidence and free admission and assessment of evidence.

When free assessment of evidence is admitted, the law fixes no minimum standard of proof. Nor is this question much debated in doctrine. Authors concentrate on the question of admissibility of evidence and tend to leave aside the standard of proof as well as the degree of belief of the judge. This is partly due to the complexity of our hybrid system and the prevalence of written evidence.

3.4 Admissible Means of Proof

The admissibility of the means of proof is in turn closely related to the distinction between *preuve morale* and *preuve légale*. Where the *preuve morale* prevails, any mode of proof is in principle admissible, subject only to general rules and principles governing evidence, e.g. the contradictory principle or the prohibition to pre-constitute evidence in his own favour[116]. When the *preuve légale* system is applicable, only determined means of evidence are admissible among those regulated by the *Code civil* – subject among others to the above-mentioned validity of agreements on evidence[117].

Article 1315-1 lists five different means of proof, each one governed by a subsequent section of the *Code*:

- Written evidence (*preuve littérale*) – Articles 1316 ff.;
- Testimonial evidence / evidence by witnesses (*preuve testimonial*) – Articles 1341 ff.;
- Presumptions (*présomptions*) – Articles 1349 ff.;
- Admissions of parties (*aveux des parties*) – Articles 1354 ff;
- Oaths (*serment*) – Articles 1357 ff.

[116] On this principle, see *supra*, § 2.3.
[117] *Supra*, § 2.1.

Although such enumeration may appear as a *numerous clausus*[118], those categories are loose enough to encompass nearly every imaginable kind of proof.

For instance, as we will see later[119], the written evidence now includes electronic documents and, even before the *Code civil* was modified to that purpose, the *Cour de cassation* had had occasions to recognise the admissibility of various electronic instruments.

More generally, the presumptions category is extremely broad. As a matter of fact, only a few are legal presumptions. Most of them are what French lawyers call "*présomptions du fait de l'homme"* or "*indices"* (clues). Article 1353 define them as presumptions "left to the insight and carefulness of the judges, who shall only admit serious, precise and concurrent presumptions". In the end, those presumptions may be inferred by the judge from an infinity of facts or documents[120]. Of course, they must comply with general principles governing evidence. Moreover, they are not always admissible: as stated by article 1353 itself, they are admissible "only where statutes admit testimonial evidence" (i.e. where written evidence is not mandatory).

Yet, it remains true that the system of the *preuve légale* is constraining. Since it imposes to identify under which category falls any proposed evidence, it has made it difficult for courts to admit and classify "modern" types of evidence, such as photographs, audio or video recordings. It has been necessary to enlarge legal categories, often rather artificially[121].

In principle, parties' statements do not count as evidence, not even as mere *indices*, according to the principle "*nul ne peut se constituer une preuve à soi-même*"[122]. This rule has been applied in many different situations[123]. Even where the opposite party does not question such testimony, it remains inadmissible evidence[124].

However, declarations of parties can be taken into consideration within the framework of confessions of parties or oaths.

As to confessions[125], the *Code civil* draws a distinction whether they were made in court or out of court.

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[118] Ph. Malaurie and P. Morvan, Droit civil. Introduction générale, 3rd ed., Defrénois (2009), § 195.
[119] *Infra*, § 5.
[120] J. Dupichot and D. Guével, JurisClasseur Civil Code, Art. 1349 à 1353 (Lexis Nexis 2009).
[121] See R. Legeais, Les règles de preuve en droit civil: "permanences et transformations", Poitiers, 1954-1955.
[122] *Supra*, § 2.3.
[123] For examples, see Cass. soc., 3 déc. 1981, Bull. civ. V, n° 943 or Cass. 1ère civ., 17 janv. 1995, JCP G 1995, IV, 696.
[124] Cass. 2ème civ., 23 mai 1964, Bull. civ. II, n° 401.
[125] See Ph. Casson, JurisClasseur Civil Code, Art. 1354 à 1356, Fasc. 10 et 20 (Lexis Nexis 2009).

Judicial confessions have the value of perfect evidence against the party who made them but, subject to exceptions, they cannot be divided[126]. They cannot be revoked, unless it is proved that they are the result of an error of fact[127].

Extra-judicial confessions are admissible as evidence only in those cases where witness evidence is itself admitted. They have limited probative value: the judge is never bound by the declarations they contain and freely appreciates their value. They are revocable.

As opposed to confession, oaths[128] are declaration made *in favour* of their authors. They are of two kinds, both judicial: the *serment décisoire* (decisive oath), tendered by one litigant to the other, and the *serment supplétoire*, tendered *ex officio* by the judge.

Rather exceptional, the decisive oath is tendered by one party to the other "in order to make the judgment of the case depend upon it"[129]. It is a perfect evidence which binds the court and puts an end to the litigation[130].

On the other hand, the oath tendered by the judge is not a perfect evidence. It does not bind the judge and is only a way to complement already available evidence. As stated by article 1367 of the *Code civil*, "it is necessary 1° That the claim or the defence be not fully substantiated; 2° That it be not wholly deprived of proof". The Code of civil procedure organizes judicial administration of this oath at articles 317 to 322. The judge first determines the facts on which it will be taken[131], then sets the date, time and venue where it will be taken, formulates the question submitted to oath and states that perjury will expose a witness to criminal penalties[132]. Those penalties are those provided for false testimony by article 434-13 of the Penal Code: five years' imprisonment and a fine of EUR 75,000[133]. The oath is taken at the hearing by the party in person, in the presence of the other party or he being summoned[134]. However, if the party to whom the oath is tendered is unable to travel, the oath may be taken either before a judge who is commissioned for that purpose and travels to the residence of the party or before the court of his place of residence[135].

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[126] Art. 1356 C. civ.
[127] *Ibid.*
[128] See D. Guével, JurisClasseur Civil Code, Art. 1357 à 1369, Preuve par serment (Lexis Nexis 2011).
[129] Art. 1357 C. civ.
[130] Cass. 3ème civ., 22 févr. 1978, Bull. civ. III, n° 100.
[131] Art. 318 CPC.
[132] Art. 319 CPC.
[133] However, « the false witness is exempt from penalty where he retracts his testimony spontaneously before the decision terminating the procedure has been made by the judicial investigating authority or the court of trial » (Art. 434-13 C. pén.).
[134] Art. 321 CPC.
[135] *Ibid.*

3.5 Formally Prescribed Types of Evidence

Many provisions, whether in the *Code civil* or in other Codes or Acts, commend that certain facts must be proven by determined types of evidence (as a rule, those written evidence that will be described later in § 5).

The most important and general one has already been mentioned[136]: according to article 1341 of the *Code civil*, beyond EUR 1,500, written evidence is in principle prescribed.

Two other articles of the *Code* set out formal rules of evidence that are widely applicable.

Article 1325 provides that "Instruments under private signature which contain synallagmatic agreements are valid only insofar as they have been made in as many originals as there are parties having a distinct interest". Where this formality (*formalité du double*) has not been complied with, the written instrument does not have the value of a perfect evidence. However, not only this rule is not applicable to every situation (there is an exception in particular for commercial contracts), but also the imperfection of the instrument may be overcome by various means[137].

Article 1326 is applicable to unilateral commitments. It sets out: "the legal transaction by which one party alone undertakes towards another to pay him a sum of money or to deliver him a fungible must be ascertained in an instrument which carries the signature of the person who subscribes that undertaking as well as the mention, written by himself, of the sum or of the quantity in full and in figures. In case of difference, the instrument under private signature is valid for the sum written in full". This constraining rule obviously aims at protecting parties against thoughtless undertakings. As article 1325, article 1326 is subject to several attenuations and an instrument that is not established in conformity with it is not necessarily deprived of probative value[138].

Apart from these generally applicable rules, many specific provisions require formal evidence for determined facts or claims. For example:

- the assignment of a business must in principle be proved by a written instrument that contains prescribed information[139];
- where a lease made without any writing has not yet been carried out, and one of the parties denies it, proof may not be adduced through witnesses, however moderate the price may be, and although it is alleged that a deposit was paid[140];
- performance, publishing and audiovisual production contracts, as well as free performance authorization, must be proved by a written document[141].

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[136] *Supra*, § 2.1.
[137] See I. Pétel-Teyssié and L. Dauxerre, JurisClasseur Civil Code, Art. 1325 (Lexis Nexis 2013).
[138] See I. Pétel-Teyssié and L. Dauxerre, JurisClasseur Civil Code, Art. 1326 (Lexis Nexis 2013).
[139] Art. L 141-1 C. com.
[140] Art. 1715 C. civ.
[141] Art. L 131-2 of the Code of intellectual property.

In many cases, the law requires a written document without specifying whether such instrument is required *ad validitatem* or *ad probationem*. As a consequence, it belongs to the judge to decide it. The solution may vary from a legal provision to another but, as a rule, the Cour de cassation decides that the formality is only required *ad probationem*. Such interpretation was made, for instance, about article 2044 C. civ., according to which a compromise contract must be made in writing[142], or about article L 112-3 of the Insurance Code, which states that the insurance contract and the information that the insurer sends to the policyholder shall be written in clear print, in French[143].

3.6 Proof of Payment by Cheque or Bill of Exchange

On paying the cheque or the bill of exchange, the drawee may demand that it be returned to him duly receipted by the bearer[144]. According to article 1282 of the *Code civil*, such "voluntary remittance of the original instrument under private signature, by a creditor to a debtor, is proof of discharge"[145].

Yet, voluntary remittance of the instrument is not the only admissible evidence. In fact, proof concerning cheques and bills of exchange is governed by common rules on evidence. In particular, it is free in commercial matters and subject to article 1341 C. civ. in civil matters (written evidence required only beyond EUR 1,500).

3.7 Various Evicence a Party Presents in the Proceedings

See *supra*, § 3.1.

3.8 Duty for Parties to Produce Evidence

Article 11§2 CPC, already cited[146], adds that "where a party holds evidence material, the judge may, upon the petition of the other party, order him to produce it, where necessary under a periodic penalty payment".

Under this article, the parties may be required to produce any document they hold, notarial deeds as well as instruments under private signatures; the judge may order the delivery of a certified copy or the production of the original instrument itself[147]. The request for such an order may be made without any formality[148]. If the judge considers

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[142] Cass. 1ère civ., 10 oct. 1995, Bull. civ. I, n° 360.
[143] Cass. 1ère civ., 14 nov. 1995, Bull. civ. I, n° 402; JCP E 1996, pan. p. 36; D. 1996, somm. p. 187.
[144] Art. L 131-37 of the *Code monétaire et financier* for the chèque, Art. L 511-27 for the bill of exchange.
[145] The *Cour de cassation* considers that this presumption set out by article 1282 C. civ. is irrefutable: Cass. com., 6 mai 1991, n° 89-19.136, Bull. civ. IV, n° 158, D. 1992, somm., p. 339, obs. M. Cabrillac.
[146] *Supra*, § 1.2.
[147] Art. 138 CPC.
[148] Art. 139§1 CPC.

that the request is well-founded, he orders the delivery or the production of the original, copy or extract of the instrument, as the case may be, under the conditions and guarantees that he determines, if necessary, under a periodic penalty payment[149].

Two questions have been raised concerning those rules.

First, article 11 does not state clearly whether the judge is bound by a request for production made by a party. The *Cour de cassation* has ruled several times that, on the contrary, his power is discretionary in this regard[150], except when such production would inescapably prove the requesting party's allegations[151]. However, the Supreme Court controls that the court's decision is properly motivated.

Second, the question has been raised as to whether the judge could order *ex officio* the production of documents by the parties. The *Cour de cassation* has answered in the negative[152]. However, regarding some exception courts (*e.g. Tribunaux d'instance* or *Tribunaux de commerce*), special provisions empower the judges to order production of evidence by the parties[153].

No specific penalty is provided for in case of a refusal to produce evidence. Paragraph 2 of article 11 only enables the judge to impose on the requested party a periodic penalty payment. It is true that under paragraph 1 of the same article, when the parties do not cooperate for the implementation of investigation measures (*mesures d'instruction*), the judge may "draw any consequence of an abstention or refusal". Yet, a majority of scholars consider that this provision is not applicable to the production of evidence ordered according to article 11§2, which is not, strictly speaking, a *mesure d'instruction*[154]. Only in specific procedures – e.g. before the *Tribunal d'instance* or the *Tribunal de commerce* – the judge has such prerogatives.

3.9 Duty for Third Persons to Produce Evidence

A general obligation to cooperate to the establishment of truth is set out by the *Code civil* at article 10[155].

A major aspect of this obligation is of course the duty to produce evidence, once again governed by article 11§2 CPC, although in slightly different terms. The judge "may, upon the petition by one of the parties, request or order, where necessary under the same

[149] Art. 139§2 CPC.
[150] E.g. Cass. 2ème civ., 16 oct. 2003, Bull. civ. II, n° 307.
[151] Cass. 3ème civ., 15 juin 1976, Bull. civ. II, n° 262.
[152] Cass. 1ère civ., 21 oct. 1975, Bull. civ. I, n° 281.
[153] See F. Ferrand, Rép. pr. Civ. Dalloz voc. 'Preuve' (2006), pt. 318.
[154] F. Ferrand, *op. cit.*, pt. 321. – S. Guinchard, C. Chainais and F. Ferrand, Procédure civile, Droit interne et droit de l'Union européenne, 31st ed., Dalloz, 2012, § 570. – L. Cadiet et E. Jeuland, Droit judiciaire privé, 8th éd., Lexis Nexis, 2013, § 573.
[155] *Supra*, § 2.2.

penalty, the production of all documents held by third parties where there is no legitimate impediment to do so."

As described previously for documents held by the parties, the judge cannot order such production *ex officio*[156]. Similarly, the request may be made without any formality[157] and the third person may be ordered to produce the original, a copy or an extract of the instrument[158]. The prerogative of the judge is discretionary.

The main difference with production by a party is that a third person is entitled to put forward a difficulty or a "legitimate impediment" to produce the requested document[159]. In such case, article 141 CPC provides that the judge may, on informal request made to him, retract or modify his decision. The third party may appeal against the new decision within fifteen days as from its pronouncement. In most cases, the "legitimate impediment" relates to privacy or to professional secrecy[160].

Again, the *Code de procédure civile* provides no specific penalty in case of refusal to produce the requested evidence. However, article 10§2 of the *Code civil* provides that "he who, without legitimate reason, eludes that obligation when it has been legally prescribed to him, may be compelled to comply with it, if need be on pain of periodic penalty payment or of a civil fine, without prejudice to damages".

3.10 Value of Judicial and Administrative Decisions

Judicial decisions have a superior probative value.

Formally, they appear as authenticated documents, of which they have the probative authority according to article 457 CPC. In itself, this status is not insignificant since authenticated documents are conclusive evidence of their content until forgery has been proved[161].

However, a judicial decision is much more than an authenticated document: it has the authority of *res judicata*[162]. Probative force (attached to the *instrumentum*) and authority (attached to the *negotium*) *can* in principle be distinguished and in some situations they do play different roles[163]. However, the authority of *res judicata* is often conceived as a mode of evidence, not different from the probative force of the judgement[164]. The *Code*

[156] Cass. Com., 19 déc. 1977, Bull. civ. IV, n° 307.
[157] Art. 139§1 CPC.
[158] Art. 139§2 CPC.
[159] Art. 11 and 141 CPC.
[160] Cass. 1ère civ., 21 juill. 1987, n° 85-16436.
[161] *Cf. infra*, § 5.
[162] Art. 1350 C. civ.
[163] See M. Douchy-Oudot, JurisClasseur Civil Code, Art. 1349 à 1353, Fasc. 20 – Autorité de la chose juge. – Autorité de la chose juge au civil sur le civil, Lexis Nexis (2013).
[164] H. Roland, Chose jugée et tierce opposition, LGDJ (1958), n° 117.

civil itself deals with *res judicata* in the chapter devoted to evidence, among the statutory presumptions (articles 1350 to 1352).

As a statutory presumption, the authority of *res judicata* is irrefutable and admits in principle no evidence to the contrary[165].

Since an administrative decision does not have the authority of *res judicata*, the probative force of the *instrumentum* depends upon the position of the person who established it.

For an administrative document to be an authenticated document, it must have been "received by public officers empowered to draw up such instruments at the place where the instrument was written and with the requisite formalities"[166]. It was once considered that any administrative entity was a public officer under article 1317 C. civ.[167], a solution that was abandoned by the *Conseil d'État* in the 1950's[168]. Yet, many texts confer the status of public officer to a large number of persons, e.g. civil registrars[169], mayors and their assistants[170] or diplomatic and consular agents[171].

Where the administrative document is not authenticated, it can nonetheless be received as an *indice* by the judge. Therefore, its probative value is only that of a presumption.

4 Burden of Proof and Subject of Evidence

4.1 Risk of Evidence and Alternation of Evidence

The way French law conceives the burden of proof directly follows from the central position of the adversarial principle in civil procedure[172], expressed in article 9 of the *Code de procédure civile*: "each party must prove, in accordance with law, the facts on which his claim is grounded". Whatever the powers of the juge, it is always up to the parties to prove their allegations.

As a consequence, when a party makes an allegation, he supports the risk of evidence, i.e. the risk to lose the case if he cannot prove that such allegation is grounded. This principle is set out at article 1315 §1 of the *Code civil*: "a person who claims the performance of an obligation must prove it" (*actori incumbit probatio*). Although the

[165] Art. 1352 C. civ. This is subject to exceptions, notably concerning admission of a party or oath.
[166] Art. 1317 C. civ.
[167] See I. Pétel-Teyssié, JurisClasseur Civil Code, Art. 1317 à 1320. – Preuve littérale. – Acte authentique, Lexis Nexis (2010).
[168] *Ibid.*
[169] Art. 73 and 316 C. civ.
[170] Art. L 2122-32 of the *Code général des collectivités territoriales.*
[171] Art. 48 C. civ.
[172] *Supra*, § 1.2.

text only refers to proof of an obligation, it is unanimously admitted – and it has always been ruled – that it is generally applicable, whenever no specific provision exists.

Once the claimant has provided the evidence required, the opposite party must in turn prove any allegation he might make in defence (be it procedural or substantial). According to the adage *reus in excipiendo fit actor*, he becomes in turn the claimant. Article 1315 § 2 sets out that "reciprocally, a person who claims to be released must substantiate the payment or the fact which has produced the extinguishment of his obligation". Again, despite the narrow wording of this provision, it is generally applicable.

Of course, common practice does not reflect the alternation of evidence imagined by article 1315. The party who does not bear the burden of proof does not hide behind it: each one tries to convince the judge that his allegations are grounded – or that the opposite party's allegations are not –, let alone the possibility for the judge to order the taking of evidence[173]. Nonetheless, if none of the parties is able to prove his allegations, then the court must decide the case to the detriment of the one who was bearing the burden of proof[174].

4.2 Subject of Evidence

Once the burden of proof has been attributed to one party, the question is: what exactly does this party have to prove? In French law, this question – l'*objet de la preuve* (the subject of evidence) – is traditionally distinguished from that of the burden of proof.

4.2.1 The Facts to be Proved

Two principles traditionally govern the determination of the facts that the parties have to prove: only relevant facts can be proved; only contested facts must be proved.

Facts are relevant when they are in relation with the dispute *and* when they may have influence on its solution[175]. In principle, the trial judges appreciate sovereignly whether a fact is relevant or not, although some control may be exercised by the *Cour de cassation* when the court rejects an offer of evidence that would have been binding. At any rate, this question is not often raised and only rather old cases may be cited in this regard.

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[173] *Ibid.*

[174] Cass. soc., 15 oct. 1964, Bull. civ. IV, n° 678. – Cass. com., 11 oct. 1994, Bull. civ. IV, n° 284. – Cass. 1ère civ., 6 juill. 2005, Juris-Data n° 029339.

[175] J. Chevallier, Le contrôle de la Cour de cassation sur la pertinence de l'offre de preuve, D. 1956, chron. 37.

According to the classical theory of the "*fait constant*"[176], the facts that a party proposes to prove must be contested facts. Facts that are put forward and not contested are deemed to be exact. This theory is sometimes related to the *principe dispositif*: the parties are free to decide what alleged facts they will dispute.

However, in 1991 the *Cour de cassation* ruled that "the judges are not obliged to consider an alleged fact as *constant* solely on the ground that it was not expressly contested"[177]. More recently, the Supreme Court has further declared that "the silence of a party in response to a declaration of a fact does not count as recognition of that fact"[178].

4.2.2 *Iura novit curia*

According to the adage *iura novit curia*, the court is deemed to know the law. Therefore, the parties do not have to prove it. Although this rule is stated nowhere in black and white, it is supported by a reading *a contrario* of article 9 of the *Code de procédure civile*[179].

The principle has never been seriously discussed and there is almost no litigation involving it. Whenever a judge reproaches a party for not having proven a rule of law – be it a statutory rule or a judicial interpretation – it is censored by the *Cour de cassation*[180]. The task of the judges goes even beyond: if the parties make an erroneous legal characterisation of the facts, the court has the duty to restore their exact characterisation (art. 12 CPC, §2).

Yet, the obligation of the judge to know the law can be questioned as far as foreign rules of law are concerned[181]. This difficult question has raised much controversy. On the one hand, a French court can not be deemed to have knowledge of every foreign rule of law. On the other hand, especially for rights of which the parties do not have free disposition, the same court may have the obligation to apply a foreign rule of the law and, therefore, to know its content. After much hesitation, the *Cour de cassation* finally decided in 2005 (and has constantly re-affirmed since then) that when a French court retains that a foreign rule is applicable, it must, whether on request of a party or *ex officio*, search for the content of such rule in order to make a decision that is consistent with the applicable

[176] Th. LE BARS, La théorie du fait constant, JCP 1999. I. 178. – X. Lagarde, D'une vérité l'autre, Brèves réflexions sur les différentes cultures de la preuve, Gazette du Palais, 22 juillet 2010 n° 203, p. 6. The *fait constant* may be translated more or less "established fact".
[177] Cass. 2ème civ. 10 mai 1991, Bull. civ. II, n° 142.
[178] Cass. 1ère civ. 18 avr. 2000, n° 97-22421, Bull. civ. I, n° 111, RTD civ. 2001. 132, obs. B. Fages et J. Mestre.
[179] "Each party must prove, in accordance with law, the facts on which his claim is grounded".
[180] Cass. com., 28 mai 1953: D. 1953, p. 555.
[181] This is true also for "private" rules of law such as custom or usages: See M. Oudin, Juris-Classeur de droit civil., Art. 1315 et 1315-1, fasc. 10, Preuve – Règles générales (Lexis Nexis 2005) n° 9 ff; F. Ferrand, Rép. pr. Civ. Dalloz voc. 'Preuve' (2006), pt. 106 ff.

foreign law[182]. This obligation is however softened by the fact that evidence of the content of the foreign law is free[183].

4.3 Duty to Contest Specified Facts and Evidence

Cf. supra, § 4.2.1.

4.4 Respective Roles of the Parties and the Judge

The free disposition principle and the balance between adversarial and inquisitorial principles have been shortly described in the first part of this paper. Some aspects need further developments here.

As regards ***facts***, they are in principle delimited by the parties themselves. The Code of civil procedure not only states that the parties must, in support of their claims, put forward the relevant facts supporting their claims[184]. It also provides that the judge may not base his decision on facts not in the debate, i.e. not put forward by the parties[185]. However, the judge is not completely passive.

To start with, among the facts mentioned in the debate, he may take into consideration those that the parties have not expressly relied upon to support their claims[186]. Such facts (often called *faits aventices)*, are therefore "in the debate".

Secondly, article 8 CPC enables the judge to "invite the parties to provide factual explanations that he deems necessary for the resolution of the dispute". The *Cour de cassation* has always held that this power was discretionary[187].

As regards ***evidence*** too, it is in principle the burden of the parties, as clearly stated by article 9. As already pointed out, evidence is readily described as a risk for the parties[188]. As a consequence, a judge is not obliged to answer mere allegations that are not accompanied with an offer of evidence[189].

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[182] Cass. 1ère Civ., 28 juin 2005, n° 00-15734, Bull. 2005, I, n° 289; Com., 28 juin 2005, n° 02-14.686, Bull. 2005, IV, n° 138. Both decisions were much commented: B. Ancel et H. Muir Watt, RCDIP 2005, p. 645; N. Bouche, D. 2005, p. 2853; H. Kenfack, D. 2005, pan. p. 2748; P. Courbe, D. 2006, pan. p. 1495; Ph. Delebecque, RTD com. 2005, p. 872.

[183] See M. Oudin, Juris-Classeur Civil Code, Art. 1315 et 1315-1, fasc. 10, Preuve – Règles générales (Lexis Nexis 2005), pt. 18.

[184] Art. 6 CPC.

[185] Art. 7 § 1 CPC.

[186] Art. 7 § 2 CPC.

[187] Cass. 1ère civ., 4 déc. 1973, Bull. civ. I, n° 336. – Cass. Com., 5 nov. 1991, Gaz. Pal. 1992, Pan. 77.

[188] *Supra*, § 4.1.

[189] Among many decisions, see for example Cass. com., 13 janv. 1964, Bull. civ. III, n° 20. – Cass. com., 28 oct. 1980, Bull. civ. IV, n° 353; Gaz. Pal. 1981, 1, somm. p. 46. – Cass. 1ère civ., 6 mars 2013, n° 12-15369.

However, here again, the function of the judge has evolved. He is no more a mere spectator of the debate. In particular, he cannot refuse to decide the case on the pretext that evidence provided by the parties would be insufficient[190]. Such attitude is recurrently analysed as a denial of justice. For instance, where the court retains that some damages occurred, it cannot refuse to evaluate their amount because of insufficient evidence[191].

Therefore, despite the very restrictive wording of article 9 CPC, the judge is given various possibilities to help evidence to emerge.

A first option was opened by the *Cour de cassation,* which ruled that the judge may always invite a party to provide evidence[192].

A second option is that of the *mesures d'instruction*. As already described[193], these are investigation measures that article 10 CPC empowers the judge to order. Article 144 CPC specifies that, "at any event, the investigation measures may be ordered when the judge is not supplied with sufficient material to determine the matter". Such measures may be ordered at any time until deliberation of the court, *ex officio* or on demand of a party[194]. Yet, it must be recalled here that the judge cannot order such measures "to compensate for the deficiency of the parties"[195].

5 Written Evidence

As already pointed out, written evidence lays on top of the hierarchy of evidence in French law[196]. Due to its overwhelming importance, it is regulated at length in the *Code civil*, at articles 1316 to 1340. No other mode of evidence was given equal attention by the legislator.

5.1 Concept of Written Evidence

For a long time, written evidence (called alternatively *preuve par écrit* or *preuve littérale*) has been a synonym of paper-based evidence. This was so commonly admitted that there was no practical need for a legal definition. A consequence of technologic progress was however that courts came against growing difficulties in applying traditional evidence concepts to new modes of establishing and conserving documents.

[190] Cass. 2ème civ., 21 janv. 1993, Bull. civ. II, n° 28. – Cass. 2ème civ., 28 juin 2006, JCP G 2006, IV, 2622, RTD Civ. 2006 p. 821, obs. R. Perrot.
[191] Cass. 3ème civ., 8 déc. 2009, Procédures 02.2010, n° 30, obs. R. Perrot.
[192] Cass. 2ème civ., 12 oct. 2006, n° 05-12835, Bull. civ. II, n° 267, RTD Civ. 2007 p. 178, obs. R. Perrot.
[193] *Supra*, § 1.2.
[194] Art. 143 CPC.
[195] Art. 146 CPC.
[196] *Supra*, § 3.1.

Yet, it is only in 2000[197] that the legislator decided to handle the problem. It was decided that a definition of written evidence should be established, that would include traditional as well as electronic written documents.

Article 1316 of the *Code civil* now states that "documentary evidence, or evidence in writing, results from a sequence of letters, characters, figures or of any other signs or symbols having an intelligible meaning, whatever their medium and the ways and means of their transmission may be."

Though modernized through the inclusion of electronic documents[198], this definition remains classical to some extent. In the end, an electronic writing is no more than a writing recorded on an alternative medium (video or audio recordings remain therefore excluded from this category[199]). As a matter of fact, it has become habitual to distinguish between *écrits sur support papier* and *écrits sur support électronique*, i.e. paper-based documents and electronic-based documents[200].

Written documents fall into two categories.

Some documents are specially designed to serve as evidence (they are called *"preuves préconstituées*") and have therefore a high probative value, provided that they are established according to certain rules. Two types of documents fall under this category: the *actes sous seing privé* – i.e. documents under private signatures – and the *actes authentiques* – authenticated documents.

The second category includes the remaining documents, which, though having weaker probative value, may serve as evidence under specific circumstances. This category is very large: it goes from copies to accounting documents, passing through simple letters or domestic papers. It is impossible, within the framework of this report, to review them all[201].

5.2 Electronic Documents

Before the adoption of the 2000 Act on electronic documents, the courts had many occasions to deal with the probative value of "new" technologies. Their attitude was globally liberal. Whenever, reasoning by analogy, it was possible to recognise the same probative effects as legally admitted modes of proof, they did so.

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[197] Loi n° 2000-230 du 13 mars 2000 portant adaptation du droit de la preuve aux technologies de l'information et relative à la signature électronique.
[198] On which *cf. infra*, § 5.2.
[199] On the difficulty to include video and audio recordings in the categories of evidence imagined by the drafters of the *Code civil*, *see supra*, § 3.4.
[200] Such distinction is drawn by the *Code civil* itself in the subsequent Articles (*cf. infra*).
[201] See. J.-L. Mouralis, Rép. Civ. Dalloz, voc. 'Preuve 1° (Modes de preuve)' (2011), § 476 ff.

For instance, a **photocopy** was recognised the same value as a copy under article 1348 of the *Code civil*[202]. This article was modified by a 1980 Act to provide an up-to-date definition of a copy[203] and recognise it a high probative value, almost comparable to that of an original written document. In fact, the holder of a copy is now exempted from producing the original document when it has not been preserved[204].

Similarly, interpreting an Act which required that the assignment of professional claims be made in writing, the *Cour de cassation* decided in 1997 that a **telecopy** could meet this condition, insofar as its integrity was established and uncontested, as well as the imputability of its content to its designated author[205].

The 2000 Act took further steps.

First, it set out a definition of written documents likely to include electronic documents, as already described[206].

Second, it also recognized, as a principle, equal probative[207] value to paper-based and electronic documents. Article 1316-3 of the *Code civil* now sets out that "a writing in electronic form is admissible as evidence in the same manner as a paper-based writing, provided that the person from whom it proceeds can be duly identified and that it be established and stored in conditions calculated to secure its integrity".

Finally, the reform dealt with electronic signatures. After providing a general definition of signature at § 1, article 1316-4 of the *Civil code* provides at § 2 that "where it is electronic, it consists in a reliable process of identifying which safeguards its link with the instrument to which it relates. The reliability of that process shall be presumed, until proof to the contrary, where an electronic signature is created, the identity of the signatory secured and the integrity of the instrument safeguarded, subject to the conditions laid down by decree in *Conseil d'État*." The decree mentioned in article 1316-4[208] provides much technical details on electronic signatures, which integrity rests on the use of electronic certificates delivered by a third-party certifier[209].

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[202] Cass. 1ère civ., 25 juin 1996, Bull. Civ. I, n° 270, JCP 1996. IV. 1940.

[203] A copy is "a reproduction that is not only faithful but also enduring. Is deemed enduring an indelible reproduction of the original which involves a non-reversible alteration of the medium".

[204] Art. 1348 § 2 C. civ. *Cf. infra*, § 5.7.

[205] Cass. com. 2 déc. 1997, D. 1998. 192, obs. D.-R. Martin, JCP 1998, p. 905, obs. P. Catala and P.-Y. Gautier, JCP, éd. E, 1998, p. 178, obs. Th. Boneau.

[206] *Supra*, § 5.1.

[207] As far as substantive value is concerned, i.e. when the written in form is not required *ad probationem* but *ad validitatem*, the equivalence between paper-based and electronic documents is less extended.

[208] Décret n° 2001-272 du 30 mars 2001 pris pour l'application de l'article 1316-4 du code civil et relatif à la signature électronique.

[209] For a description of the French system of electronic signatures and an extended bibliography on this topic, see L. Grynbaum, Juris-Classeur Civil Code, Art. 1316 à 1316-4, fasc. 10, Écrit électronique, Lexis Nexis 2012.

It must be noted that not only documents under private signatures may be established in electronic form, but also authenticated documents[210].

5.3 Presumption of Correctness of Authenticated Documents

The main difference between acts under private signatures and authenticated documents lies in the presumption of correctness of the latter. Authenticated documents are conclusive evidence of their content until forgery has been proved[211].

A document is authenticated when it has been "received by public officers empowered to draw up such instruments at the place where the instrument was written and with the requisite formalities"[212]. Many texts confer the status of public officer to a large number of persons, e.g. civil registrars[213], mayors and their assistants[214] or diplomatic and consular agents[215]. Yet, they produce only a limited range of instruments. By contrast, notaries have extended prerogatives: they are entitled to authenticate "any act or contract to which the parties must or want to confer authenticity"[216]. Thus, they can authenticate not only those acts for which authenticity is required by law (such as donations or mortgages), but also acts that could in principle be established in a private form. In practice, many important acts such as companies constitutions are received by notaries in order to confer on them the maximum security and probative value.

Authenticated documents must be established in accordance with formal conditions in order to produce their plain effect[217], notably as regards evidence. However, an instrument that is not authentic because of the lack of power or incapacity of the officer, or of a defect in form, has the value of a private instrument, if it was signed by the parties[218].

Contestation of an authenticated document is possible only through a specific procedure governed by articles 303 ff. of the *Code de procédure civile*: *l'inscription de faux* (forgery). This procedure is complex and lengthy and, in case of failure, the claimant may be ordered to pay a civil fine up to EUR 3,000 as well as possible damages[219].

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[210] Art. 1316-4 and 1317 C. civ.
[211] Art. 1319 C. civ.
[212] Art. 1317 C. civ.
[213] Art. 73 and 316 C. civ.
[214] Art. L 2122-32 of the *Code général des collectivités territoriales.*
[215] Art. 48 C. civ.
[216] Ord. n° 45-2590, 2 nov. 1945, art. 1.
[217] See I. Pétel-Teyssié, JurisClasseur Civil Code, Art. 1317 à 1320, Preuve littérale. – Acte authentique, Lexis Nexis 2010.
[218] Art. 1318 C. civ.
[219] Art. 305 CPC.

5.4 Probative Value of Documents under Private Signatures

Unlike authenticated documents, private documents are in principle subject to very few conditions of establishment. The most notable one is that they must be signed by the parties, otherwise they are deprived of probative value[220].

However, private documents are often governed by specific rules. Some are general ones and have already been described: the *formalité du double*, that concerns synallagmatic agreements, as well as the written mention required for unilateral commitments[221]. Beyond this, many specific contracts, civil and commercial (leases, insurance contracts, agency…), have their own requirements.

The general rule governing the probative value of documents under private signatures is set out at article 1322 C. civ.: an instrument under private signature, acknowledged by the person against whom it is set up, or statutorily held as acknowledged, is, between those who have signed it and between their heirs and assigns, as conclusive as an authenticated document. A party against whom such an instrument is set up is obliged to formally admit or disclaim his handwriting or his signature[222]. In the case where the party disclaims his handwriting or his signature, article 1324 of the *Code civil* provides that "a verification shall be ordered in court", whereas article 287 of the *Code de procedure civile* states that "the judge will verify the impugned handwriting save where he is able to make a ruling without considering it". The *Cour de cassation* used to decide that the powers of the judge were discretionary in this regard, but more recent decisions tend to impose to the judge the verification of contested documents[223]. At any rate, after conclusive verification, the document under private signatures has the probative value of an authenticated document[224].

5.5 Distinction between the Evidential (Probative) Value of Public and Private Documents

Cf. § 3.10.

5.6 Taking of Written Evidence

In practice, written evidence is most often taken *via* the *dossier de plaidoirie*, *i.e.* the dossier submitted by the parties to the court and which contains their submissions and supporting documents[225]. This common practice illustrates the decline of oral hearings

[220] This is subject to exceptions: see D. Guével, JurisClasseur Civil Code, Art. 1322 à 1324, Actes sous seing privé. – Règles générales, Lexis Nexis (2012).
[221] *Supra*, § 3.5.
[222] Art. 1323 C. civ.
[223] See D. Guével, *op. cit.*, § 46 ff.
[224] Art. 1322 C. civ.
[225] See B. Deroyer and R. Apéry, Le dossier de plaidoirie, Recueil Dalloz 2010 p. 2074.

already pointed out[226]. Before the *Tribunal de grande instance*, where procedure is written, it was even confirmed by the legislator[227].

However, according to the contradictory principle[228], documents must be communicated to the opposite party in due time and it must at least be possible to discuss them at the hearing. But the documents that are mentioned in the submissions of a party and that were not disputed before the court are deemed to have been duly produced and submitted to free discussion of the parties[229].

5.6.1 Written Evidence Obtained by the Court

Cf. § 1.2 and 4.4.

5.6.2 Obligation of the Parties to Produce Evidence

Cf. § 3.8.

5.7 Copies

In theory, it is not necessary to produce documents in their original version, since in principle copies are admissible evidence. However, the probative value of copies, based on two articles of the *Code civil* apparently in contradiction the one with the other (1334 and 1348), is rather complex[230].

In brief terms, where the original version still exists, a copy has probative value only if it is uncontested. The original version may always be requested by the court. However, copies of authenticated acts are governed by specific rules.

Where the original document no longer exists, the copy of an act under private signatures has probative value only if the conditions set by article 1448 are satisfied. The copy must be a reproduction not only faithful but also enduring. Is deemed enduring an indelible reproduction of the original which involves a non-reversible alteration of the medium. The copy of an authenticated act may have various probative values. Under specific conditions, it can even have the probative value of the original document.

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[226] *Supra*, § 1.4.
[227] Art. 779 § 3 CPC.
[228] *Supra*, § 1.3.2.
[229] Cass. 1ère civ., 28 janv. 2003, Bull. civ. III, n° 27.
[230] See D. Guével, JurisClasseur Civil Code, Art. 1334 à 1337, Reproduction d'actes écrits. – Copies. Actes recognitifs, Lexis Nexis 2012.

6 Testimonial Evidence

6.1 The Witnesses – General Duty to Testify

The witnesses must of course be third parties, according to the principle "*nul ne peut se constituer une preuve à soi-même*"[231].

As far as third parties are concerned, article 205 § 1 CPC provides that "any person may be heard as a witness, except those people who lack the legal capacity to testify in court."

But in reality, third persons have a real duty to testify. Such an obligation may be derived from article 10 of the *Code civil*, according to which "any person has the duty to help the Justice in order to establish the truth." And article 206 of the *Code de procédure civile* is even clearer*:* "any person *legally summoned* to testify is bound to do so".

Although witnesses are in principle allowed to perceive allowances[232], those who default may be cited at their expense if their hearing is deemed necessary[233]. Furthermore, defaulting witnesses and persons who, without any legitimate excuse, refuse to testify or to take an oath may be sentenced to pay a civil fine up to EUR 3,000, but the one who proves the reason why he was unable to come on the appointed day may be exonerated from paying the fine and the cost of summons[234].

6.2 Exceptions

However general those provisions may seem, there are many exceptions to the duty to testify.

On the one hand, some persons may refuse to testify or be authorised by the court not to testify. According to article 206 CPC, "persons who present a legitimate excuse may be exempted from testifying".

The "legitimate excuse" is freely appreciated by the court. It may rest for example in the professional secrecy that binds the third person – although professional secrecy should be analysed as an impediment more than an excuse[235]. Are also excused diplomatic or consular agents, according to the 1961 Vienna Convention on Diplomatic Relations[236].

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[231] *Cf. supra*, § 2.3. On the application of this principle to testimonial evidence, see M. Oudin, JurisClasseur Civil code, Art. 1341 à 1348, Preuve testimonale. – Généralités, Lexis Nexis (2006), § 19 ff.
[232] Art. 221 CPC.
[233] Art. 207 § 1 CPC.
[234] *Ibid.*
[235] *Cf. infra*.
[236] Published by decree n° 71-284 du 29 mars 1971.

On the other hand, some persons may be prohibited from testifying. Such an incapacity may result of a criminal conviction[237] or of the family links between the parties and the third person: article 205 § 2 CPC sets out that "descendants may never be heard on the grievances raised by spouses in support of a petition for divorce or judicial separation".

It must be noted, though, that in principle a minor is no more incapable to testify. On the contrary, pursuant to the 1990 New York Convention on the Rights of the Child, article 338-1 of the *Code de procédure civile* recognises the right of any child capable of discernment to be heard in any procedure concerning him.

A third exception plays a major role in practice. Any person bound by a duty of professional secrecy[238] is prohibited from testifying on facts protected by such duty. This has been decided for:

- Priests informed under the seal of confession[239];
- Medical practitioners[240];
- Social workers[241];
- Bankers[242];
- Lawyers[243];
- Notaries[244].

Usually, courts consider that evidence obtained in violation of a duty of professional secrecy has been illegally obtained and must therefore be dismissed[245].

As for mediators, a specific rule is set out at article 131-14 CPC: "The findings of the mediator and the declarations he has collected may not be produced nor cited in the subsequent proceeding without the consent of the parties, nor, in any case, be referred to in any other proceeding"[246].

On the other hand, as already pointed out[247], business secrecy doesn't enjoy the same protection.

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[237] Art. 131-26, 4° C. pén.
[238] On which see *supra*, § 2.2.
[239] Cass. 2ème civ., 23 avr. 1966, Bull. civ. II, n° 476.
[240] CA Paris, 4 déc. 1950: Gaz. Pal. 1951, 1, p. 141.
[241] Cass. 2ème civ., 24 juin 1992, Bull. civ. II, n° 173.
[242] Cass. com., 5 oct. 2004, n° 02-13476.
[243] CA Paris, 17 janv. 1969, D. 1969, p. 316.
[244] Cass. 1ère civ., 15 janv. 1968, Bull. civ. I, n° 17; JCP G 1968, IV, 32.
[245] See for instance Cass. Com., 5 oct. 2004, *op. cit.*
[246] See also Loi n° 95-125 du 8 février 1995 relative à l'organisation des juridictions et à la procédure civile, pénale et administrative, Art. 21-3.
[247] *Supra*, § 2.2.

6.3 Form of Testimonial Evidence

The taking of testimonial evidence follows two patterns: investigations (*déclarations par voie d'enquête*) and certificates (*attestations*). Yet, it must be pointed out that certificates are far more frequent than oral investigations, which have turned to be rather exceptional.

6.3.1 Investigations

Investigations are governed by articles 204 to 231 CPC. They constitute the traditional, oral way of taking testimonial evidence. Predominant in many countries, they are little used in France, despite the attempts that were made to simplify them when the *Nouveau code de procédure civile* was adopted in 1975.

Although an accelerated type of investigation exists – *l'enquête sur-le-champ*[248] – the ordinary investigation is strictly organised by articles 222 ff. CPC. It may be ordered *ex officio* by the court or demanded by the parties as a *mesure d'instruction*. In such case, the judge freely decides to order the requested investigation or refuse it[249].

A requesting party must state the facts that he intends to prove[250] as well as the surname, first names and domicile of the persons whose audition is requested[251]. The decision ordering the investigation must identify the witnesses[252] and determine the terms and timetable of the investigation[253]. Then, the witnesses are summoned by the clerk of the court, at least eight days before the date of the investigation, whilst the parties are informed of the date of the investigation verbally or by ordinary letter[254].

Whether accelerated or ordinary, the investigation is carried out according to the following rules.

There is no cross examination in French procedure. The judge himself hears the witnesses, separately and in the order that he determines, in principle in the presence of the parties and their lawyers who must at least have been summoned[255]. If necessary, an expert can also be present[256].

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[248] Art. 231 CPC: »The judge may, at trial or in the judge's council chamber as well as in any other venue where a preparatory inquiry is being carried out, hear in short order those persons whose testimony he deems useful to establish the truth.«
[249] The *Cour de cassation* has decided that such prerogative of the judge is consistent with article 6 ECHR: Cass. 3ème civ., 5 avr. 2006, n° 04-18398, Bull. civ. III, n° 94.
[250] Art. 222 CPC.
[251] Art. 223 CPC.
[252] *Ibid.*
[253] Art. 225 to 227 CPC.
[254] Art. 228 and 230 CPC.
[255] Art. 208 and 209 CPC.
[256] Art. 215 CPC.

The witnesses shall state their surname, first names, date and place of birth, domicile, occupation, as well as, if necessary, their family relationship or affinity with the parties, or their relation of subordination towards them, their relation of collaboration or their common interests with them[257].

Witnesses must take an oath to tell the truth[258]. The judge must remind them that they incur a fine and imprisonment in case of false testimony[259]. Persons who are heard without taking oath are informed about their obligation to tell the truth.

Because the testimony is supposed to be spontaneous, the witnesses may not read from any notes[260].

The judge may hear the witnesses on all facts whose evidence is legally admissible, even where these facts are not stated in the decision ordering the investigation[261].

The parties must not interrupt, question or attempt to influence the witnesses, nor talk to them directly under the penalty of exclusion. However, once the judge has heard the witnesses, the parties may submit some more questions to ask them. The judge will ask those questions that he deems necessary[262].

In principle[263], the testimonies are recorded in a minute which bears various indications and is signed by the witnesses and the judge[264].

6.3.2 Certificates

Before the adoption of the *Nouveau code de procédure civile*, practice had developed written certificates as an alternative to oral testimony, in particular where the witnesses were unable to be physically heard by the judge. The judges used to admit without difficult such practice, and the *Cour de cassation* had even ruled that a judge could not refuse to take into consideration a certificate on the grounds that it did not fit in formal conditions prescribed for testimony[265].

The *Nouveau code de procédure civile* legalised this practice and gave it a legal framework, at articles 200 to 203.

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[257] Art. 210 CPC.
[258] Art. 211 CPC.
[259] According to article 434-13 of the *Code pénal*, "false testimony made under oath before any court of law […] is punished by five years' imprisonment and a fine of EUR 75,000. However, the false witness is exempt from penalty where he retracts his testimony spontaneously before the decision terminating the procedure has been made by the judicial investigating authority or the court of trial".
[260] Art. 212 CPC.
[261] Art. 213 CPC.
[262] Art. 214 CPC.
[263] Except where the case is immediately decided in last resort.
[264] Art. 219 and 220 CPC.
[265] Cass. 1ère civ. 2 mai 1950, Bull. civ. I, n° 106.

A certificate may be produced by a party on his own or upon the request of the judge[266]. Only those persons who may be heard as witnesses may make a certificate[267].

Article 202 CPC details the drafting of the certificate. It must be written, dated and signed by the drafter in his own hand. It must state the surname, the first name, the date and place of birth, the domicile and the occupation of the drafter as well as, if necessary, his family relationship or affinity with the parties, his relation of subordination towards them, his relation of collaboration or his common interests with them. It must further state that it is made to be produced in a court of law and that the drafter is aware that he shall face penalties for any false statement on his behalf.

The certificate must contain an account of facts that the drafter has witnessed or which he has personally noticed.

A third person may not be aware of such legal constraints when drafting a declaration. This is why the *Cour de cassation* considers that a certificate that does not meet all these requirements isn't *ipso facto* void[268]. Yet, the judge may decide not to take it into consideration by a motivated decision[269].

The judge also has the power to hear the drafter by way of an investigation[270].

7 Taking of Evidence

The specific structure of procedural rules in this field must be recalled. As a matter of fact, there is a formal distinction between the taking of evidence by the parties themselves and the taking of evidence by the judge (the "*mesures d'instruction*").

Taking of evidence by the parties is not ordered or allowed by the court and derives from article 9 CPC according to which "each party must prove, in accordance with law, the facts on which his claim is grounded"[271].

Taking of evidence by the judge is allowed by article 10 CPC: "the judge has the authority to order *ex officio* any legally appropriate investigation measures (*mesures d'instruction*)"[272].

7.1 About Mandatory Sequence in which Evidence has to be taken

There is no logical or chronological sequence as between different types of evidence.

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[266] Art. 200 CPC.
[267] Art. 210 CPC.
[268] See for example Cass. 1ère civ., 30 nov. 2004, Bull. civ. I, n° 292.
[269] Cass. 2ème civ., 20 mars 2003, JCP G 2003, II, 10132.
[270] Art. 203 CPC.
[271] *Cf. supra*, § 1.2.
[272] *Ibid.*

See Introduction, especially the distinction between those procedures that include a phase of *mise en état* and those that don't.

As a rule, taking of evidence takes place after the proceedings have started. Yet, since a 1973 *décret*, there exists a possibility for a party to ask for any legally admissible investigative measure *in futurum*, i.e. before any proceeding has started. According to article 145 CPC, "If there is a legitimate reason to preserve or to establish, before any legal process, the evidence of the facts upon which the resolution of the dispute depends", the court may order such measure for the taking of evidence. Such taking of evidence is know as "*référé probatoire*"[273].

7.2 Bringing the Evidence to the Court

The parties may bring certificates (see above) or ask the judge to order an investigation measure (such as summoning and hearing of witnesses or appointment of an expert), subject to the rules defining the respective roles of the parties and the judge (*supra*, § 1.2).

7.3 Deadline for the Taking of Evidence by the Parties

In principle, the taking of evidence is allowed until deliberation of the court. However, this depends on the way *instruction* is organised[274]. In particular, where a phase of *mise en état* exists, no taking of evidence is allowed after this phase has been closed[275]. As a consequence, as we have seen in § 1.1, any evidence introduced by the parties after the *ordonnance de clôture* would be declared inadmissible *ex officio*.

7.4 Applications to Obtain Evidence (mesures d'instruction)

The conditions in which the *mesures* d'instruction may be requested and ordered or refused have already been described[276].

It may be recalled here that the availability of investigation measures is very extended. They can be ordered "at any event […] when the judge is not supplied with sufficient material to determine the matter", at the request of the parties or *ex officio*.

The *Code de procédure civile* lists a large number of available investigation measures at articles 179 ff., but article 147 provides that the judge must limit the choice of the order

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273 - – - - aise, 2000, p. 99. – G. CHABOT, Remar , D. 2000, chron. 256. – – - 145 du nouveau code d , JCP 1984. I. 3158.

274 *Cf.* Introduction.

275 *Cf.* Introduction and § 1.1 *in fine.*

276 *Supra*, § 1.2.

as to what is sufficient for the resolution of the dispute by endeavouring to select the simplest and least onerous ones. The judge may combine several measures and, at any time, even while they are being carried out, decide to add any other necessary measure to those that have been ordered[277]. He may at any time extend or restrict the scope of the prescribed measures[278].

The power of the judge to order or refuse a *mesure d'instruction* is sovereign and discretionary. However, the judge cannot substitute the parties in the taking of evidence[279]. However, as already pointed out, such measures cannot be ordered "to compensate for the deficiency of the parties"[280]. In such case, the judge has the obligation to reject the application.

In principle, decisions relating to investigation measures (whether ordering, modifying or refusing them) may take the form of a simple reference in the file or on the register of the hearing and are not notified to the parties; the clerk of the court sends a copy of the decision by ordinary letter to the defaulting or absent parties at the time of the pronouncement of the decision[281].

7.5 The Hearing

7.5.1 Presence and Participation of the Parties

This question applies above all to investigations, which are in principle carried out in the presence of the parties and their lawyers who must at least have been summoned[282].

7.5.2 Distinction between the Direct and Indirect Type of Evidence

The French legal system does not distinguish between the direct and indirect type of evidence.

7.6 Witnesses

See § 6.3.1 and 6.3.2.

Although the question about preparation of witnesses before hearing (by councils or the parties) is absent from our texts and literature, the preparation of witnesses is contrary to

[277] Art. 148 CPC.
[278] Art. 149 CPC.
[279] See for instance Cass. 1ère civ., 23 oct. 2013, n° 10-28620 or Cass. 1ère civ., 12 févr. 2014, n° 12-27033.
[280] *Supra*, § 1.2.
[281] Art. 151 and 152 CPC.
[282] *Cf. supra*, § 6.3.1.

the philosophy of oral testimony, which is supposed to be spontaneous[283]. Anyhow, as previously pointed out, the oral form of testimony is not predominant in France[284].

7.7 Investigation Measures Implemented by an Expert (Expert Witnesses)

In principle, the intervention of an expert takes place within the framework of an investigation measure ordered by the court. Articles 232 to 284-1 of the *Code de procédure civile* are devoted to three types of "investigation measures implemented by an expert". They include (by order of extent and complexity):

- Findings (*constatations*);
- Consultations;
- Expertise.

Although some principles are common to all, these measures are mainly governed by specific rules, so that it is preferable to deal with them separately.

Besides those organised interventions of experts, parties always have the possibility to present private expert reports as evidence (*rapports d'expertise officieux*)[285]. The judge may not refuse to examine such reports but freely appreciates their probative value[286], provided that they have been submitted to the contradiction of the parties[287].

7.7.1 Common Rules

In principle, the judge may commission any person of his choice as an expert[288], although the parties are free to make any proposal in this respect. Some official lists of experts exist in civil and criminal matters – both at national and local level – i.e. for each *Cour d'appel.* Those lists are more and more regulated[289]. To be referenced as an expert, a person must have specific qualifications set out by a 2004 Decree[290]. In particular, where the expert is an individual, he must exercise or have exercised during a relevant period of time an activity in relation with his speciality. However, in principle the judge is not bound by those lists, although he naturally tends to use them.

The experts may be recused for the same causes as judges. The party who intends to recuse the expert must do so before the judge who has commissioned him, or before the judge entrusted with the supervision, prior to the operations or as of the discovery of the cause of recusal[291].

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[283] *Cf. supra*, § 6.3.1.
[284] *Ibid.*
[285] See A. Aynès and X. Vuitton, Droit de la preuve, Lexis Nexis 2013 p. 247.
[286] Cass. 1ère civ., 1er déc. 2011, n° 10-19402.
[287] Cass. Ch. Mixte, 28 sept. 2012, n° 11-18710.
[288] Art. 232 CPC.
[289] See R. Genin-Meric and C. Martel-Emmerich, Juris-Classeur Procédure civile, fasc. 661: Éléments d'un statut du technicien auxiliaire du juge, Lexis Nexis 2010.
[290] Décret n° 2004-1463 du 23 décembre 2004 relatif aux experts judiciaires.
[291] Art. 234 CPC.

If the recusal is admitted (as well as if the expert does not accept the mission or if there is a lawful impediment), the judge who commissioned the latter or the judge entrusted with the supervision replaces him. He may also, at the request of the parties or *ex officio*, replace the expert who has failed in his duties after having received his explanations [292].

The judge sets he mission of the expert, which he may later add to or restrict[293], and assigns a time limit for this mission[294]. He may always request the expert to complete, clarify or to explain his findings or conclusions either in writing or at the hearing[295]. The judge is not bound by the findings or conclusions of the expert[296].

The expert must fulfil his mission personally[297], conscientiously, objectively and impartially[298]. He must give his opinion on the points he has been commissioned to examine and may not consider other questions, except in case of a written consent of the parties. At any rate, he is strictly prohibited from expressing an opinion on a point of law[299].

The expert may not receive remuneration directly from one party in any form whatsoever, even as a reimbursement of outlays, save where so ordered by the judge[300].

Where the expert has collected oral or written information from third persons, the parties may request the hearing of these persons by the judge[301].

The opinion of the expert, whose disclosure infringes one's privacy or any other legitimate interest, may not be used outside the proceeding, except with the judge's permission or with the consent of the concerned party[302].

7.7.2 *Constatations* (Findings)

Sometimes, the contested facts require no real investigation: they may simply be recorded by the expert. This is the case, for instance, of adultery recordings.

Such findings are governed by articles 249 to 255 of the *Code de procédure civile*.

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[292] Art. 235 CPC.
[293] Art. 236 CPC.
[294] Art. 239 CPC.
[295] Art. 245 CPC.
[296] Art. 246 CPC.
[297] Art. 233 CPC.
[298] Art. 237 CPC.
[299] Art. 238 CPC.
[300] Art. 248 CPC.
[301] Art. 242 CPC.
[302] Art. 247 CPC.

The findings may be ordered at any time including at the conciliation stage or during the deliberation. In the latter event, the parties are informed of the same.

The findings are recorded in writing unless the judge chooses an oral presentation.

The judge who orders the findings sets the time-limit within which the minutes must be submitted or the date of the hearing where the findings will be presented orally. He designates the party or parties who are bound to pay a retainer fee to the expert as an advance on his remuneration, which he fixes.

The judge fixes the payment to the observer on proof of the completion of his mission. He may deliver to him a writ of execution.

7.7.3 Consultations

A consultation takes place when the intervention of the expert is purely intellectual, "where a purely technical question does not require complex investigations"[303].

Consultations are dealt with at articles 256 to 262 of the *Code de procédure civile.* Their regime is very close to that of findings. Unlike the findings, however, they are in principle oral, unless the judge requires them to be submitted in writing.

7.7.4 Expertise

Dealt with at length by articles art. 263 to 284-1 CPC, expertise is subsidiary to findings and consultations[304]. It is more complex than them, much more formalistic too. This formalism starts with the decision ordering an expertise, for which article 265 imposes a series of mandatory items.

As for findings or consultations, the judge is in principle free to appoint any person as an expert. Although some lists of judicial experts are established each year, those lists are only indicative[305] and judicial experts do not constitute a regulated profession. However, in practice, judges tend to choose experts on those lists.

The expert immediately informs the judge of his acceptance and starts the operations of expertise as soon as he is informed of the payment, by the parties, of the retainer fee or the amount of the first instalment fixed in the deposit order[306], unless the judge directs him to start immediately the operations[307].

Once the mission accepted, the expert enjoys much freedom in the carrying out of the expertise, provided that he respects the framework set out by the judge. He must inform

[303] Art. 256 CPC.
[304] Art. 263 CPC.
[305] Art. 265 CPC.
[306] On the retainer fee, see infra, § 8.1.
[307] Art. 267 CPC.

the judge of the progress of the operations and the steps taken by him[308]. If he faces difficulties that obstruct the implementation of his mission, or if the enlargement of the latter becomes necessary, he so reports to the judge, who may extend the time-limit within which the expert must give his opinion[309].

The expert must have access to any relevant document. Therefore, article 275 CPC states that "the parties must give immediately to the expert all documents that the latter deems necessary for the implementation of his mission". In case of failure of the parties, the judge may order the production of those documents, if necessary, under a periodic penalty payment. The court may draw any such inference in law resulting from failure to produce the necessary documents to the expert[310].

The expertise is subject to contradiction. In particular, the expert must summon all parties to the meetings he organises[311] and make sure that all the documents communicated to him by a party have also been communicated to the opposite party[312].

Exceptionally, the results of the expertise may be reported orally to the court. Article 282 CPC states in this regard: "if his opinion does not require written explanations, the judge may allow the expert to present it orally at the hearing; it will be recorded in the minutes".

But most often, the expert handles a written report to the court[313]. If the judge does not find sufficient clarification in this report, he may hear the expert, the parties being present or summoned[314].

The report is accompanied by a remuneration claim, a copy of which is addressed to the parties.[315] The parties have 15 days to comment in writing this demand. The judge then sets the remuneration of the expert.

8 Costs and Language

8.1 Costs[316]

8.1.1 Inventory

Article 695 of the *Code de procédure civile* lists the expenses – named *dépens* – that are strictly necessary for the proceedings.

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[308] Art. 273 CPC.
[309] Art. 279 CPC.
[310] Art. 275 CPC.
[311] Cass. 3ème civ., 22 juin 2005, Procédures 2005, n° 224, obs. Perrot.
[312] Cass. 2ème civ., 25 mars 1999, RTD Civ. 2000, p. 158, obs. Perrot.
[313] Art. 282 CPC.
[314] Art. 283 CPC.
[315] Art. 282 CPC.
[316] See M. Redon, Rép. Proc. Civile Dalloz voc. Frais et dépens, 2013.

Among those listed expenses, some are related to the taking of evidence, i.e.:

- Allowances for witnesses (3°);
- Expert fees (4°) and
- Cost of interpreting and translation rendered necessary by the inquiry orders to be carried out abroad at the request of courts pursuant to Council Regulation (EC) n°1206/2001 of 28 May 2001 on cooperation between courts of the Member States in the taking of evidence in civil and commercial matters (9°).

Witnesses may perceive various allowances, detailed in a 1920 Decree[317].

In any case, they are entitled to perceive an inclusive appearance allowance (*indemnité de comparution*).

If the witness justifies, by way of a certificate delivered by his employer, that he suffered a loss of wages, he is entitled to an additional allowance.

Furthermore, witnesses are reimbursed of their travel costs when their domicile is located more than 4 km from their domiciles and they perceive a meal allowance.

Under some conditions, accompanying persons may as well get allowances.

As regards experts, calculation of their fees is made in two steps.

First, the judge fixes "at the moment of the nomination of the expert or as soon as he is able to do it, the amount of the retainer fee to be put on accounts for the payment of the expert as near as possible to the foreseeable final payment". He also specifies "the party or parties who must deposit the retainer fee at the clerk's office of the court within the time-limit that he sets"[318].

Then, after the expert has performed his task, the court sets his payment, taking into account his duties, the respect of time-limits and the quality of the expertise[319]. Where the judge plans to fix the payment at an amount lower than the amount requested by the expert, he must first invite him to submit his comments[320].

8.1.2 Burden of Costs

According to article 696 CPC, expenses are borne by the losing party, unless the judge, by a reasoned decision, imposes the whole or part of them on another party.

Yet, the costs related to unjustified proceedings, processes and enforcement procedures, are borne by the legal officers who carried them out without prejudice to the damages

[317] Décret du 27 déc. 1920, art. 9, as modified by Décret n° 49-1251 du 27 août 1949.
[318] Art. 269 CPC.
[319] Art. 284 CPC.
[320] *Ibid.*

that might be claimed. The same applies to legal costs relating to proceedings, processes and enforcement procedures that are null due to the fault of those officers[321].

Article 748 CPC provides that the implementation of international letters of request (*commissions rogatoires*) takes place without expenses or taxes. However, the sums due to witnesses, experts and interpreters, as well as to any person participating in the implementation of such letters of request are at the expense of the foreign authority. The same applies to the expenses resulting from the application of a particular form of procedure at the request of the commissioning court.

8.2 Language and Translation

Since a famous *Ordonnance de Villers-Cotterêts (1539),* the language of courts is French. The status of French is also supported by article 2 of the Constitution, according to which "the language of the Republic shall be French".

As a consequence, the *Cour de cassation* repeatedly states that the judge is entitled, without violating article 6 ECHR (right to a fair trial), to dismiss as evidence any document written in a foreign language if a translation is not produced[322].

Where a witness who does not speak French testifies orally, an interpreter is in principle appointed by the judge in the same conditions as an expert[323]. As for experts, lists of interpreters are set up for every *Cour d'appel*.

Article 23 CPC provides that the judge is not bound to resort to an interpreter where he masters the language that the witness speaks. However, it seems that judges make scarce use of this faculty, which makes little sense if the parties themselves do not understand the language spoken by the witness.

9 Unlawful Evidence

The question of unlawful evidence is related in French law with the principle called "*loyauté de la preuve*": loyalty – or fairness – of evidence[324]. According to it, a means of evidence is not admissible in court if it was obtained and/or provided unfairly.

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[321] Art. 698 CPC.

[322] Cass. Com., 2 juill. 2013, n° 12-19501. – Cass. Com., 27 nov. 2012, n° 11-17185, Bull. Civ. IV n° 213. – Cass. Soc., 19 mai 2010, n° 09-40690.

[323] See *supra*, § 7.7.1.

[324] See M.Oudin, *op. cit.*, pt. 55. – M.-E. Boursier, Le principe de loyauté en droit processuel: Dalloz, 2003 – A.-E. Credeville, Vérité et loyauté des preuves, Rapport de la Cour de cassation 2004, p. 51. – H. Houbron, Loyauté et vérité. Etude de droit processuel, th. Reims 2004. – V. Perrocheau, Les fluctuations du principe de loyauté dans la recherche des preuves, Petites Affiches 17 mai 2002, p. 6. – L. Raison-Rebufat, Le principe de loyauté en droit de la preuve: Gaz Pal. 26-27 juill. 2002, doctr., p. 1195.

This principle has emerged in recent years in civil procedure and is currently spreading in various branches of law. Of course, this is not to say that, in the past, evidence taking could be absolutely disloyal or unfair. The contradictory principle itself can be regarded as an application of a general principle of fairness. The principle of loyalty also underlies more precise evidence rules, e.g. article 259-1 C. civ. according to which, in divorce proceedings, a spouse cannot produce evidence obtained "by violence or fraud". Apart from such rules, courts have always tended to reject "fraudulent" or "illicit" evidence[325].

But only recently the judges have started to refer expressly to the principle of loyalty, which they derive not only from article 9 CPC[326] but also to article 6 ECHR (right to a fair trial).

There is no precise definition of what an unfair evidence is. One can only find various illustrations in case law. For instance, the *Cour de cassation* has decided in a leading case that the recording of a phone call, made and retained secretly and without agreement of the other party, is "an unfair practice that makes the evidence obtained this way inadmissible before a court"[327]. Another case of unfairness, namely late communication of evidence, has already been discussed[328].

10 Relationship between Regulation 1206/2001 and Existing Errangements between Member States

Under article 21(3) of Regulation 1206/2001, France has declared to the Commission that only a Franco-British Convention[329] would be maintained as further facilitating the taking of evidence and compatible with the regulation. This was justified by the fact that "this convention has been extended to include the countries of the Commonwealth and the United Kingdom's overseas territories, our relations with which are not governed by the Regulation of 28 May 2001".

All other bilateral agreements (namely with Germany, Austria, Belgium, Spain, Italy and Luxemburg) were projected to be denounced. However, to my knowledge, such denunciation has not taken place to this day and those conventions still appear in force on the website of the Ministry of Foreign Affairs[330].

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[325] See for instance Cass. soc., 22 mai 1995: Bull. civ. 1995, V, n° 164: shadowing of an employee by a private investigator on request of the employer.
[326] "Each party must prove, in accordance with law, the facts on which his claim is grounded".
[327] Cass. 2e civ., 7 oct. 2004: Bull. civ. 2004, II, n° 447; D. 2005, p. 122, note Ph. Bonfils; JCP G 2005, II, 10025, note N. Léger; RTD Civ. 2005 p. 135, obs. J. Mestre et B. Fages.
[328] *Supra*, § 1.3.
[329] Franco-British Convention of 2 February 1922 to facilitate the performance of procedural acts between persons resident in France and Great Britain.
[330] http://basedoc.diplomatie.gouv.fr/Traites/Accords_Traites.php.

Table of Authorities

France has opted for a single body to be competent at national level, namely the *Bureau de l'entraide civile et commerciale internationale* of the Ministry of Justice.

Part II – Synoptical Presentation

1 Synoptic Tables

1.1 Ordinary/Common Civil Procedure Timeline

Phase #	Name of the Phase Name of the Phase in National Language	Responsible Subject	Duties of the Responsible Subject (related only to Evidence) and Consequences of their Breach	Rights (related only to Evidence) of the Responsible Subject
1	Application (*Saisine)*	Applicant		
2	Summoning of the parties (*Convocation des parties*)	Court		
3	Instruction phase (*Mise en état*) where relevant (*cf.* Introduction)	Parties and court	See Introduction and § 1	Id.
4	Public hearing (*Audience publique*)	Parties and court	See Introduction and § 1	Id.
5	Jugement (*Judgment*)	Court		

1.2 Basics about Legal Interpretation in French Legal System

There is no protocol for interpretation of substantive legal rules.

1.3 Functional Comparison

Legal Regulation / Means of Taking Evidence	National Law	Bilateral Treaties	Multilateral Treaties	Regulation 1206/2001
Hearing of Witnesses by Mutual Legal Assistance (Legal Aid)	(Articles 733 to 735 CPC) The judge may give letters of request (*commissions rogatoires*) either to a competent judicial authority in the State concerned or to French diplomatic or consular authorities. The clerk of the commissioning court transmits to the public prosecutor a certified copy of the decision that gives letters of request, together with a translation done upon the request of the parties. The public prosecutor immediately transmits the letters to the Minister of Justice for the purpose of transmission, unless by virtue of a Treaty the transmission may be effected directly to the foreign authority.	Irrelevant (see § 10)	Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters: The court transmits the letter of request to the Central Authority of the requested State which forwards the letter to the Competent Authority in its country for execution. The law of the requested State applies to the execution of the letter of request. The requesting authority may also request the use of a special method or procedure for execution of the letter of request, provided that this is not incompatible with the law of the State addressed or impossible to perform.	The request is directly transmitted by the requesting court to the competent requested one. The hearing is conducted by the requested court in accordance with the law of its Member State.
Hearing of Witnesses by Video-conferencing with Direct Asking of Questions	No provision on this matter in the CPC. Though courts are equipped with videoconference facilities, it seems little used in international taking of evidence.	Id.	Id.	Possible according to article 10, encouraged by article 17.

Direct Hearing of Witnesses by Requesting Court in Requested Country	Most likely through the intervention of French diplomatic or consular authorities.	Id.	Possible subject to article 8 ("A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorisation by the competent authority designated by the declaring State may be required.")	Possible according to articles 12 and 17.

Legal Regulation / Means of Taking Evidence	**National Law**	**Bilateral Treaties**	**Multilateral Treaties**	**Regulation 1206/2001**
Hearing of Witnesses by Mutual Legal Assistance (Legal Aid)	(Articles 736 to 748 CPC) The letters of request are implemented in accordance with French law unless the foreign court has requested that it should be implemented in a particular manner. Where so requested in the letters, the questions and answers are transcribed or recorded in full (739). The parties and their representatives, even where they are aliens, may, on leave of the judge, ask questions; the questions must be asked in or translated into French (740).	Irrelevant (see § 10)	See above. The French Government has declared under article 33 that in pursuance of Article 4 § 2, it will execute letters of request only if they are in French or if they are accompanied by a translation into French.	See above.
Hearing of Witnesses by Video-conferencing with Direct Asking of	See above.	Id.	See above.	Id.

Questions				
Direct Hearing of Witnesses by Requesting Court in Requested Country	Article 741 CPC sets out that, upon request, the requested judge informs the requesting one of the venue, date and time at which the implementation of the letters of request will be carried out; the foreign requesting judge may attend the same. No further precision is provided about the exact role of the requesting judge in such circumstances.	Id.	See above. France has made no declaration under article 8.	Id.

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