# Questionnaire for national reports

## SIMPLIFIED DEBT COLLECTION PROCEDURES IN FRENCH LAW

WARNING

The answers given thereafter take into account the *loi n° 2011-1862 du 13 décembre 2011*, which will enter into force on 1st January 2013 and modifies various provisions of both the *Code de procedure civile* and the *Code de l'organisation judiciaire*.

### I. Introduction - main features of the national summary procedures for recovery of monetary claims (general overview)

1.1 Types of litigation: overview over the different possibilities to gain a judgment in judicial proceedings. Shortly describe the summary procedures in your country (simplified and accelerated procedures) and other possibilities for judicial collection of debts. Present any special rules for certain type of claims (e.g. consumer disputes, bills of exchange etc.).

Globally, the judicial recovery of monetary claims has decreased in the last twenty years. This is due not only to a better prevention of non-payment in certain fields, but also to a strong tendency to have recourse to out-of-court solutions[1].

Nonetheless, the volume of judicial litigation remains important. This is true, especially, for simplified debt collection procedures. For example, according to the statistics of the Ministry of justice, in 2008, up to 632 545 *procédures d'injonction de payer* (order for payment procedures) took place in civil matters.

Certainly, the order for payment procedure is one of the commonest and most successful simplified procedures conducted before French courts. Yet, many others exist. The most important are the following:

- The *procédure de référé* is the ordinary urgent procedure, ruled by Articles 484 ff. of the *Code de procédure civile* (Code of civil procedure, hereinafter CPC). It has been extended to various jurisdictions, among which (the president of) the *tribunal de grande instance*

[1] See P. Ancel (dir.), L'évolution du contentieux de l'impayé : éviction ou déplacement du rôle du juge ?, CERCRID (2009) ; B. Thuillier, L. Sinopoli and F. Leplat (dir.), La prise en charge de l'impayé contractuel en matière civile et commerciale, CEDCACE-CRIJE (2010).

(regional court)[2], the *tribunal d'instance* (district court)[3] and (the president of) the *tribunal de commerce* (commercial court)[4]. It is an oral, adversarial, procedure that enables the president of a court to take a provisional decision that does not have the force of res judicata[5]. The judge does not decide on the merits of a case; he orders immediately enforceable measures to safeguard the interests of the claimant. Yet, his powers are rather extensive and many different kinds of *référés* exist in practice, some of which are justified by urgency, others by the absence of serious contestation. In particular, in the context of debt collection, the *référé-provision* enables a judge to grant the creditor an advance (*provision*) on his claim "when the existence of the claim is not seriously disputable"[6], regardless of the urgency of the situation[7]. The *référé-provision* is a very popular procedure, not least because the *Cour de cassation* admits that the only limit to the advance that the court may grant is the amount of the alleged claim against which there is no serious objection[8]: as a consequence, the advance may correspond to the entire debt[9]. This makes the *référé-provision* particularly attractive: it "has, in court practice, particularly in commercial cases, become the ordinary law means of collecting debts, when the debtor cannot put forward any serious argument against the application submitted against him or her"[10].

- The *déclaration au greffe* or *saisine simplifiée* procedure is ruled by Articles 843 and 844 of the *Code de procédure civile*[11]. It is a procedure available for small claims – less than EUR 4,000 – whatever their object, well-adapted for consumer litigation. The *déclaration au greffe* is a simplified way of introducing the procedure. The *tribunal d'instance* is seised by a mere declaration to the office of the court (*greffe* – hence its name). No representation by a lawyer is necessary. On this procedure see infra, IV.

- For unpaid cheques, an accelerated procedure is set forth by Article L 131-73 of the *Code monétaire et financier* (monetary and financial Code). Whatever the amount of the unpaid cheque, the creditor must not have recourse to a tribunal. After obtaining a certificate of non payment from his bank, he can directly apply for an order for payment issued and served by a

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[2] CPC, Art. 808 ff.
[3] CPC, Art. 848 ff.
[4] CPC, Art. 872 ff.
[5] CPC, Art. 488.
[6] CPC, Art. 809, 849 and 873.
[7] This is an exception to the ordinary rules governing the *référé* procedure, repeatedly reminded by the *Cour de cassation*, e.g. Cass. soc., 29 mai 2002, n° 00-42101.
[8] Cass. com., 20 janv. 1981, *Bull. civ. IV*, n° 40; Cass. com., 22 juill. 1986, *Bull. civ. IV*, n° 185.
[9] Cass. 3e civ. 17 juin 1998, *Bull. civ. III, no 128*.
[10] A. LACABARATS, 'Early settlement of disputes: urgent procedure in French Law', Proceedings of the 1st European Conference Of Judges "Early settlement of disputes and the role of judges", organised by the Council of Europe (2004) p. 33.
[11] As modified by the Décret n°2010-1165 du 1er octobre 2010.

*huissier de justice* (≈ bailiff / judicial officer). If the cheque is not paid within 15 days, that same *huissier* issues an enforcement order.

- The *procédure d'injonction de faire* (order for performance procedure) is available for contractual non-monetary claims, when not all the parties to the contract are merchants. It is ruled by Articles 1425-1 ff. of the *Code de procédure civile*. This procedure has met with little success as compared to the order for payment procedure.

1.2 Explain the current state of IT operational options in judicial procedures for recovery of monetary debts. Can the actions in general be filed electronically (please explain under points II. and IV. below the details about potential electronic submission of the application for national order for payment or small claims procedure)? Is there available an e-service of judicial documents? Is electronic communication between parties and the court mandatory or just optional? How often do parties use e-tools in judicial proceedings?

Although electronic data processing is commonly used in the courts, it is primarily a tool for internal management of the cases (registration, monitoring …). Only recently it has become a communication tool between the courts and the parties[12].

A major step was taken in 2005, with the *décret n° 2005-1678 du 28 décembre 2005*, which inserted in the *Code de procédure civile* a new section entitled "*La communication par voie électronique*" (communication by electronic means). According to the new Article 748-1 CPC, various documents relating to the proceedings (pleadings, supporting documents, warnings, summons, minutes, etc.) may be communicated by electronic means, provided that their recipient has expressly agreed to it or any specific provision requires such communication means (Art. 748-2 CPC). These electronic communications take place within the framework of two secure virtual networks: the *réseau privé virtuel justice* (RPJV), accessible to judges and employees of the courts, and the *réseau privé virtuel avocat* (RPVA[13]), accessible to subscribing lawyers and connected to the RPJV.

So far, however, electronic communications ruled by Article 748-1 ff. CPC have been experimented or applied only to the *tribunaux de grande instance*, the *cours d'appel* and the *Cour de cassation*. They are not effective to day within the *tribunaux d'instance*, which deal with orders for payment in civil matters and with the national small claims procedure.

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[12] See Th. Piette-Coudol, 'Le recours aux moyens électroniques dans la procédure civile, pénale et administrative', Communication commerce électronique (11/2009) p. 10 ; H. Croze, 'Les actes de procédure civile et les nouvelles technologies', Procédures (4/2010) p. 17 ; M.-Ch. de Lambertye-Autrand, 'Regard européen sur l'introduction des nouvelles technologies dans le procès civil', Procédures (4/2010) p. 30.

[13] Web portal of the RPVA: www.ebarreau.fr.

Very recently[14], an application named "IP WEB"[15] was installed within the *tribunaux d'instance*. It enables electronic recording and transmission of all the data related to the orders as between the courts and the *huissiers de justice* who are in charge of the service and enforcement of orders. In the years to come, IP WEB will also provide statistics on the orders for payment.

As far as the *tribunaux de commerce* are concerned, they have developed their own electronic device for dealing with orders for payment (*cf. infra*, 2.3.e).

## II. National order for payment procedure

The French *procédure d'injonction de payer* (order for payment procedure) was created in 1937[16]. After several amendments, it is now dealt with in the *Code de procédure civile*, at Articles 1405 to 1424.

### 2.1. Scope of the procedure

a) What types of claims are eligible (e.g. only monetary claims, only contractual claims etc.)?

Initially, the order for payment procedure dealt only with collection of small commercial claims (thus, it was first called procedure of '*recouvrement simplifié pour les petites créances commerciales*'). The reason was that such claims were not well recovered because of the cost and complexity of ordinary procedures.

The order for payment procedure has been later extended to civil claims. Today, according to Article 1405 CPC, two categories of claims can be recovered through the order for payment procedure:

- Contractual claims or claims based on statutory obligations (e.g. contributions to social insurance or debts arising from joint ownership[17]). In both cases, the amount of the claim must be determined. If the claim is contractual, the amount is determined according to the terms of the contract, including any penalty clause. The order for payment procedure is not available for a claim arising from a liability in tort.
- Claims arising from several negotiable instruments: bills of exchange, promissory notes and assignments of commercial claims according to the *Loi n° 81-1 du 2 janvier 1981 facilitant le crédit aux entreprises*. The order for payment procedure is not

[14] Arrêté du 3 mars 2011 (JO 12 avr. 2011).
[15] "IP" is for "*Injonction de Payer*", order for payment.
[16] Décret-loi du 25 août 1937.
[17] Décret n° 67-223 du 17 mars 1967, Art. 60.

available for unpaid cheques: a specific simplified procedure is applicable to them, provided for at Article L 131-73 of the *Code monétaire et financier*.

A specific order for payment procedure is set forth by the *Code du travail* (labour Code) for the reimbursement of unemployment benefits following an unfair dismissal (Art. R 1235-1 ff.).

For contractual non-monetary claims, the creditor may have recourse to an *injonction de faire* (order for performance – *supra,* 1.1).

b) Is there an upper limit regarding the value of the claim (e.g. in Austria up to 75.000 EUR)?

Not anymore. When the procedure was created in 1937, a rather low upper limit was laid down: 1,500 old francs. It was then raised several times, reaching 250,000 old francs in 1953, and finally abandoned in 1972.

c) Is the use of order for payment procedure optional or obligatory?

The use of order for payment procedure is optional. If the creditor chooses the order for payment procedure and his application is rejected, this does not preclude him to have recourse to an ordinary procedure (Art. 1409 al. 2 CPC).

d) Is the procedure available if the defendant lives in another Member State or in a third country - is the national order for payment procedure possible in cross-border cases?

Until 1981, the applicable provisions stated that no order for payment could be issued if it had to be served abroad or if the defendant had no identified domicile or residence in France. These requirements no longer appear in the *Code de procédure civile* which only states (Art. 1406 al. 2) that the competent court is that of the place where the debtor, or one of the debtors, live.

There is some controversy as to the consequences of the new wording. While there is no doubt concerning the availability of the procedure when the debtor is domiciled abroad but has a residence in France, it is uncertain whether an order can be granted when the debtor has no residence or domicile in France or when the order has to be served abroad[18]. Yet, a large majority of scholars consider that the procedure should be excluded in such circumstances.

However, the French procedure remains of course available for a foreign creditor against a debtor established or domiciled in France.

[18] See C. Brahic-Lambrey, Rép. pr. Civ. Dalloz voc. 'Injonction de payer' (2009).

e) Is it one-step procedure (like according to Regulation 1896/2006) or two-step procedure (like in Germany having *Zahlungsbefehl* und *Vollstreckungsbescheid)?*

It is a one-step procedure: once the deadline for opposition to the order has passed, no other judicial decision is necessary. The creditor only needs an enforcement clause to be affixed on the order (*cf. infra*, 2.7).

f) Rules on representation by a lawyer.

Representation by a lawyer is not compulsory (see infra, 2.3.b).

2.2. Competent court. Are there applicable general rules on subject matter and local jurisdiction or is there only one court or body authorized to issue national order for payment? Discuss the advantages and disadvantages of your national rules on jurisdiction.

According to the subject matter and the amount of the claim, three different courts may have jurisdiction (Art. 1406 CPC):

- The *tribunaux d'instance* have jurisdiction in civil matters, up to EUR 10,000.They also have jurisdiction, no matter the amount, in specific matters, e.g. leases or consumer credit.
- The *tribunaux de grande instance* have jurisdiction in civil matters for claims higher than EUR 10,000 and where the *tribunaux d'instance* have no specific jurisdiction.
- The presidents of the *tribunaux de commerce* have jurisdiction in commercial matters.

As a rule, the competent court is that of the place where the debtor, or one of the debtors, live (Art. 1406 al. 2 CPC). There is an exception for joint ownership cases, where the court of the place where the real estate is located has jurisdiction[19].

Note that all these rules are mandatory. As a consequence, any stipulation to the contrary would be void and the court should declare *sua sponte* that it has no jurisdiction (Art. 1406 al. 3 CPC). This is true not only for territorial jurisdiction, but also for jurisdiction *ratione materiae.*

2.3. Application for an order for payment - formal requirements:

a) Are there provided any standardised forms for application for an order for payment? If so, is the use of a standardised form obligatory and where can that form be obtained? Please describe the content of the standard form.

[19] Décret n° 67-223 du 17 mars 1967, Art. 60.

Different forms exist, one for each court that can deliver an order for payment.
These forms are available on the French Administration's website[20] and from the offices of the courts concerned. They are very short (less than two pages) and contain the data required for a valid application under Articles 58 and 1407 CPC (*infra*, c).
The use of these forms is not compulsory.

b) Is it necessary to be represented by a lawyer?
Representation is not obligatory. According to Article 1407 al. 1 CPC, the application may be submitted either by the creditor himself or by any representative (*mandataire*). It has been decided that, among others, a *huissier de justice* is able to represent the creditor (but he can not represent him anymore in the opposition proceedings)[21].

c) Must the reasons for the claim be described in detail?
Since the application is a *requête* (i.e. a referral to a court where the opposite party has not been previously summoned), it must contain all the information listed in Art. 58 CPC for any kind of *requête*: identification of the applicant (for natural persons: name, surname, profession, etc.; for legal entities: form, company name and head office); identification of the debtor; object of the application.
It must further specify, as a particular type of *requête*, the amount and all the elements of the sum claimed, as well as the grounds for it (Art. 1407 CPC).

d) Must written evidence be presented in respect of the claims asserted? If so, which documents are admissible as proof (e.g. invoice, bill of exchange etc.) and in what kind of form (written, online, other)?
Article 1407 of the Code of civil procedure only states that the application must be accompanied by the documents supporting his claim. There is no precision as to the kind or the form of these documents. It is admitted that any type of document (contract, invoice, etc.) is admissible as long as it is likely to ascertain the claim (subject to appreciation of the courts: *cf. infra*, 2.4).

e) Can the application be filed electronically? If so, please describe the procedure.

[20] http://vosdroits.service-public.fr/particuliers/F1746.xhtml?VUE=self.
[21] Cass. 2ème civ., 5 nov. 1975, *RTDCiv* 1965 p. 204, obs. Perrot.

In 2006, the offices of the *tribunaux de commerce* created an online service for the registration of applications, available on their common website *infogreffe*[22]. The user can fill the form online; add the digitized documents supporting his claim; sign the form by way of an electronic certificate; pay online the cost of the application.

As to the other courts, there is still no possibility to file an application online.

2.4. Issue of the order for payment

a) Specific rules for dealing with submitted application for order for payment and issuing the court decision. The extent of the examination of the claim by the court.

and

b) The decision of the court on the payment order.

According to Article 1409 CPC, the claim is examined by the court 'on the basis of the documents produced'. The court has the power – and the duty[23] – to appreciate the documents submitted and to decide whether, on the basis of these documents, the application "seems" well-founded. In other words, the court relies on the mere plausibility of the claim[24].

If the claim does not seem well-founded, the court rejects the application.

If it seems well-founded, the court issues an order for payment. It can also consider that the claim is only partially founded and therefore deliver an order to pay the amount retained (Art. 1409 CPC). In such case, i.e. when the creditor obtains an order for a lower amount than requested, he has no appeal but he can decide not to serve the order and start an ordinary procedure in order to obtain a more favorable decision (Art. 1409 al. 3 CPC).

In any case, the order needs not to be substantiated[25]. However, it has been noted that judges, according to their 'habits', often substantiate their decisions when they reject the application[26].

c) Information of the defendant on his procedural rights and obligations along with the decision: are there any legal instructions or guidelines to submit the application? If so please explain the content of the legal instructions (*Rechtsbelehrung*) on the order for payment.

The task to inform the defendant on his procedural rights is in practice devoted to the *huissier de justice* who serves the order (see d below). The need to properly inform and warn the

[22] http://www.infogreffe.fr/infogreffe/injonctionDePayer.do?direct=true.

[23] See S. Guinchard, C. Chainais and F. Ferrand, Procédure civile. Droit interne et droit de l'union européenne (Dalloz 2010), n° 2219.

[24] See P. Estoup, La pratique des procédures rapides (Litec 1998) n° 386.

[25] Cass. 2ème civ., 16 mai 1990, n° 88-20377, *Bull. civ. II*, n° 103.

[26] Estoup *supra* n. 25, n° 391.

defendant is precisely the reason why the possibility to serve the order by way of a registered letter was abandoned in 1981[27].

d) Service of the order for payment on the defendant.

Service of the order is completed on initiative of the creditor. A certified copy of the order must be served by a *huissier de justice* on every debtor within six months, failing which the order is lapsed (Art. 1411 CPC).

General rules on service are laid down at Articles 653 ff. of the *Code de procédure civile*. In principle, according to Article 654, the recipient must receive personal service (*signification à personne*). It is only when personal service is impossible that service can be made at his domicile or residence (Art. 655 CPC).

The legal formalism imposed on service of an order for payment is constraining (Art. 1413 CPC). Service is null unless it contains:

- the information required for any service by a *huissier de justice*: date and identification of the claimant, the *huissier* and the recipient;
- notice to the debtor that he must either pay to the creditor the sum set by the court decision along with interests and charges or, if he has any defence, lodge an opposition to the order for payment;
- indication of the time limit for such an opposition as well as the competent court and the formalities required;
- notice to the debtor that the documents produced by the creditor can be consulted at the office of the court and that failing an opposition in the time limit he will have no appeal and any legal proceeding will be available to the creditor to enforce his claim.

If the debtor receives personal service, he must also be given all this information verbally (Art. 1414 CPC).

2.5. Rejection of the application:

a) On which grounds? Is there a prima facie examination of a claim?

See 2.4 above.

b) Does the creditor have an appeal against it?

[27] Décret n° 81-500 du 12 mai 1981.

If the application is rejected, the creditor has no appeal against the court decision. However, ordinary procedures remain open to him (Art. 1409 al. 2 CPC).

2.6. Opposition by the defendant (objection against order for payment) – prerequisites and procedure, especially:

a) Procedural rules: e.g. form (paper or electronic form), representation by a lawyer, deadline, court fees etc.? As to the deadline for the objection against the order for payment, please discuss arguments for shorter or longer term.

The statement of opposition must be lodged within one month following service of the order. Yet, when the debtor did not receive personal service (*signification à personne*), i.e. when the service was made at his domicile or at his residence, the time limit runs from the date of the first document served personally (e.g. a *commandement de payer* delivered by a *huissier* before initiating enforcement proceedings) or from the date of the first measure of enforcement on the debtor's property (Art. 1416 al. 2 CPC). Since the time-limit for applying for an enforcement clause runs from the date of service (*infra*, 2.7.c), this means that in some instances opposition will be available after the order has become enforceable[28].

According to Article 1415 CPC, the statement is made to the office of the court that issued the order for payment (the office of the *tribunal de commerce* if the order was issued by its president). A model letter for opposition is available on the website of the Ministry of Economy[29].

Representation by a lawyer is governed by the procedural rules applicable to the court before which opposition is lodged.

b) Does the objection against order for payment have to be substantiated or not (e.g. Article 16 (3) Regulation No. 1896/2006). If so, which are the most frequent reasons for successful objection?

Since opposition is the only defence available to the debtor, it is considered that it must be a largely open procedure. As a consequence, the statement of opposition does not have to be substantiated. However, the statement must make it clear that the debtor lodges an opposition to the order: this is not the case, for instance, if the debtor only asks for an extension of the payment deadline[30].

[28] Cass. 1ère civ., 24 nov. 1998, n° 96-22782, *Bull. civ. I*, n° 330.
[29] http://www.economie.gouv.fr/directions_services/dgccrf/documentation/fiches_pratiques/fiches/e04.htm.
[30] Cass. com., 23 juin 1982, n° 81-12411, *Bull. civ. IV*, n° 247.

Although the statement needs not to be substantiated, the model letter provided by the website of the Ministry of Economy provides for a motivation of the opposition. Many defences are available to the debtor, such as the absence of claim, the non-contractual nature of the claim, formal irregularity of the order, etc.

c) Effect of notice of opposition. If the objection is allowed, does the court revoke (annuls) order for payment, does the order for payment lose its effect *ex lege* or does the court uphold the order for payment and decides about its destiny with judgment in the subsequent litigation?

See d) below.

d) The nature and structure of the procedure following the successful objection filed against order for payment.

Upon opposition, the procedure is converted automatically into an ordinary, *inter partes*, procedure. The order for payment itself is considered as void and will not have the force of *res judicata*[31]. The court that issued the order is seised of the whole claim, i.e. the initial application and all incidental applications and defence on the merits (Art. 1417 CPC). However, this is subject to:

- The fact that this court has jurisdiction only within the limits of its competence *ratione materiae*. This means that if a *tribunal d'instance* has issued an order for an amount over his monetary competence (EUR 10,000[32]), it is the *tribunal de grande instance* that is competent to hear the opposition[33].
- The possibility given to the creditor, in his application, to demand that, upon opposition, the case be referred to the court he deems competent (Art. 1408).

The office of the court summons to the hearing all the parties, including those who did not lodge an opposition (Art. 1418 CPC). The letter of summons is null unless it contains various information listed in Article 1418: date of the letter, indication of the court to which the opposition is referred, date of the hearings, conditions in which the parties can be assisted or represented. Notice must also be given to the defender that if he does not appear, the court may pronounce a judgment based on the sole information provided by his opponent.

[31] S. Guinchard, C. Chainais and F. Ferrand, Procédure civile. Droit interne et droit de l'union européenne (Dalloz 2010), n° 2228.
[32] Article L 221-4 of the *Code de l'organisation judiciaire*.
[33] Cass. 2ème civ., 9 févr. 1994, n° 92-16687, *Bull. civ. II*, n° 54.

If none of the parties appear, the court takes notice of the extinction of the proceedings, as a consequence of which the order for payment lapses (Art. 1419 CPC). If only one party does not appear, it is usually considered that ordinary rules for default judgments apply[34]. Nothing is said about the default of only one party.

According to common law, the creditor must prove his claim and the amount of it[35].

The judgment concluding such ordinary procedure – either by rejecting the opposition or by invalidating the order – replaces the order for payment (Art. 1420 CPC[36]). It acquires the force of *res judicata* (of which the order itself is therefore deprived) and is enforceable. It is subject to appeal according to ordinary rules i.e., depending on the amount of the claim, before a *cour d'appel* or only before the *Cour de cassation* (Art. 1421 CPC).

2.7. Effects of the absence of timely opposition.

a) What is the consequence, if the objection is not filed? Does that mean that defendant only admits facts or recognizes the justification of the claim?

See c) below.

b) What needs to be done in order to obtain an enforceable judgment? Does the court issue a certificate or declaration of enforceability (*Vollstreckbarkeitsbestätigung*), similar to one that is foreseen in Article 18 Regulation 1896/2006? If so, does it do it on application or on its own motion? Do there exist any legal remedies against the certificate or declaration of enforceability?

See c) below.

c) Effects of order for payment - is it only enforceable or also final (*rechtskräftig*)? Is it still possible to appeal against this decision?

The *Cour de cassation* considers that an order for payment is not a plain judgment (*decision de justice*) until the time limit for opposition has run out[37]. It has been said that it is only a virtual or a conditional judgment until then[38].

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[34] ,Art. 467 ff. CPC.
[35] Cass. 2ème civ., 23 oct. 1991, n° 90-15529, *Bull. civ.* II, n° 272.
[36] As a consequence, where an appeal is lodged against the judgment rendered upon opposition, the *cour d'appel* can not confirm the order itself: Cass. 1ère civ., 13 mai 2003, n° 00-20146, *Bull. civ. I*, n° 115.
[37] Cass. 2ème civ., 13 sept. 2007, n° 06-14730, *Bull. civ.* II, n° 218.
[38] S. Guinchard, C. Chainais and F. Ferrand, Procédure civile. Droit interne et droit de l'union européenne (Dalloz 2010), n° 2222.

In the absence of opposition within one month after service of the order, Article 1422 CPC provides that, no matter the form or the service (i.e. personal or not), the creditor is entitled to apply for a *formule exécutoire* (enforcement clause) to be affixed on the order[39]. Such application can also be made if the debtor has withdrawn his opposition (*ibid.*).
The request for a *formule exécutoire* can be made either by declaration or by an ordinary letter addressed to the office of the court (Art. 1423 al. 1 CPC). It must be made within one month after expiry of the time limit for submitting the statement of opposition, failing which the order lapses (Art. 1423 al. 2 CPC). It is therefore the office – not the judge – which affixes itself the *formule* and checks if the conditions thereto are fulfilled. Until 1981[40], the judge could control that service had been properly rendered or that the debtor had really withdrawn his opposition: this is no more the case.

The *formule exécutoire* – which writing is the same for any enforceable act or decision[41] – orders to all the *huissiers de justice* to enforce the order with the help of enforcement officials. The *formule exécutoire* confers on the order all the effects of a *jugement contradictoire* (judgment after trial, inter partes). It is not subject to appeal (Art. 1422 al. 2 CPC). Only formal regularity of the *formule exécutoire* or the conditions in which it was affixed by the office of the court may be contested, by means of an appeal (*pourvoi*) to the *Cour de cassation*[42].

2.8. Costs of procedure.
The order for payment procedure is rather inexpensive.

First of all, the cost of representation by a lawyer – not compulsory – may easily be avoided. The use of the forms provided for application is simple enough to make the help of a lawyer unnecessary.

As to the proceedings, a distinction must be made between civil courts (*tribunaux d'instance* and *tribunaux de grande instance*) and commercial courts.

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[39] The *Cour de cassation* has, at least once, admitted that the creditor can request in advance that, failing opposition in the time limit, the court office affix the *formule exécutoire* (Cass. 2ème civ., 23 janv. 1991, 89-18747, *Bull. civ.* II, n° 27). But this decision has been criticized by some authors.
[40] Décret n° 81-500 du 12 mai 1981.
[41] The text of the *formule* was set out by the *Décret n°47-1047 du 12 juin 1947 relatif à la formule exécutoire*.
[42] Cass. 2ème civ., 29 nov. 1995, n° 93-15860, *Bull. civ.* II, n° 292.

As long as civil courts are concerned, the principle used to be that proceedings were free (*principe de gratuité de la justice*[43]). The judges, as well as the employees of the offices of the courts, are public servants remunerated by the Ministry of Justice. As a consequence, not only the application itself, but all the subsequent proceedings before the court were free of charge. By way of exception, Article 695 CPC provided a list of procedural and enforcement costs (*dépens*) that might be incurred under specific circumstances (translation where necessary, expenses of witnesses, service of a procedural document in a foreign country …). Note that in principle the losing party had to reimburse these costs[44]. A 2011 Act[45] created a new fee that every claimant has to pay in non-criminal cases. This fee, which amount is EUR 35, is intended to fund legal aid. Beneficiaries of legal aid must not pay this fee. A new Article 1424-16 CPC states that in orders for payment proceedings, this fee must be paid at the moment when the claimant applies for the *formule exécutoire* (or, in case of a European order for payment, when a copy of the notice is addressed to the court).

As concerns commercial courts, , the *greffes des tribunaux* (offices of the courts) are private entities in charge of a public service and receive a compensation (*émoluments*) paid by the parties. For an application to the president of the tribunal de commerce, the cost is about EUR 38. Lodging an opposition before the tribunal de commerce and obtaining a judgment upon opposition costs about EUR 100. The costs of the procedure before the *tribunal de commerce* are dealt with at Article 1425 CPC. According to this article, the costs of the procedure are advanced by the creditor and deposited (*consignés*) at the office of the tribunal no later that 15 days after the application, failing which the application lapses. Opposition is received at no cost by the office of the court, which immediately invites the creditor to deposit the costs of opposition within 15 days, failing which his application lapses. Naturally, the creditor will recover these costs if the opposition is rejected.

The only cost that can not be avoided concerns the service of the order by a *huissier de justice*. However, the fees of the *huissiers* are strictly regulated[46] and rather low. Subject to various adjustments (postal costs, VAT, transport cost), the base rate varies from EUR 13,20 to EUR 52,80 according to the amount of the claim. Under Articles 695 and 696 CPC, these costs must in principle be reimbursed by the debtor if he loses the case.

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[43] See N. Cayrol, 'La répartition des frais en procédure civile française'.
[44] Art. 696 CPC.
[45] Loi n° 2011-900 du 29 juillet 2011. See also Décret n° 2011-1202 du 28 septembre 2011.
[46] Décret n°96-1080 du 12 décembre 1996 portant fixation du tarif des huissiers de justice en matière civile et commerciale.

2.9. Enforcement of the national order for payment domestically and abroad. Describe main difficulties of cross-border enforcement on the ground of your national payment order.

Enforcement (called, as a specific branch of French law, *voies d'exécution*) used to be ruled by a 1991 Act that had been modified several[47]. In December 2011[48] this Act was repealed and replaced by a new *Code des procédures civiles d'exécution* which entered into force on 1st June 2012 (hereinafter CPCE).

Article L 111-2 CPCE authorizes enforcement when the creditor has obtained a *titre exécutoire* (enforcement order), for example a judgment (Art. L 111-3). It must be recalled that, in the absence of timely opposition, the *formule exécutoire* confers on the order all the effects of an ordinary judgment (*supra*, 2.7).

The office of the court delivers an enforceable copy (*copie exécutoire*[49]) of the enforcement order with the *formule exécutoire.* In possession of this copy, the creditor can resort to a *huissier de justice,* to whom Article L 122-1 CPCE entrusts enforcement. Before initiating enforcement proceedings, the *huissier* must serve the order on the debtor[50].

Concerning cross-border-enforcement, since the *formule exécutoire* confers on the order all the effects of a *jugement contradictoire*, it is usually admitted that once a French order for payment has been issued[51], it should be enforced abroad without major difficulties[52]. Reference is made to *Klomps v Michel*[53] and *Hengst Import BV v Campese*[54]. In these cases, the Court of Justice decided that a national order for payment complies with Article 34(2) of Regulation 44/2001 (ex-Article 27(2) of the 1968 Brussels Convention), and should therefore be enforced in another member state, provided that the order was duly served on the debtor and that the debtor had the possibility to lodge an opposition. The same position had been previously adopted by the *Cour de cassation*[55].

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[47] *Loi n° 91-650 du 9 juillet 1991*. Recently, the *Loi n° 2010-1609 du 22 décembre 2010* has authorized the Government to adopt by way of an *ordonnance* the legislative part of a new *Code des procédures civiles d'exécution*, i.e. a Code of enforcement.

[48] Ordonnance n° 2011-1895 du 19 décembre 2011 relative à la partie législative du code des procédures civiles d'exécution. The regulatory part of the code was adopted only in May 2012 (Décret n° 2012-783 du 30 mai 2012).

[49] Art. 465 CPC.

[50] Art. 503 CPC.

[51] On the difficulty to issue an order when the defendant has in France no residence or domicile, *cf. supra* 2.1.d.

[52] See for instance J. Miguet and L. Camensuli-Feuillard, Juris-Classeur de droit civil. Fasc. 990. Procédure d'injonction de payer (Lexis Nexis 2009) n° 52; M. Lopez de Tejada and L. d'Avout, 'Les non-dits de la procédure européenne d'injonction de payer', RCDIP (2007) p. 717.

[53] *Klomps v Michel* (C-166/80) [1981] ECR 1593.

[54] *Hengst Import BV v Campese* (C-474/93) [1995] ECR 1-2113

[55] Cass. 1ère civ., 10 mars 1981, n° 79-14220, *Bull. civ. I*, n° 84.

The only real difficulty pointed out by the French doctrine and case-law relates to foreign orders for payment provisionally enforceable, i.e. before service on the debtor. In fact, the *Cour de cassation* refused to recognise such an order[56]. It is sometimes argued that it is only for those situations that a European instrument would have been justified[57].

Obviously, the question has evolved since the adoption of Regulation 805/2004 on a European Enforcement Order for uncontested claims. An *injonction de payer* that was properly served on the debtor and faced no opposition from him can be certified as a European enforcement order[58].

2.10. Comparison between national and EU order for payment procedure (differences and similarities) and final critical evaluation of the national order for payment procedure.

The main difference between French and EU order for payment procedure lays in the prerogatives of the court as to the assessment of the application.

The role of the judge is jurisdictional under French law, in that the judge is entitled to appreciate the merits of the claim on the basis of the documents submitted by the applicant[59]. In the words of the Commission[60], France has adopted the "evidence" model.

In contrast, the intervention of the judge is rather administrative under EU law, closer to the "no-evidence" model. However, the judge must examine, on the basis of the application form – and therefore on the basis of the "description of evidence supporting the claim" – whether the claim appears to be founded (Art. 8 Regulation 1896/2006). The option retained is therefore intermediate – some have called it a "strange cultural mix"[61].

A technical consequence of the above is that the use of forms is much more extensive under EU law than under French law. This makes the entire EU procedure more straightforward that the domestic one.

## III. Implementation of Order for Payment Procedure Regulation (1896/2006) in Member States

[56] Cass. 1ère civ., 18 mai 1994, n° 92-19126, *Bull. civ. I*, n° 176.
[57] M. Lopez de Tejada and L. d' Avout, supra n. 51.
[58] *Ibid.* and C. Crifò, Cross-Border Enforcement of Debts in the European Union, Default Judgments, Summary Judgments and Orders for Payment (Wolters Kluwer 2009), p. 211.
[59] See S. Guinchard, C. Chainais and F. Ferrand, Procédure civile. Droit interne et droit de l'union européenne (Dalloz 2010), n° 2219, 2232.
[60] Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation, pt. 3.1.1.
[61] E. Jeuland, Droit processuel (LGDJ 2007), p. 568.

The European Order for Payment, "*injonction de payer européenne*", was inserted in the *Code de procédure civile* at Articles 1424-1 ff. by the *Décret n° 2008-1346 du 17 décembre 2008*. Since the Regulation 1896/2006 is directly applicable in domestic law, the provisions contained in the *Code* are only adaptation and coordination ones. Thus, they are quite minimalist and make little sense if not read alongside the Regulation itself.

Another difficulty for understanding the implementation of Regulation 1896/2006 in France lies in the information communicated by France in accordance with Article 29 of the Regulation and available on the European Judicial Atlas in Civil Maters. In fact, part of the information provided is (or was at that time) inaccurate or inconsistent with other official documents (among which a circular issued by the Ministry of justice in May 2009[62]), as we will see in the next paragraphs.

3.1 Competent court (subject matter, local jurisdiction). Which courts have jurisdiction to issue a European order for payment? Is only one court competent (centralised system like in Austria and Germany: das Bezirksgericht für Handelssachen Wien; das Amtsgericht Berlin-Wedding) or is there a decentralised system in force?

Recital 12 states: "When deciding which courts are to have jurisdiction to issue a European order for payment, Member States should take due account of the need to ensure access to justice". In how far did your country take into account that notion?

Although some proposals were made to relieve the judges from the burden of issuing orders for payment and therefore to delegate this task to the offices of the courts[63], the legal community remains in its majority committed to the intervention of a judge. The only real question that had to be dealt with was: what courts shall have jurisdiction to issue a European order for payment?

In the information communicated in accordance with Article 29 of Regulation 1896/2006, France stated that jurisdiction to issue a European order for payment lies with the *tribunal d'instance* and – within the limits of its competence *ratione materiae* – the president of the *tribunal de commerce*. Yet, this declaration was inconsistent not only with general principles of jurisdiction in French law, but also with the 2009 circular[64]. Not only did such

[62] Circulaire de la DACS C3 06-09 du 26 mai 2009 relative à l'application du règlement (CE) no 1896/2006 du Parlement européen et du Conseil du 12 décembre 2006 instituant une procédure européenne d'injonction de payer, BOMJ 30 août 2009.

[63] See S. Guinchard, L'ambition raisonnée d'une justice apaisée, Report to the Ministry of justice (La documentation française 2007), p. 81 ff. ; X. Lagarde, 'Réformer l'injonction de payer. Défense d'une proposition', JCP G (2008) I 165.

[64] Supra n. 61.

inconsistency cause great difficulties to claimants – especially foreign claimants – but there was also a risk that the Commission might bring an action against France for failure to fulfill its obligations under Article 29[65].

Fortunately, the *loi n° 2011-1862 du 13 décembre 2011* brought the *Code de l'organisation judiciaire* and the *Code de commerce* in line with the declaration under article 29. New articles L 221-7 COJ and L 722-3-1 C. com. (both in force on 1st January 2013) give jurisdiction to the *tribunal d'instance* and the president of the *tribunal de commerce* (within the limits of the competence *ratione materiae* of the *tribunal de commerce*).

As to territorial jurisdiction, according to Article 6 of Regulation 1896/2006, it "shall be determined in accordance with the relevant rules of Community law, in particular Regulation (EC) No 44/2001". Article 1424-1 al. 2 CPC adds that when Regulation 44/2001 refers to the courts of a Member State with no further precision (e.g. under Art. 2), the competent court is that of the place where the defendant or one of the defendants live.

3.2 Application for a European order for payment:

a) The means of communication accepted for the purposes of the European order for payment procedure and available to the courts (Article 7(5)). Can the application be submitted electronically? Does there exist alternative electronic communications system in the courts of the Member State of origin pursuant to Article 7(8)?

On the European Judicial Atlas in Civil Maters, one can read that the application for a European order for payment may be submitted to the court by post or by electronic means. However, this is in contradiction with Article 1424-2 CPC, which states that the application form is handed over or sent by post to the office of the court. This inconsistency is due to the fact that, while in theory civil procedure has been adapted to electronic communications[66], in practice electronic means are being installed quite slowly within French courts. For the time being, it would just be technically impossible to submit an application electronically and the declaration on the European Judicial Atlas is deceptive. It has been pointed out that, at any rate, the information about courts provided on this website do not include any e-mail address[67].

[65] M. Salord, Rép. pr. Civ. Dalloz voc. 'Procédure européenne d'injonction de payer' (2010) n° 71-72. See also J.-P. Beraudo and M.-J. Beraudo, JurisClasseur Europe Traité. Fasc. 2820. Injonction de payer européenne et procédure européenne de règlement des petits litiges (Lexis Nexis 2009) n° 40 ff.
[66] See Art. 748-1 CPC, supra 1.2.
[67] M. Salord, supra n. 64, n°105.

b) Admissible language of the application?

According to the 2009 circular, the forms must be completed in French. However, "courts can accept a form written in a foreign language, provided that it is completed in French". In other words, the standard form may be a foreign one, but the information provided by the claimant must appear in French. Yet, most of the information is inserted by the claimant under the form of codes – subject to important exceptions, like the description of evidence under section 10 that will require some translation.

c) How many copies of the application are required?

There is no requirement as to the number of copies that must be addressed to the court.

d) The amount of the penalties under the law of the Member State of origin in case of debtor's deliberate false statement (Article 7(3))?

Deliberate false statements fall under Articles 441-1 ff. of the *Code pénal* which are applicable to forgery and use of forgeries. Forgery is defined by Article 441-1 as a fraudulent misrepresentation, whatever its form, intended or likely to prove a right or a fact with legal consequences. The maximum sentence is three years imprisonment or a fine of EUR 45,000 (Art. 441-1 al. 2 CP).

3.3. Issue of the European order for payment:

a) Recital 16 states: "The court should examine the application, including the issue of jurisdiction and the description of evidence, on the basis of the information provided in the application form. This would allow the court to examine prima facie the merits of the claim and inter alia to exclude clearly unfounded claims or inadmissible applications. The examination should not need to be carried out by a judge."

Describe the examination of the application. Who issues the order for payment – judge, *Rechtspfleger*, clerk or computer?

Only judges are entitled to examine applications and issue orders for payment. Although the examination of the application is somewhat lighter than in domestic law, it is generally admitted in the legal community that some issues could hardly be dealt with by a clerk – let alone a computer.[68] This is particularly true for jurisdiction issues.

[68] See *inter alia* C. Nourissat, 'Le règlement (CE) n° 1896/2006 du 12 décembre 2006 instituant une procédure europénne d'injonction de payer', Procédures (5/2007) étude 10.

As to the prerogatives of the judge when examining the application, the description at recital 16 is extremely close to French practice[69]: examination on the sole basis of the documents produced and rejection of the clearly unfounded claims. Judicial practice should therefore not vary from domestic orders to European ones.

b) Service of the European order for payment on the defendant pursuant to Article 13 and 14.

Service of a European order for payment in France is quite similar to that of a domestic order (supra, 2.4.d). The major difference lies in the fact that there is no time-limit to serve the European order and that, therefore, no lapsing is incurred.

As in domestic law, service is entrusted to a *huissier de justice*. According to Article 1424-5 al. 1 CPC the order is served "on initiative of the creditor", although Article 12(5) of Regulation 1896/2006 sets out that "The court shall ensure that the order is served on the defendant in accordance with national law"[70].

The huissier must serve on every defendant a certified copy of the application form and of the order, to which must be annexed an opposition form (Art. 1424-5 al. 1 CPC). The notice must:

- contain the information required for any service by a *huissier de justice* (date, identification of the claimant, the *huissier* and the recipient);
- identify the court before which an opposition may be lodged as well as the time limit and the formal requirements for an opposition (Art. 1424-5 al. 2 CPC);
- warn the defendant that failing an opposition in the time limit any legal proceeding will be available to the creditor to enforce his claim (Art. 1424-5 al. 3 CPC);
- inform the defendant on his right to apply for a review of the European order for payment before the competent court in the Member State of origin pursuant to Article 20 of the Regulation 1896/2006 (id.).

If the debtor receives personal service, he must also be given all this information verbally, as well as the "important information for the defendant" mentioned at the end of the European order for payment form (Art. 1424-6 CPC).

The last provision contained in the *Code de procédure civile* provides that a copy of the notice must be addressed to the court that issued the order (Art. 1424-7 CPC).

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[69] Supra, 2.4.b.

[70] Some have doubts about the possibility for the court that issued the order to control its service in another member State: M. Lopez de Tejada and L. d' Avout, supra n. 51.

3.4. Opposition to the European order for payment:

The opposition procedure, left to ordinary domestic laws by Article 17 of Regulation 1896/2006, is ruled in France by Articles 1424-8 to 1424-14 CPC. They are nearly identical to Articles 1415 to 1422 applicable to domestic orders for payment[71].

a) Form of the statement of opposition - paper form or by any other means of communication, including electronic (Article 16(4))?

According to Article 1424-8 CPC, an opposition is lodged either by a declaration with acknowledgement of receipt to the office of the court or by registered mail. As already mentioned, electronic means are not available to day.

b) Pursuant to Article 17 (1) where a statement of opposition is lodged, the proceedings shall continue before the competent courts of the Member State of origin. Does the court revoke (annul) the European order for payment (e.g. by decree) or it ceases to be in force by law?

The procedural consequences of an opposition are set out by Article 1424-9 which is identical to Article 1417 for domestic orders. The same principles are therefore applicable (supra, 2.6). In particular, the order for payment automatically ceases to be in force.

c) Legal remedies against the court decision on statement of opposition?

As in the domestic procedure again, an appeal is available, before a *cour d'appel* or before the *Cour de cassation* only, depending on the amount of the claim (Art. 1424-13 CPC).

3.5. Absence of timely opposition:

a) Describe the certificate procedure (declaration of the European order for payment for enforceable pursuant to Article 18).

See c) below.

b) Explain the formal requirements for enforceability according to Article 18 (2).

See c) below.

c) Effects of the absence of timely opposition: does the European order for payment become final (rechtskräftig) or it is only enforceable.

The procedure and the formal requirements imposed by French law in accordance with Article 18(2) are nearly the same as in domestic law: in absence of timely opposition, taking into account a period of ten days to allow a statement to arrive, the office of the court declares the

[71] Supra, 2.6.

European order for payment enforceable using the standard form *and* affixing on the order a *formule exécutoire* (Art. 1424-14 CPC). The only difference is that in the European procedure the claimant does not have to apply for the *formule exécutoire* as in the domestic one.

3.6. Safeguarding the debtor's rights.

a) Problems with certificate. On one hand it may happen that certificate shall be rectified where, due to a material error, there is a discrepancy between the European order for payment and the certificate. On the other hand can the certificate wrongly granted (e.g. to early certification without due waiting on statement of opposition to arrive). Describe the procedures for rectification and withdrawal of the declaration of enforceability referred to in Article 18?

This issue is not addressed by the *Code de procédure civile.* However, as it has been decided for the *formule exécutoire* in domestic law[72], an appeal to the *Cour de cassation* should be available to contest formal regularity of the certificate or the conditions in which it was affixed.

b) Explain the review procedure and the competent courts for the purposes of the application of Article 20.

In its communication under Article 29 of Regulation 1896/2006, France has declared that "The rules governing the review procedure in exceptional cases provided for in Article 20 of the Regulation are the same as those applicable to the opposition procedure. The claim for the purposes of review is brought before the court that issued the European order for payment." The same principle is set out by Article 1424-15 CPC.

3.7. Costs of procedure.

Like in the domestic procedure (supra, 2.8), since 2011 a Eur 35 fee must in principle be paid by the claimant.

The costs of the procedure before the *tribunal de commerce* are dealt with at Article 1425 CPC. Since this provision is also applicable to domestic orders for payment, it has already been described (supra, 2.8). The only difference here, set out at Art. 1425 al. 3 CPC, is that when the claimant does not advance the costs of the procedure or those of opposition, his application does not lapse and must be examined by the court.

[72] Supra, 2.7.

3.8. Enforcement in the Member State of enforcement:

a) Which authorities have competence with respect to enforcement?

The *Code des procédures civiles d'exécution* entrusts enforcement to the *huissiers de justice*[73].

If difficulties arise, jurisdiction lies with the president of the *tribunal de grande instance*, designated as *juge de l'exécution* (enforcement judge) by the *Code de l'organisation judiciaire* (Art. L 213-5 COJ). He can however delegate his functions to one or several judges (id.). In practice, there is in every *tribunal de grande instance* a judge (or several judges) specialised in matters of enforcement – domestic and international – and known as *juge de l'exécution* or *JEX*.

The *juge de l'exécution* has exclusive jurisdiction for deciding on difficulties relating to enforceable titles and disputes concerning enforcement (Art. L 213-6 COJ).

b) What should be done for the European enforcement order to be executed in the Member State of enforcement? Are there required any court proceedings, administrative proceedings or activities of an execution body (agency)? How long will it take from issue of the order to the beginning of the execution? Which languages are accepted pursuant to Article 21(2)(b)?

Once the creditor has obtained an enforceable copy of the enforcement order with a *formule exécutoire*, no further court proceeding is required. The creditor can directly contact a *huissier de justice* who is territorially competent and ask for enforcement of the order. The *huissier* will start enforcement after having served the order on the debtor[74]. The time from issue of the order to the beginning of the execution depends on the kind of enforcement measure chosen. Authorisation from the *JEX* is required only in a limited number of cases, e.g. when the goods to be seized are in the hands of a third party.

France has declared under Article 29 of Regulation 1896/2006 that the following languages are accepted under Article 21(2)(b): French, English, German, Italian and Spanish.

c) Legal remedies in the Member State of enforcement: Which authorities have competence for the purposes of the application of Article 22 (1) and (2) and Article 23? Describe the procedure for those legal remedies.

Since Article 22 (1) and (2) and Article 23 deal with enforcement of the order, jurisdiction lies in the *juge de l'exécution*[75]. However, they raise, at the enforcement stage, issues that could

[73] Art. L 122-1. See also Ordonnance n°45-2592 du 2 novembre 1945 relative au statut des huissiers (Art. 1).
[74] Art. 503 CPC.
[75] 2009 Circular, pt. 5.3.

be dealt with before granting the certificate – typically the irreconcilability of decisions. The consequence is that the prerogatives of the *JEX* under these articles are more important than in French law[76].

Procedure before the *juge de l'exécution* is laid down by the *Code des procédures civiles d'exécution*. Except as otherwise specified, ordinary procedural rules apply (Art. R 121-5). The procedure before the *JEX* is oral (Art. R 121-8). Representation by a lawyer or another person is possible but not necessary (Art. R 121-6).

**IV. National small claims procedure**

The French small claims procedure is called *déclaration au greffe* or *saisine simplifiée*. It is ruled by Articles 843 and 844 of the *Code de procédure civile*, as modified by the *Décret n° 2010-1165 du 1er octobre 2010*. This procedure was introduced in French law in 1988[77].

Strictly speaking, the *déclaration au greffe* is not a specific procedure but a simplified way of introducing the procedure before the court. The subsequent procedure is an ordinary one. Only two articles were therefore enough to set it out: Article 843 dealing with the declaration itself and Article 844 dealing with summons of the parties.

Although there are no recent statistics on the matter, it seems that the *déclaration au greffe* has met with very little success[78].

4.1. Scope of the procedure, threshold. Is it applicable only for monetary claims or reserved to certain types of disputes (e.g. consumer disputes)? Is a national small claims procedure as an option or an obligation for the plaintiff?

The procedure is available when the amount of the claim does not exceed EUR 4,000 (Art. 843 CPC). There is no restriction as to the nature of the claim, provided that it falls within material jurisdiction of the *tribunal d'instance*. However, the procedure clearly aims at simplifying consumer litigation: Article R 142-1 of the *Code de la consommation* (consumer Code) states that disputes arising from the application of the Code fall under Articles 843 and 844 CPC when the claim does not exceed the amount set out by those articles.

There is no obligation for the plaintiff to use such procedure: Article 843 CPC states that the court "may be seised" by a *déclaration au greffe*.

[76] Ibid.
[77] Décret n° 88-209 du 4 mars 1988.
[78] It represented only 3% of the simplified referrals to courts in 1991 (Infostat Justice n° 32, 1993).

4.2. Competent court (subject matter and local competence).

The *déclaration au greffe* is available to bring an action before the *tribunal d'instance*. Provided that the claim does not exceed EUR 4,000, ordinary rules apply to material and territorial jurisdiction.

4.3. Introduction of the procedure.

a) Forms (orally, paper form, electronically)? Are there available any standard forms?

According to Article 843 CPC, the court is seised by a declaration made orally to the office of the court or prepared in writing and handed over or sent by post to the office of the court. The declaration must summarize the grounds of the claim and is accompanied by the supporting documents (id.).

Two forms are available online, one for each court[79], but their use is not compulsory.

Upon declaration, the office of the court summons the parties by registered letter with acknowledgement of receipt, a copy of the summons being sent the same day by simple letter (Art. 844 CPC). The office may as well summon the claimant verbally, making him sign a register (id.).

b) Mandatory representation by the lawyer?

Representation by a lawyer is not compulsory.

c) Assistance: is there any support by a court clerk or help desk for the introduction of a procedure?

The introduction of the procedure through the forms available online is quite simple. These forms come along a notice, also available online, that explains how to make the declaration and describes the following proceedings. No further help is provided by the texts.

4.4. Peculiarities of the small claims procedure compared to regular procedure, e.g.:

a) Relaxation of certain rules concerning the taking of evidence.

b) Oral or written procedure. Is there a possibility of a purely written procedure?

c) Limitations concerning ius novorum.

d) Shorter deadlines (e.g. for answer to an action).

e) Relaxation of rules concerning the content of the judgment, time limit for the delivery of the judgment. Is there any time frame for resolving the case?

[79] Formulaire Cerfa n° 12285*03 for the *juridiction de proximité*, Fomulaire Cerfa n° 11764*03 for the tribunal d'instance, available at http://vosdroits.service-public.fr/particuliers/F1746.xhtml?VUE=self.

After the court has been seised, all ordinary rules apply. In particular, procedure is oral according to Art. 846 CPC and there is no restriction as to its length (although before the *tribunal d'instance* the proceedings tend to be shorter than in other courts: on average 5,1 months[80]).

4.5. Is there any exclusion or restriction of the possibility to appeal against the judgment? If so, on which grounds can the appeal be based and within which time should it be lodged?

There is no specific exclusion or restriction. However, because of the value of the claim, no ordinary appeal before a *cour d'appel* is available. Only an appeal (*pourvoi*) to the *Cour de cassation* is possible.

4.6. Reimbursement of costs.

Since the court is seised by a simple declaration, the claimant avoids the cost of an *assignation* (≈ summons) by a *huissier de justice*. All other costs are governed by ordinary rules (supra, 2.8).

4.7. Enforcement of the judgment domestically and abroad.

Despite the specific way of introducing the procedure, the judgment is an ordinary one, governed by general procedural rules. It is therefore enforced like any ordinary judgment.

4.8. Comparison between national and EU small claims procedure. Differences and similarities.

Comparing national and EU small claims procedure is not easy: while there is a genuine simplified procedure in EU law, French law has only simplified the initiation of proceedings, after which ordinary rules apply. For instance, after an oral or written declaration introducing the proceedings, procedure is oral in domestic law. It is written – with exceptions – in the EU procedure. But this is a difference between a domestic ordinary procedure and a European simplified one. Comparing them makes therefore little sense.

## V. Implementation of Small Claims Regulation (861/2007) in Member States

[80] Source: Annuaire statistique de la justice 2008.

The already mentionned *Décret n° 2008-1346*[81] has inserted in the *Code de procédure civile* a new Chapter (Art. 1382-1391) entitled "The European small claims procedure" (*La procédure européenne de règlement des petits litiges*).
As already pointed out for the European order for payment procedure, implementation of the Small Claims Regulation is complicated by the fact that the information communicated by France in accordance with Article 25 of the Regulation and available on the European Judicial Atlas in Civil Maters is (or was) inaccurate or inconsistent with other official documents (among which a circular issued by the Ministry of justice in May 2009[82]).

5.1. Competent court: Which courts or tribunals have subject matter and local jurisdiction to render a judgment in the European Small Claims Procedure?
As regards material jurisdiction, France has declared under Article 25(1)(a) that "the courts or tribunals which have jurisdiction to give a judgment in the European Small Claims Procedure are the district courts (*tribunaux d'instance*) and the commercial courts (*tribunaux de commerce*), within the limits of their jurisdiction". As happened with the European order for payment procedure (*supra*, 3.1), this was inconsistent with both the 2009 circular and the *Code de l'organisation judiciaire* –. Yet, the same *loi n° 2011-1862 du 13 décembre 2011* modified both the *Code de l'organisation judiciaire* and the *Code de commerce* to bring them in line with the declaration under article 29 (those modifications will enter into force on 1st January 2013). New articles L 221-4-1 COJ and L 721-3-1 C. com. give jurisdiction to the *tribunaux d'instance* and the *tribunaux de commerce* (within the limits of their competence *ratione materiae*).

As regards local jurisdiction, for once, all the sources are consistent. The European Judicial Atlas sets out that where Regulation 44/2001 refers, not to the courts or tribunals that have territorial jurisdiction, but to the courts or tribunals of a Member State, the court that has territorial jurisdiction is determined according to the rules of French law. And both the 2009 circular and Article 1382 CPC specify that in such case, the competent court is that of the place where the defendant or one of the defendants live.

5.2. Formal prerequisites for the introduction of the procedure:

[81] Supra, III.
[82] Circulaire de la DACS C3 06-09 du 26 mai 2009 relative à l'application du règlement (CE) no 861/2007 du Parlement européen et du Conseil du 11 juillet 2007 instituant une procédure européenne de règlement des petits litiges, BOMJ 30 août 2009.

a) Which means of communication are accepted for the purposes of the European Small Claims Procedure and available to the courts or tribunals in accordance with Article 4(1)?

As happened with the European order for payment (supra, 3.2.d), the information communicated by France under Article 25 of Regulation 861/2007 is not consistent with the *Code de procédure civile*. While on the Judicial Atlas it is stated that "the request for institution of legal proceedings can be submitted to the court or tribunal by post or by electronic means", according to Article 1383 CPC the application form is handed over or sent by post to the office of the court. As already pointed out, there is no technical possibility, so far, to commence the procedure electronically.

b) Which languages are accepted pursuant to Article 6 (1)?

According to the Small Claims circular (identical to the Order for Payment one), the forms must be completed in French. However, "courts can accept a form written in a foreign language, provided that it is completed in French". In other words, the standard form may be a foreign one, but the information provided by the claimant must appear in French. Yet, most of the information is inserted by the claimant under the form of codes – subject to important exceptions, like the description of evidence under section 10 that will require some translation.

The Small Claims circular adds that nonetheless the supporting documents may be submitted in a foreign language, except when the competent court considers that a translation is necessary or when a party asks for it (pt. 3.2.5).

5.3. Conclusion of the procedure:

a) Issue of a judgment.

According to Article 5(1) of Regulation 861/2007, although the European Small Claims Procedure is in principle a written procedure, the court may decide to hold an oral hearing. Article 1388 CPC adds that in such case the court hears the case according to its main proceedings rules.

b) Certificate procedure – certificate concerning a judgment referred to in Article 20 (2).

Emission of the certificate – compared to a passport by the 2009 circular (pt. 4.2) – is conceived as an administrative task, therefore entrusted to the office of the court (Art. 1390 CPC).

5.4. Appeal against judgment:

a) Is there available an appeal under the national procedural law against a judgment in accordance with Article 17 and with which court or tribunal this may be lodged?

And

b) If so, within what time limit such appeal shall be lodged and on which grounds?

Under French law, when the amount of the claim does not exceed EUR 4,000, the court decides *en dernier ressort*, i.e. its decision is not subject to an ordinary appeal before the *cour d'appel*[83]. Similarly, France decided to exclude ordinary appeals for small claims judgments. Yet, some specific appeals exist for those decisions rendered *en dernier ressort*, which will be available against a judgment given in the European Small Claims Procedure[84]. They are shortly described on the European Judicial Atlas in Civil Maters.

The appeal named *opposition* (Art. 571-578 CPC) is available when the judgment has been rendered *par défaut* (by default), i.e. when the defendant has neither personally received the notice served pursuant to Article 5(2) nor responded in the form prescribed by Article 5(3). The appeal must be brought by the defendant before the court that issued the judgment, according to the forms prescribed for an application before such court. It must be lodged within one month (Art. 538 CPC) following notification of the judgment (Art. 528 CPC). In an *opposition* procedure, the entire case is re-examined.

When *opposition* is not or no longer available, the parties may only lodge one of the following two "extraordinary appeals" (*voies extraordinaires de recours*: Art. 579 ff. CPC):

- The appeal to the *Cour de cassation* (Articles 604 to 618-1 CPC) is available only when one party considers that the judgment does not comply with a rule of law (Art. 604 CPC). In other words, the *Cour de cassation* can not re-examine the facts of the case. The time-limit for an appeal to the *Cour de cassation* is two months (Art. 612 CPC).
- The *recours en révision* is governed by Articles 593 to 603 CPC. It is an application for judicial review of the case, by the same court that issued the judgment. It is available in a strictly limited number of situations (Art. 595 CPC): fraud by the party who won the case, discovery after the judgment of decisive documents hidden by that

[83] For the *juridiction de proximité,* see Art. R 231-3 COJ; for the *tribunal de commerce,* see Art. R 721-6 of the *Code de commerce* (commercial code).
[84] 2009 circular, pt. 3.7.

party, judgment based on documents or statements subsequently declared false. This appeal must be lodged within two months following the day when the party had knowledge of the ground for revision he invokes (Art. 596 CPC).

5.5. Safeguarding the debtor's rights.

a) Problems with certificate referred to in Article 20 (2). On one hand it may happen that certificate shall be rectified where, due to a material error, there is a discrepancy between the judgment and the certificate. On the other hand the certificate can be wrongly granted (e.g. the judgment does not fall within the scope of Small Claims Regulation).

Describe the procedures for rectification and withdrawal of the certificate concerning a judgment referred to in Article 20 (2).

This issue is not addressed by the *Code de procédure civile*. However, as it has been decided for the *formule exécutoire* in domestic law[85], an appeal to the *Cour de cassation* could be made available to contest formal regularity of the certificate or the conditions in which it was affixed.

b) Explain the procedures for review referred to in Article 18.

When, in 2008, the small claims procedure was introduced into the *Code de procédure civile*, no specific procedure was set out for review of a judgment. The Ministry of justice considered that the requirements of Article 18 were already met by the above-mentioned procedures: *opposition*, *pourvoi en cassation* and *recours en révision*[86]. However, these procedures are rather restrictive[87] and may not be available in some of the circumstances mentioned by Article 18, e.g. when the defendant was prevented from objecting to the claim by reason of force majeure[88].

This "deficiency" of the French legislator gave rise to some criticism[89], in response to which a 2010 *Décret*[90] created an Article 1391 CPC. According to this new provision, the right to apply for a review, laid down by Article 18, shall be exercised according to the *opposition* procedure or, when it is not available, "according to similar procedural modalities".

5.6. Costs of procedure.

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[85] Supra, 2.7.
[86] See Beraudo and Beraudo, supra n. 64, § 103.
[87] See supra, 5.4.b.
[88] Beraudo and Beraudo, § 104-105.
[89] Ibid.
[90] Décret n° 2010-433 du 29 avril 2010, Art. 4.

Costs are governed by the rules applicable to ordinary procedures, in particular Articles 695 ff. of the *Code de procédure civile*[91].

5.7. Enforcement of the judgment in the Member State of enforcement – procedure and requirements:

a) Which authorities have competence with respect to enforcement?

The authorities that have competence with respect to enforcement are the same as for the European order for payment[92]: the *huissier de justice* and, in case of a dispute, the *juge de l'exécution*.

b) Provide basic information on the methods and procedures of enforcement in the Member State.

Enforcement of the judgment is similar to that of an order for payment (supra, 3.8.b). Only slight differences exist. For instance, whereas the European order for payment becomes enforceable by way of the *formule exécutoire* (as in domestic law[93]), article 20 of Regulation 861/2007 makes it unnecessary for a small claims judgment. The creditor only needs a copy of the judgment together with the certificate (standard Form D).

c) Which languages are accepted pursuant to Article 21(2)(b)?

As communicated pursuant to Article 25 of Regulation 861/2007, the languages accepted under Article 21(2)(b) are: French, English, German, Italian and Spanish.

d) Legal remedies in the Member State of enforcement. Which authorities have competence for the purposes of the application of Articles 22 and 23? Describe the procedure.

Jurisdiction lies with the court dealing with enforcement in general, i.e. the *juge de l'exécution*[94]. This authority and the procedure applicable by it have already been evoked.[95]

Concerning article 23, France has provided some precisions pursuant to article 25(1)(e). For the purposes of application of Article 23,

- in the case of a judgment by default, the court or tribunal with which the appeal (*opposition*) is lodged can, before examining the merits again, withdraw its judgment

[91] Supra, 2.8.
[92] See supra, 3.8.a.
[93] Supra, 2.7.c and 3.5.c.
[94] 2009 circular, pt. 4.4. As with the EOP, it is noted in the circular that the prerogatives of the *juge de l'exécution* are more important in that respect than they are under domestic law.
[95] Supra, 3.8.c.

in so far as it ordered provisional enforcement, which has the effect of staying enforcement;

- in all cases, the *juge des référés* (urgent procedure judge) and the *juge de l'exécution* can order a stay of enforcement by granting a period of grace to the debtor, according to Article 510 CPC.

## VI. Final critical evaluation of EU Regulations on Simplifying Cross-Border Debt Collection

It is quite soon to evaluate the implementation of these Regulations, especially as there exist no general statistics on the matter. It seems anyway that the use of the new procedures remains very limited[96]. This is certainly due to a lack of information, but also to initial uncertainty and contradiction in the available documents: we have pointed out several times, in particular, the inconsistency between domestic instruments and the information available on the Judicial Atlas. Furthermore, the European procedures – especially the order for payment one – have been designed in a context of dematerialisation. The availability of electronic tools is clearly a key to their success[97].

So far, one may only propose a rather theoretical evaluation and comparison between domestic and European procedures. From this point of view, although much concern has been expressed about the lack of procedural guarantees and the weakening of rights of defence[98], everyone recognizes that Regulations 1896/2006 and 861/2007 should simplify cross-border debt collection.

6.1. Do Regulations 1896/2006 and 861/2007 in your opinion really simplify, speed up and reduce the costs of litigation in cross-border cases concerning pecuniary claims and ease cross-border enforcement of judgments?

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[96] M. Salord (supra n. 64) notes at § 211 that only 195 European order for payment procedures were initiated in France in 2008, 717 in 2009. In 2010, the Paris *tribunal de commerce* edited a study on the first year of application of the European order for payment (http://www.greffe-tc-paris.fr/communication/doc/article_ipe_2010.pdf). According to this document, in 2009, the office of the court received 46 applications for a European order for payment, while receiving on the same period 12700 applications for a domestic order for payment.

[97] Op. cit. at. § 212.

[98] See for example Lopez de Tejada and d'Avout, supra n. 51; E. Guinchard, 'L'Europe, la procédure civile et le créancier: l'injonction de payer européenne et la procédure européenne de règlement des petits litiges', RTD Com (2008) p. 465 ; C. LEGROS, 'Commentaire du règlement CE no 1896/2006 instituant une procédure d'injonction de payer européenne', *Les Petites Affiches*, 30 July 2007, p. 8.

It is hardly deniable that the procedures created by both Regulations are faster and more automatic than the domestic ones. The intensive use of forms clearly simplifies the procedure – though it may be assumed that the very administrative look of these forms can discourage creditors and contribute to explain the difficult start of the new procedures. But above all, since these procedures need no exequatur at all, they far more efficient in cross-border situations[99] and should in the end meet with success.

However, it can not be ignored that the multiplication of alternative procedures – at least four – is *per se* a source of complexity. But most important, in an attempt to counterbalance the prerogatives of the creditor, both Regulations contain various mechanisms that seriously complicate the procedure. This is true in particular for the review procedure. It has been written that this procedure was a real time-bomb[100] that could give rise to much litigation. Indeed, the simplification of the first phase of the procedure has led almost inevitably to a more complex second phase. Similarly, it has been argued that the adoption of the "no-evidence" model could give rise to a high rate of oppositions. In fact, it seems that in the Member States that belong to the "no-evidence" model the number of oppositions is much higher than in those that belong to the "evidence" model. Thus, the existence of a preliminary control of the claim does not prejudice the efficiency of the procedure[101].

6.2. Are the national procedures truly frequently impracticable in cross-border cases (recital 7 Regulation 1896/2006), especially having in mind that some of the classical features of cross border litigation constitute direct or indirect discrimination on grounds of nationality and are thus prohibited, for instance the security for the costs of judicial proceedings (*cautio iudicatom solvi*) as an example of direct discrimination (see ECJ case of 26 September 1996, Data Delecta v MSL Dynamics, C-43/95, ECR 1996, p. I-04661). Do the advantages of Regulations 1896/2006 and 861/2007 truly outweigh potential obstacles in national procedures involving a party from other Member State (e.g. address for service within local jurisdiction (*Wahldomizil*) or representative ad litem (*Zustellungsbevollmächtigter* etc.)?

Many French scholars have pointed out that cross-border impracticability of national procedures was overestimated by the Commission – particularly concerning orders for

[99] See for example Beraudo, supra n. 64 at § 24, according to whom "in transnational cases, creditors are bound to prefer these new instruments that allow them to circumvent many obstacles".

[100] G. Payan, 'Faut-il encore payer ses dettes ? Réponses en droit international privé communautaire', *Les Petites Affiches*, 29 mars 2006, p. 21.

[101] E. Guinchard, 'Commentaire sur la proposition de règlement instituant une injonction de payer européenne', *Les Petites Affiches*, 17 mai 2006, p. 4.

payment[102]. However, there does not exist any statistical study that could demonstrate that national procedures are efficiently enforced in other Member States. Neither does the Commission refer to any data on the matter proving the contrary[103] – and it is difficult to be satisfied with the "self justification" contained in recital 7[104].

On the other hand, from a French perspective, it is undeniable that the domestic order for payment procedure is mostly designed for internal litigation. This is evidenced by the fact that an order for payment is not available, in the view of the majority, when the debtor has no residence or domicile in France or when the order has to be served abroad (supra, 2.1.d). The availability in every Member State of an identical procedure seems an adequate answer to such difficulty.

6.3. Which is, from the creditor's point of view, the most convenient alternative in your country in case of cross-border collection of debts in EU?

Despite the « second stage » complexity of both European procedures referred to above (6.1), they remain more convenient in a cross-border context, not only because they are simpler at the procedural stage, but also because they are easier to enforce afterwards. Hence, the choice should be between the order for payment procedure and the small claims one.

If we leave aside the argument of the amount of the claim, each procedure has its own advantages. The order for payment procedure is, at least initially, less demanding for the creditor since he is not required to prove his claim. Moreover, it may be argued that since it is a specific procedure – while the small claims procedure is only a simplified one – it is much less dependant upon domestic laws[105].

On the other hand, whenever there is a risk that the claim may be contested, a good strategy may be to prefer the small claims procedure in which the arguments of the defendant will be immediately discussed. In the European order for payment procedure, the creditor will have to wait until opposition for such a discussion to take place, which will delay the procedure[106].

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[102] See supra 2.9.

[103] According to declarations of Ms Reding, companies only recover 37% of cross-border debts (see J. Bores Lazo, 'Advantages and Disadvantages of the Unification of Rules Simplifying Cross-Border Debt Collection', 2 LeXonomica-Journal of Law and Economics (2010) p. 415). Obviously, this rate is unsatisfactory, but there is no evidence that it is due to a real impracticability of national procedures.

[104] Lopez de Tejada and d'Avout, supra n. 51.

[105] E. Guinchard, supra n. 97, § 7.

[106] M. Salord, supra n. 64, § 37.