The Dynamics of Pretrial Negotiation in France: Is There a Deadline Effect in the French Legal System?

BRUNO DEFFAINS AND MYRIAM DORIAT

University of Nancy 2, Nancy, France
E-mail: Bruno.Deffains@dmail.univ-nancy2.fr
E-mail: doriat@dmail.univ-nancy2.fr

I. Introduction

Economic models relating to the organization of the judicial system attempt to describe and explain the development and outcome of trials. They enable a more precise idea to be gained as to the outcome of strategic interaction rendered even more complex inasmuch as one of the actors may hold personal information or present characteristics the other party cannot see. As noted by Swanson and Mason (1998), "the intuition behind these models is the following: When one side in a litigation case has information that the other does not, it may be rational for one party to wait to convey the information credibly. Delaying settlement will be the preferred strategy when the cost of waiting is outweighed by the benefit of establishing credibility. In some cases, information asymmetries may be so large as to preclude agreement."

However, the literature concerning pretrial negotiations presents several restrictive hypotheses on the type of negotiation because the offer is generally of a "take-it-or-leave-it" nature [Bebchuck (1984); Reinganum and Wilde (1986); Nalebuff (1987)]. In screening models (in which the uninformed party makes the offer in such a way that no information is transmitted), when a complaint has been lodged, the noninformed party puts forward the negotiating terms at the outset. In the second stage, the party holding confidential information either accepts or refuses this offer. If an agreement is reached, the judge will no longer intervene, except to witness and record the outcome of the dispute when the affair is taken off the court lists. The aim of the optimal offer of the uninformed party is to make a selection among the various unobservable types of the opposing party.

This type of model is inherently static. It enables the probability of an agreement and its amount to be determined, but it is not possible to appreciate the moment it happens. Any analysis of the date implies reasoning within a dynamic context. A very interesting point is then to determine whether the agreement appears early in the negotiation or, a contrario, very late, thereby reflecting the existence of a deadline effect. Empirical and theoretical explanations of the deadline effect have been proposed, notably by Roth et
al. (1988). They showed empirical proof of the existence of a “deadline effect” in noncostly multiperiod negotiations, by creating the conditions for bargaining between two individuals. “The deadline effect” means that a high percentage of amicable settlements may be observed just before the negotiation deadline. A negotiation deadline is defined by Ma and Manove (1993) as a point in time after which the potential value of an agreement is decreased sharply. The concentration of agreements occurring in the final stage of the negotiations seems, in the authors’ opinions, to constitute a reasonably robust result\(^1\) and is likely to characterize numerous bargaining situations in the real world.\(^2\)

In the context of legal disputes, negotiation can take the form of offers and counter-offers. Such behavior seems all the more credible when the trial date is distant. All negotiation before the court’s decision may be seen as a multiperiod game in which each party can accept or make a counter-offer within the period in answer to that of the opponent. The temporal horizon of the two parties is generally finite because the trial date is usually known in advance. If this condition is not satisfied, it would theoretically be possible to reason within the framework of an infinite horizon model, as suggested by Rubinstein (1982). The approach would be that of a sharing game in which each side makes an offer until a settlement is reached.

What is new compared to the canonical bargaining model at any period, is the appearance of an “exit option” from which each party benefits one after the other, on the assumption that the offer of the opponent can be accepted. However, a discount rate should be included that measures the players’ impatience, because each one must wait at least one period before receiving a payment as long as the exit option is not used. Negotiation before the trial does have one peculiarity compared to most bilateral bargaining models in the sense that taking a positive discount rate into consideration is not sufficient to make the parties negotiate rapidly. This is due to the fact that, under certain conditions, the plaintiff prefers to negotiate as quickly as possible, whereas the defendant wishes to wait. Because the rate is the same, the two effects compensate for each other and the size of the stakes does not diminish with time.

Furthersing this approach, the only dynamic model integrating a psychological discount rate with endogenous offers has been developed by Spier (1992). She considers a defendant who is privately informed about the liability for damages suffered by the plaintiff; the subgame perfect equilibrium involves the plaintiff making the defendant an offer at each period, with a fraction of the defendant pool accepting each offer. In this context, Spier’s model predicts a U-shaped aggregate settlement pattern, with most claims being settled immediately (to avoid legal costs) or “at the door of the court” as parties attempt to obtain maximum rent by making take-it-or-leave-it offers at the last moment. This last phenomenon constitutes a deadline effect imposed by the date of the judgment.

Spier’s model aims at giving an account of certain stylized facts of the American legal system, notably that most negotiated solutions happen immediately after the complaint or just before the court ruling. There seems to be a definite U-shaped curve of

---

\(^1\) This phenomenon is robust, in the sense that the distribution of agreements over time does not respond to changes in the bargaining environment nearly as much as do other features of the outcome of bargaining, such as the terms on which agreement is reached.

\(^2\) Because deadlines are widely believed to often have similar effects in natural bargaining situations, understanding this phenomenon is likely to have practical implications about the design and conduct of negotiations.
bargaining due to the number of agreements made in the first and final negotiation periods.

Quick agreements reflect the wish to avoid negotiation costs, and the deadline effect brings out the wish to maintain the credibility of an uncompromising attitude in bargaining. In reality, Spier denotes this U-shaped in the case of a binary distribution of defendant types. With a uniform distribution, however, the extent of transactional solutions in the first period is not very high. In both cases, the deadline effect is important because the plaintiff’s inability to commit himself is advantageous for the defendant. As soon as several agreements are signed quickly, the final offer is below the amount the plaintiff could request with a binding commitment. As in the single-offer model, only those defendants with the best chances of winning their case will reject the plaintiff’s offer up until the trial date. In the final period, the principal factor for establishing the number of agreements is the proceedings cost born by the plaintiff if the case goes before the court (as negotiation costs borne at the start of each period are lost).

However, these conclusions are based on a rather restrictive theoretical context as information asymmetries always come out in favor of the defendant and only concern the expected liability level. So, it can be questioned to what extent the proximity of an expensive trial is enough to induce parties to settle regardless of the nature of the informational disadvantage, of the subject of the case, and of the competent jurisdiction.

Concerning the first problem, the analyses of Farmer and Pecorino (1994) and of Swanson and Mason (1998) seem to confirm the hypothesis of independence of the deadline effect relating to the nature of the information asymmetries. These articles analyze the outcome of bargaining between a risk-neutral defendant who is engaged repeatedly in civil litigation (an insurance company) and a risk-averse plaintiff who litigates once. The plaintiff is willing to pay a risk premium to the defendant to avoid the risk of going to trial, but the defendant cannot observe the exact risk premium of the plaintiff. As in Spier’s model, the information asymmetry regarding the attitudes toward risk can lead to a deadline effect. At this stage of the analysis, it may be wondered whether the deadline effect does not depend on the nature of the imbalance in information and on the party who stands to gain from it. In the model of Farmer and Pecorino (1994), asymmetry rests on a personal trait of one of the parties concerned that is likely to influence his propensity to accept the offer; the informational advantage no longer revolves around the stakes involved in the dispute but on the attitude of the parties regarding risk.

However, the curve of Farmer and Pecorino is obtained using negotiations having no cost, whereas those of Spier only appear in the presence of costly negotiations. The problem is put in the following manner: Waiting for the ultimate phase of the negotiations to reach an agreement with risk-averse plaintiffs forces the defendant to make them the same offer as he would to the neutral plaintiffs. This strategy involves costs equivalent to the difference between the offer accepted by neutral plaintiffs and those accepted by the risk-averse plaintiffs. These costs have the same effect as negotiation costs: They encourage the defendant to reach a rapid settlement with risk-averse plaintiffs so as to avoid having to make the same offer as to the risk-neutral plaintiffs.

By extending Spier’s conclusions, the U-curve of the settlements over time also gives way to the deadline effect only where various degrees of risk aversion are envisaged (uniform distribution of plaintiffs). So, the specific observation of a distribution of settlements in the shape of a U-curve, or of a deadline effect, seems to be independent
of the information asymmetry type and of the party benefiting from the information advantage. Whether it concerns the stakes of the conflict or a personal characteristic of the parties, a settlement peak appears just before the trial takes place when it is a costly one. Negotiation costs have no direct influence on this effect because they are totally irretrievable once the ultimate phase of the negotiations is reached. However, they do indirectly limit this effect. To be precise, when the costs are nil all agreements are reached on the steps to the courtroom; conversely, when they are positive they provoke the initial settlement peak (left side of the U-curve). Because the latter is deducted from the final settlements reached without negotiation costs it indirectly limits the deadline effect.

As for the two other problems, the question of independence of the deadline effect depending on the subject of the case and on the competent jurisdiction has never attracted attention. The reason is, no doubt, that most previous studies have first tried to find a theoretical proof of the deadline effect with numerical simulations [Spier (1992)]. Then, only a careful observation of the facts enables a conclusion to be made on the delay in settling disputes and the effects of legal costs [Fenn and Rickman (1998)].

Finally, the theoretical bases of our reflection centers mainly on models such as that of Spier, developed for the analysis of actions for damages for personal injury that rely critically on details of procedural rules and cost-allocation rules. This point is important because our empirical work refers to a wide range of datasets, and only one is directly concerned (liability law). In fact, we consider that the strategic approach is relevant in most civil conflicts (property, family, contracts, labor, etc.) because the details of procedure and cost rules are globally the same as in liability cases. So, we begin our discussion by a closer analysis of how cases are conducted in France.

This article provides empirical evidence on pretrial negotiation in France with the primary goal of determining whether there is a deadline effect. We take on the task of checking on the existence of such an effect in the area of legal conflict based on informational asymmetries between the parties. We propose here an exhaustive study of civil conflicts in French Law based on data from the Statistics Department of the Ministry of Justice concerning conflicts solved by the tribunaux d’instance (TI) and the tribunaux de grande instance (TGI) during the year 1995 (we have at our disposal 668,683 disputes). Besides the fact that this analysis permits us to investigate the generalization of the deadline effect beyond common law, it will provide answers to three questions:

1. Do we observe a deadline effect in France, where the out-of-court settlement rate is relatively low?
2. Does the deadline effect depend on the subject of the case and on the competent jurisdiction?
3. Are theoretical analyses about the deadline effect able to give an account of stylized facts?

These questions are all the more interesting as most developed countries are faced with a “crisis” of justice. In the United States, when we study the data, it can be noted that nearly 90% of conflicts are settled by an agreement between the parties, but more often this is concluded at the last possible moment, while costly time has already passed and while a considerable amount of money has been spent during the discovery period. This explains the development of new methods of conflict resolution called alternative dispute resolution, the purpose of which is to save time and money by laying emphasis on conciliation and by securing a settlement as quickly as possible. In a very different
procedural context, the French judicial system is characterized by a low settlement rate. Nevertheless, the country favors a more rapid dispensation of justice by encouraging the development of alternative dispute resolution. The officialization of the transaction contract in the area of road accident damages (law of 5 July 1985) or the recent legislative consecrations of the judicial conciliation and mediation (laws of 8 February 1995 and 18 December 1998) testify to this evolution. Similarly, Article 21 of New Code of Civil Procedure (NCCP) clearly states that “it is part of the judge’s mission to reconcile parties.”

After having presented the principal characteristics of the French legal system and demonstrated the relevance of the models of litigation (Section II), we will attempt to empirically verify the presence of this effect in France from available data related to TI and TGI (Section III). Finally, the confrontation of theoretical arguments with empirical results permits us to draw some conclusions about characteristics of the French legal system (Section IV).

II. Description of the French Legal System

Before analyzing the different phases that make up a court case and clarifying their major constituents, it is appropriate to go into some detail about the procedural rules governing civil litigation overall.

Procedural Rules in French Civil Law

From the moment a party decides to go to court, it becomes subject to the NCCP, which lays down “a general framework regarding trials in civil law.” The procedural rules governing civil litigation are basically the same whatever area of law is concerned: family law, the law of goods and property, contract law, liability, etc. The NCCP also stipulates that the trial is something belonging to the parties. Hence, a good deal of freedom is given to the parties so that they may decide on the manner in which the conflict is to take place.

Two important exceptions nevertheless exist that can exert an influence on the number of settlements or on the date they are obtained. The first concerns road accidents. Indeed, since the bill proposed by Minister of Justice Badinter became law in 1985, the insurance company underwriting civil liability is required to make an offer of damages to the victim within a period of 8 months. Hence, the victim is not required to go to court to obtain damages. (It is quite the opposite in America where it is a requirement. This could explain the low settlement rate observed in France after court proceedings and the high settlement rate observed in the United States.) A large number of cases are indeed settled out of court without the courts ever being informed. The cases going as far as litigation are thus those for which all attempts at conciliation have failed. There is, thus, little chance that any agreement can be reached after legal proceedings have begun, to the effect that we should expect to observe a flat settlement curve and a very low settlement rate in the area of liability in road accidents.

The second exception concerns divorces. Article 251 of the Code Civil (Principles of Civil Law) stipulates that when a party files for divorce because of misconduct, an attempt to reconcile the parties is mandatory before legal proceedings can begin. Divorces of this nature thus only continue on into legal action for cases in which this reconciliation has already failed. A low settlement rate is to be observed in this type of case. Nevertheless, the low level of the settlement rate is quite independent from the date on which settlement occurs, in such a way that procedural dispositions should have
no influence over the deadline effect. However, in the case of divorce by mutual consent, the law (Article 231 of the Code Civil) requires that a 3-month period of reflection be observed after the application. This means that conciliation in divorce proceedings by mutual consent generally takes place within 3 months of the application and that the date this occurs is more a consequence of legal constraints than of the date that the case comes before the court. The deadline effect, should one exist, in this type of divorce cannot be explained by the imminence of the court’s decision but by the end of the mandatory conciliation period.

The French system of cost allocation differs from that prevailing in America and traditionally studied in models of conflict. More precisely, in the United States each party bears his own legal costs. In the French system legal costs are divided into two categories: the “dépends” and the “irrégétible” costs. The “dépends” (including lawyers’ fees and experts’ fees) are borne by the losing party, whereas the “irrégétible” costs are funded by each party. However, the transfer of legal costs only becomes effective once the court has pronounced its ruling. Hence, during the negotiation period both the French and American systems are on an equal footing: Each party bears their own costs. It is not until after the final verdict that the costs of the winner are transferred to the loser. The result of this is that the differences in the allocation of legal costs observed between the two countries affect the out-of-court settlement rate (due to this transfer of costs to the loser) but not the moment at which settlements are concluded (the allocation rules distribute the costs differently only after the verdict).

The French system also differs from those of the United States and England in that there is no rule identical to Rule 68 or to the Payment into Court rule, which sanctions plaintiffs who have refused a settlement greater than the damages awarded by the court. The considerable amount of costs involved in legal proceedings is likely to discourage those on low income from going to court to defend their rights. The aim of legal aid is to remove these financial obstacles, thereby granting access to the court system, thanks to state aid, which covers between 15% and 100% of the proceedings costs of the party concerned. This aid reduces negotiation and court costs but does not cancel them out altogether. Indeed, it only eliminates the financial costs of the conflict, but, above all, it does not cover the legal costs of the opponent should the beneficiary lose the case. Hence, there is always a risk that the beneficiary of legal aid will be obliged to pay the costs of his opponent. This risk, added to the nonmonetary costs of litigation, may constitute a sufficient threat to incite the beneficiary to come to a settlement at the very beginning of the negotiations (so as to avoid the nonmonetary costs) or on the steps to the courthouse (so as to avoid paying the legal costs of his opponent). Legal aid does not therefore have any influence over the date on which settlements are obtained and remains without influence on the deadline effect. On the other hand, because of the reduction in negotiation and trial costs that it brings about, it is likely to have an effect on the out-of-court settlement rate.

Legal Proceedings
A conflict begins with an accident, with the fact that a party does not abide by the clauses of a contract, or with the violation of a right. Should the victim choose to take the matter to court to validate his claims, then the case is submitted to the court. The action is seen as the right to go before a judge but does not necessarily imply the existence of a right: It may take place without a right being automatically associated with it or without the judge gratifying the plaintiff.
The action opens legal proceedings, which is understood as the series of actions and
deadlines from the time the proceedings begin until the moment of judgment, or until
any other form of halt to the proceedings intervenes (withdrawal, cancellation, or
transaction). The action must be submitted to the appropriate court, which, theoreti-
cally, is that of the defendant. In this article we will restrict our work to the TI
(magistrates courts) and to the TGI (county courts), which deal with civil law conflicts.
The TGI covers all civil cases except those in which a law has given jurisdiction to a
special court. It deals with cases where the amounts involved are over 30,000 francs. In
general, the principle of collegiality applies (a presiding judge and two magistrates),
but, to accelerate the proceedings, courts of one judge are allowed on agreement of the
parties or by decision of the legislator.5 The parties must be represented by a lawyer
(Article 751 NCCP).
First, the case is handed over to the inventory judge, who is “responsible for the
fairness of the procedure.” His role is to further an out-of-court settlement for all cases4
and to gather together all the necessary elements enabling the case to be resolved.
When this has been accomplished, it may then go before the court. The hearing for the
defense is usually held before the court in collegial form. The debate is based on an oral
presentation of the lawyers’ written summaries (accusatory procedure). When this is
over, the case goes to deliberation and the court decides on the outcome of the dispute
that is delivered publicly.
The TI (magistrates court), as a special court, takes charge of all financial disputes
under 30,000 francs. It is composed of one judge only who is responsible for the
investigation of the case.5 Representation by a lawyer is optional.
Those parties who are not satisfied with the decision of the lower court may go to the
Court of Appeal,6 which will rejudge the entirety of the case. Resorting to the High
Court of Appeal remains feasible, although the costs involved in such an undertaking
make it highly unlikely that the majority of cases will go this far. As a rule, the High
Court will not rejudge the case as a whole, but will limit itself to checking whether the
law has indeed been applied by the lower courts. This court is particularly attached to
form and is a very important source of law.
Once the case has been brought before the appropriate court, the dispute can be
solved in two different ways. On the one hand, the parties can endeavor to come to an
agreement throughout the procedure, either voluntarily or on the initiative of the
judge. On the other hand, the parties can refuse to negotiate or fail in their attempt at
an out-of-court settlement. At this point, the judge will make a ruling on the dispute.
The solution is known as jurisdictional.

Nonjurisdictional Forms of Dispute Settlement
Out-of-court settlements are only allowed in cases in which the parties have free use of
their rights. As opposed to jurisdictional forms of conflict settlement (court rulings and

---

5 The law of 8 January 1993 set up the Judge of Family Affairs; that of 9 July 1991, the Judge of Enforcement.
4 As must any judge, he must abide by Article 21 of the NCCP, which stipulates that “it is part of the mission of a
decision to reconcile the parties.”
5 There are no inventory judges in the TI.
6 Providing that the stakes are above 13,000 francs.
For what reasons do the parties decide to settle their conflict out of court? An old proverb of French law claims that “a bad settlement is better than a good trial.” The notion of bad settlement has no meaning in an economic sense. Coase (1960) indeed demonstrates that an agreement reached between free parties exempt of transaction costs is of benefit to both sides. Experience seems to support his claims as a second proverb, quite the opposite of the first, states that “there is no better justice than that administered by the parties to each other.” Consequently, the settlement always benefits both parties when there are no transaction costs to be paid. Any refusal to come to an agreement is thus linked to external reasons that prevent the parties from seeing it as a source of efficiency.

The wisdom of popular proverbs is not, however, sufficient to guarantee the amicable settlement of conflicts. The legislator has thus intervened to encourage the development of agreements between opposing parties to define their field of action and to guarantee their application. The notions of transaction, conciliation, and mediation along with their fields of application have thus been clearly defined. The legislator has reserved the right to impose the court ruling when free competition or public order is threatened.

The transaction, conciliation, and mediation are the voluntary, or nonjurisdictional, forms of solution to a dispute in the sense that the solution emanates from the desire of the parties themselves to arrive at an out-of-court settlement. They are the direct opposite of court rulings and sentences in which the judge or arbitrator imposes a solution and that here make up the jurisdictional forms of conflict settlement.
Jurisdictional Forms of Conflict Settlement

There are two jurisdictional forms of conflict settlement: court ruling and arbitration. We will not go any further with regard to arbitration to the extent that we have no data concerning this form of conflict settlement. Our analysis of the jurisdictional forms of conflict settlement will, therefore, be restricted to court rulings only.

The judgment is the result of deliberation during which the judges (if in collegial form) who were present at the trial undertake a majority vote. There are two types of judgment: judgments on litigation, the aim of which is to settle a difference, and amiable judgments, which recognize a condition but do not necessarily imply the existence of a conflict. We will restrict ourselves to the first of the two.

When the judge fails in his role as conciliator or when the parties cannot reach an agreement by themselves, the case is decided by the judge in accordance with law (first paragraph of Article 12 of the NCCP). So as to pronounce the law, the judge must "give or restore the exact description to the facts and contentious acts without paying attention to the description the parties would have offered" (Article 12, paragraph 2 of the NCCP).

Economists adopt a basic view of the trial, which they sometimes confuse with or voluntarily reduce to the verdict. In an economic analysis of legal conflict, the trial is, indeed, often the ultimate phase of the dispute: The parties go to court when they have exhausted all the avenues leading to an out-of-court settlement. In their models, economists of law thus neglect the conciliatory role of the judge and restrict their analysis of his function to one of pronouncing law. Therefore, the agreement is always supposed as exclusively being the result of the will of the parties, with no intervention by the judge or a third party.15

III. Empirical Evidence

With the aid of the data of the Statistics Department of the Ministry of Justice concerning cases settled before the TI (magistrates courts) and the TGI (county courts), we will underline the small number of out-of-court settlements in French law before highlighting the settlement time period and the deadline effect.

Low Out-of-Court Settlement Rate

Our study shows that a very small number of those going to court resort to nonjurisdictional means to settle their disputes. The settlement rate, indeed, appears relatively low both in the TGI and the TI. On this point France clearly stands apart from the United States, where the majority of cases seem to have a cooperative outcome.16

In fact, in the TI (magistrates courts) the settlement rate (Table 1), all civil cases included, attains only 24.7%, which means that less than one quarter of civil cases are

---

15 As for the judge, any conciliators or mediators are not usually included in the analysis.
16 Numerous Anglo-Saxon writers highlight the small number of cases actually going to court in the United States. Below are a number of examples to underline this phenomenon:

- Priest and Klein (1984) on the basis of various studies state: "It is well known that only a very small fraction of disputes comes to trial," (p. 2).
- Bechuck (1984) confirms this: "The great majority of legal disputes is not resolved by the courts, but rather through out of court settlements," (p. 404).
- Miceli (1997): "The fact that the vast majority of civil cases are settled or dropped just before they go to trial"; his claim is supported by a table showing that the trial rate is below 5% between 1987 and 1993 (p. 157).
settled out of court. We must, however, underline the existence of a heavy disparity between case types. The maximum settlement rate (34.4%) is in the field of company law where more than one third of the disputes are settled by agreement between the parties, whereas the minimum rate (21.7%) is to be seen in business law where a mere fifth of the cases arrive at a negotiated solution. A relatively high settlement rate also may be observed in property law (29.7%) and labor law (30.1%). Rates close to the average also are present in family law (24.2%), contract law (23.1%), and liability (25.1%). The high rate of disparity present is confirmed by a heavy coefficient of variation indicating that, on average, the settlement rate of any given category of conflict has a difference of 19.4% with the average settlement rate.

Although it is low, the proportion of settlements seems to be greater in the TI (magistrates courts) than in the TGI (county courts), where its average value is 21.6%. Therefore, if a quarter of the disputes are settled amicably in the TI, only one fifth of cases arrive at a cooperative outcome in the TGI.

Similarly to the TI, considerable disparities are to be found in the settlement rates observed in the TGI (Table 2). If the maximum rate is always to be found in company law (35.7%, higher than that of the TI), the minimum is now to be seen in labor law (17.4%). The fall in this last rate (more than 12 points) is considerable, because less than one fifth of labor disputes has a cooperative outcome in the TGI as against almost one third in the TI. The settlement rate increases strongly, however, when it comes to business law, in which it now attains 28.3% (i.e., an increase of 6.6 points). If the settlement rate changes very little for contract law (22.5%) when we look at the TGI, it falls sharply, on the contrary, for property law (in which it loses over 6 points to arrive at 23.4%). The fall in the settlement rate regarding liability is noteworthy but limited (21%, representing a drop of 4.1 points), as it is in family law (20.8%, i.e., a fall of 3.4 points). The rate disparity in the TGI is also higher than in the TI because the coefficient of variation is 28.6% in the first case compared to 19.4% in the second, indicating that, on average, in the cases brought before the TGI the settlement rate has a difference of more than 25% with the average rate.

These results are very important because it seems that current theoretical models of pretrial negotiation predict most often a high settlement rate. Such an interpretation is probably based on an “American bias,” because in screening or signaling models, the settlement rate is not necessarily fixed at a high determined level. In fact, theory predicts that the settlement rate depends on different factors such as the level of informational asymmetries, transaction and legal costs, or procedural constraints. We think that the models are relevant to analyze the situation in France even if these factors work differently between French courts and those in England or the United States (Section IV). Finally, the crucial point here is that the question of the existence of a deadline effect is independent of the level of the settlement rate.

**Deadline for Resolution of Disputes**

On average, it takes a little over 5 months (5.2 months) for a case to come before the TI. Even if this time limit seems reasonable, it must be said that it has been constantly increasing since 1982, at which time a case could be solved within 4.1 months (Tables 1 and 2).17 The average time to obtain a settlement is slightly less because, on average, an out-of-court settlement is struck 4.8 months after the beginning of the proceedings.

---

<table>
<thead>
<tr>
<th>TI</th>
<th>Total</th>
<th>Family Law</th>
<th>Business Law</th>
<th>Company Law</th>
<th>Contract Law</th>
<th>Liability Law</th>
<th>Property Law</th>
<th>Labor Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deadline effect</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Settlement date(s)*</td>
<td>3 months</td>
<td>3 months</td>
<td>3 months</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Settlement rate (%)</td>
<td>24.7</td>
<td>24.2</td>
<td>21.7</td>
<td>34.4</td>
<td>23.1</td>
<td>25.1</td>
<td>29.7</td>
<td>30.1</td>
</tr>
<tr>
<td>Judgment average length (in months)†</td>
<td>5.2</td>
<td>5.7</td>
<td>5.7</td>
<td>6.2</td>
<td>5.2</td>
<td>6.7</td>
<td>5.9</td>
<td>2.9</td>
</tr>
<tr>
<td>Number of conflicts judged in 1995</td>
<td>280,329</td>
<td>2,044</td>
<td>8,903</td>
<td>16,912</td>
<td>209,450</td>
<td>10,556</td>
<td>15,515</td>
<td>16,553</td>
</tr>
<tr>
<td>Settlement average length (in months)†</td>
<td>4.8</td>
<td>5.9</td>
<td>7.5</td>
<td>7.6</td>
<td>4.5</td>
<td>5.3</td>
<td>5.8</td>
<td>2.6</td>
</tr>
<tr>
<td>Number of settlements in 1995</td>
<td>92,124</td>
<td>778</td>
<td>2,471</td>
<td>8,871</td>
<td>62,772</td>
<td>3,543</td>
<td>6,569</td>
<td>7,120</td>
</tr>
<tr>
<td>Particularity</td>
<td>Two settlements and judgements peaks</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*It is the date of the peak when it exists. More precise settlement dates are not available for the moment, so we can give only an approximate date.
†Middle of class is used to calculate the average length.
TABLE 2. Conflict resolution in the TGI

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Deadline effect</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Settlement date(s)*</td>
<td>5 months</td>
<td>3 months</td>
<td>No</td>
<td>6 months</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>3 months</td>
</tr>
<tr>
<td>Settlement rate (%)</td>
<td>21.6</td>
<td>20.8</td>
<td>28.3</td>
<td>35.7</td>
<td>22.5</td>
<td>21</td>
<td>23.4</td>
<td>17.4</td>
</tr>
<tr>
<td>Judgment average length (in months)†</td>
<td>10</td>
<td>8.5</td>
<td>14.7</td>
<td>7.9</td>
<td>14.5</td>
<td>17</td>
<td>14.6</td>
<td>5.1</td>
</tr>
<tr>
<td>Number of conflicts judged in 1995</td>
<td>388,354</td>
<td>285,480</td>
<td>11,717</td>
<td>7,326</td>
<td>52,815</td>
<td>16,897</td>
<td>10,157</td>
<td>3,962</td>
</tr>
<tr>
<td>Settlement average length (in months)†</td>
<td>10.5</td>
<td>9.4</td>
<td>15.3</td>
<td>7.1</td>
<td>13.8</td>
<td>17.2</td>
<td>13.9</td>
<td>8</td>
</tr>
<tr>
<td>Number of settlements in 1995</td>
<td>107,272</td>
<td>74,780</td>
<td>4,624</td>
<td>4,071</td>
<td>15,367</td>
<td>4,494</td>
<td>3,102</td>
<td>834</td>
</tr>
<tr>
<td>Particularity</td>
<td>Presence of a second peak explained by divorces</td>
<td>Presence of a second peak explained by divorces</td>
<td>The two curves have the same form but no significant peak</td>
<td>The two curves have the same form but no significant peak</td>
<td>The two curves have the same form but no significant peak</td>
<td>The two curves have the same form but no significant peak</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*It is the date of the peak when it exists. More precise settlement dates are not available for the moment, so we can give only an approximate date.
†Middle of class is used to calculate the average length.
The situation is very different in the TGI where the time required to solve a dispute is almost doubled. The time needed to solve a case is, indeed, much longer because, on average, a case is judged in the TGI after 10 months whereas an amicable solution is found on average after 10.5 months. If these periods are very similar to those observed in the TGI between 1982 and 1984, a lengthening of them is to be feared in the future inasmuch as the average time for a case to come to court in the year 2000 should increase to 12.3 months.19

Concerning the dissimilarities between jurisdictions, significant differences are to be seen within each jurisdiction according to the legal field concerned. Consequently, in the TI, the coefficient of variation relative to the decision deadline is 22.5%, and the average time needed for the case to be decided goes from 2.9 months in labor law to 6.7 months for liability, a field in which resolving a dispute takes longer. The average time for a case in company law is relatively long (6.2 months). It is slightly less for property law (5.9 months) and in family law and business law (5.7 months). It matches the average for contract law (5.2 months).

The disparity to be seen regarding court decisions is greater concerning settlements because the coefficient of variation is more than 37%. The average time needed to reach an agreement thus varies sharply from one field of law to another and is more pronounced than for cases already tried. If the average minimum settlement time is always to be seen in labor law (2.6 months), the maximum obtained goes to company law (7.6 months), where the average time is always high. The average time for an amicable agreement to be reached is also long in business law, taking 7.5 months on average to settle in this manner. It is much shorter in family law (5.9 months), in property law (5.8 months), in liability (5.5 months), and for contracts (4.5 months).

Through a comparison of average times for settlements and court rulings it can be seen that family law, property law, and labor law are relatively similar but that the other categories of law differ markedly.

The variation in the average time required for a case to be judged in the TGI is higher than that of the TI, it being basically constant as far as agreements are concerned. Indeed, the variation in judgment times in the TGI reaches 45.2%, whereas it was only 22.5% in the TI; the coefficient of variation for agreements on the contrary remains stable at 37.6% against 37.3% in the TI. The variations observed regarding judgments do not, therefore, seem to reappear for agreements when the jurisdiction is changed.

As was seen in the case of the TI, the maximum average time is to be seen in liability (17 months) and the minimum average in labor law (5.1 months). Even if the increase in judgment time is high, the difference between the lowest and the highest nevertheless remains from one to three, whatever the jurisdiction. The longest times are to be witnessed in business law (14.7 months), in contract law (14.5 months), and in property law (14.6 months). The lowest average is in family law (8.5 months) and company law (7.9 months). As for agreements, the longest time is reached for liability (17.2 months, higher than the average time for a case in court) and not for company law, as is the case in the TI. The shortest time is in company law (7.1 months) and not in labor law, as in the TI. The classification of the fields of law according to the average time for amicable solutions is thus not consistent when there is a change of jurisdiction, and it is surprising to note that the field with the longest settlement time in the TI matches the one with

the shortest in the TGI. The explanation for this lies in the fact that the average settlement time in company law remains stable when there is a change of jurisdiction, whereas it increases sharply in all other fields.20 The average settlement times in business law are rather high (15.3 months), very close to that of contracts (13.8 months) and property law (13.9 months), but are lower in family law (9.4 months) and in labor law (8 months). Finally, the average times for court decisions and agreements differ little among the fields of law in the TGI, with the exception of labor law where the difference is over 3 months.

**Deadline Effect and the U-Curve**

The observation of a U-curve representing the temporal distribution of settlements (Figure 1) means that the latter take place basically at two moments in time: at the outset of the proceedings and just before the court’s ruling. The deadline effect corresponds to the second settlement peak, i.e., the right-hand side of the U-curve. It is only obtained if settlement and judgment peaks exist and if they are simultaneous. The search for their existence is based on statistics that show the dates on which settlements and judgments are the most numerous.

*In the TI.* Overall, the observation of temporal settlement distribution invalidates the existence of a U-curve inasmuch as no peak appears at the beginning of the proceedings. Conversely, the entirety of the fields of law studied, as well as the “total” curve gathering all disputes coming under the jurisdiction of the TI, show simultaneous peaks for judgment and agreement, thereby confirming the existence of a deadline effect in the TI. In all fields of civil law studied, the deadline effect appears toward the third month, the available data not allowing a more precise date to be given. The reduced size of the settlement peak compared to that of judgments confirms the low rate of agreements in France but does not question the existence of the deadline effect.

The deadline effect is particularly acute in labor law where the two curves progress in a similar manner and present a peak at the same moment. It is also visible to a lesser extent in family law, contract law, and in liability. The settlement curve presents a more flattened out shape for business law and property law, nevertheless peaking at the same time as the curve relative to judgments. The curves related to company law show peaks ranging from 1 to 6 months. The fact that the two curves have the same shape would seem to confirm the existence of the deadline effect. The existence of peaks ranging from 3 to 6 months may be explained by the large number of conflicts solved within 3 months and between 3 and 6 months. The calculation of solution times had shown the relative delay in the examination of this category of cases, which seemed to require more time to be solved, at least for a portion of them.

A longitudinal study carried out thanks to the use of an existing document21 shows the persistence of the deadline effect over time. Indeed, observation of the temporal distribution of cases solved with and without the courts confirms the existence of a deadline effect in the areas of the family, property, business, contracts, liability, and

---

20 In most cases the average times more than double.

21 We refer here to the study of the Minister of Justice entitled “Les Conflicts Civils 1984–1985,” published by La Documentation Francaise (1987) and especially the second chapter entitled “Analyse statistique de la durée.” The aim of this study is not to highlight a deadline effect, but its results may be interpreted in this manner.
Fig. 1. Temporal distribution of French conflicts resolution by type of conflicts.
Dynamics of Pretrial Negotiation in France

(FIG. 1. Continued).
Fig. 1. (Continued).
Dynamics of Pretrial Negotiation in France

FIG. 1. (Continued).
Consequently, transversal and longitudinal analyses tend to show the existence of a deadline effect in all areas of civil law for cases coming under the TI.

**In the TGI.** The contour of the judgments and settlements curve relative to the TGI are very different from those observed in the TI, even if the existence of a U-curve in the TGI may also be invalidated. Overall observation (“total” graph) brings out differing settlement and court ruling curves, the first showing a peak at 6 months and the second showing two peaks, one at 3 months and one at 6 months. It cannot be deduced that there is an absence of the deadline effect in the TGI. More exactly, the judgment peak observed at 6 months basically corresponds to the divorces present in family law. Procedural rules governing divorces by mutual consent set a delay of 3 months to attempt a conciliation. So, most agreements are probably concluded at the end of these 3 months. Consequently, there can be no settlement peak at 6 months for judgments because the deadline effect necessarily appears in the third month. The deadline effect also is to be seen in labor law but is considerably weaker than that observed in the TI. This fall may be explained particularly by the low settlement rate in the TGI for this area of law.

The deadline effect is invalidated, however, in all other categories of law examined. Nevertheless, in business law, contract law, and property law the judgment and settlement curves are very similar, exhibiting increases and decreases at the same moments, even if the value of the variations is always lower for settlements. This similarity shows that the highest rates of settlement are simultaneous with the highest rates of judgment in such a way that multiple and lesser deadline effects would be present. Therefore, for business law and contract law, deadline effects may be detected between the third and the sixth month and after 2 years of procedure, between the third and the sixth month, and the third year in property law.

The existence of multiple deadline effects may be explained by the various procedures governing the trials in the TGI, the duration of which varies considerably. The shortest procedure (or “short circuit”) is used when it is possible to judge the case at the outset; a very quick procedure that can be applied over a few days but the cases do not appear on the graphs. The intermediary procedure (or “average circuit”) cannot be judged immediately, but there are few elements remaining to be elucidated. Generally, this lasts about 4 months, which would explain the peaks observed between 3 and 6 months in the temporal distribution of conflicts solved in this manner via settlement or judgment. Finally, the long procedure (“long circuit”) requires the intervention of the inventory judge who will seek out the elements necessary for the case to be solved. Once the case is ready, it is brought before judges sitting in collegial formation who are to decide on the outcome. This procedure may take several months or even years. It would explain the peaks observed after 2 years of procedure. Consequently, the deadline effect is not completely invalidated in the areas of contract, business, and property law.

A comparison with the aforementioned study by the Ministry of Justice confirms the presence of a deadline effect before 6 months in business law and contract law; it is not possible to confirm the second peaks because the study is limited to the first 18 months.

Regarding liability, the deadline effect is invalidated to the extent that the amicable settlement rate remains low and stable over time, whereas the distribution of judgments is witness to peaks between 9 months and 1 year and between 18 and 24 months. The data are not available for company law.
longitudinal study confirms the absence of a deadline effect in this area. This phenomenon can be explained by the procedure governing road accidents. Indeed, the law “Badinter” compels insurance companies to make an offer of settlement to the victim. The latter takes legal action if negotiations are blocked because the parties are at odds. In this case, the insurers refrain from making other offers and await the judgment. So, a deadline effect cannot be observed.

The temporal distributions of judgments and settlements observed in company law each present a peak. The originality of the curves concerns the moment at which the settlement peak occurs. Indeed, the latter appears between 3 and 6 months in such a way that it is behind the judgment peak occurring before 3 months. The delay in the settlement peak may be explained by the large number of agreements reached between 3 and 6 months concerning the other demands related to company “redressement judiciaire.” The judgment peak itself is linked to the large number of legal decisions related to the “redressement judiciaire” of companies in difficulty occurring within 3 months. The judgment and settlement peaks do not, therefore, correspond to the same demand, thereby invalidating the existence of a deadline effect in company law.

In fact, if the deadline effect clearly becomes apparent in all areas of civil law in the TI (magistrates courts), it is much rarer in the TGI (county courts), where it doubtless remains for family and labor law. In all other cases, the deadline effect is either less apparent (for it to be highlighted there needs to be an examination of the procedures governing these conflicts) or nonexistent. How can it be that the deadline effect is quite common in the TI and quite an exception in the TGI? We will now attempt to answer this question.

IV. Conclusions and Issues for Further Research

Using data on civil conflicts in French Law, we show that although the out-of-court settlement rate is relatively low, a deadline effect exists in the French legal system. Thus, the analysis in this article suggests, perhaps surprisingly, that the generalization of the deadline effect is permitted beyond the borderline of common law.

Moreover, theoretical arguments based on asymmetries of information enable us to explain why individuals involved in costly trials reach a bilateral agreement at the door of the court. These asymmetries generate strategic behavior from those being judged. A realistic theory of solving legal disputes would, thus, seem to be necessarily based on bargaining theory. Approaches are varied, however, and only empirical research is likely to separate models. In this light, it also seems useful to consider some new directions for thought.

The main points concern financial constraints, procedural constraints, and the role of financial intermediaries in the negotiation between plaintiffs and defendants.

Financial Constraints

Whereas in the TI the deadline effect seems to have spread to the majority of case types whatever their nature, it seems invalidated when it comes to the majority of conflict categories in the jurisdiction of the TGI. It would seem that the nature of the jurisdiction affects the link between the proximity of trials and the number of settlements. An initial explanatory element lies, in our opinion, in the recognition of what is at stake in the trial. This value is generally higher in the TGI than in the TI. The near equivalence of the settlement rates (about 25%) in the two types of jurisdictions demonstrates that the stakes themselves are not a source of negotiation failure.
However, the duration of conflict settlement through the courts seems to depend on the stakes: The higher the value of the conflict, the longer it takes to resolve the case. To the extent that low-value conflicts are resolved rapidly in the courts, the parties have little time to negotiate and reach an agreement. Supposing that the parties’ information improves during the negotiations, the imminence of the trial will force them to negotiate even if the information at their disposal is relatively mediocre. Conversely, when the value of the conflict is sufficient to justify changing jurisdiction, the legal resolution of the case intervenes much later. The time given over to negotiations is, therefore, much longer. To the extent that the quality of information increases gradually during the discussions, there arrives a moment when the parties consider that the information at their disposal is sufficient for them to reach an agreement without the imminence of the trial affecting their decision. Therefore, for low-value cases, the imminence of the trial takes precedence over the quality of information, whereas in high-value cases the quality of available information exercises a greater influence on the parties in reaching an agreement. Agreements would thus come about close to the trial date in the first case, whereas they would tend to be more spread over time in the second. Consequently, the deadline effect would be an indirect function of the appropriate jurisdiction due to its direct dependence on the time given over to negotiations. Taking account of transaction costs and proceedings costs, which are higher in the TGI strengthens this phenomenon.

Procedural Constraints

Here, there are two problems to solve. The first one concerns the number of offers between litigating parties before the judge’s decision. Following Spier (1992), who considers a defendant who is privately informed about the liability for damages suffered by the plaintiff, the subgame perfect equilibrium involves the plaintiff making an offer to the defendant at each period, with some fraction of the defendant pool accepting each offer. Unfortunately, data on French civil litigation does not enable such behavior to be verified. It seems interesting to note, however, that in the English system only a fraction of claims receive more than one offer before settlement or adjudication [Swanson and Mason (1998)]. Based on data collected from the Taxing Masters in the United Kingdom, authors calculate that an average of only 0.3 offers are made in each year of a claim. Their analysis shows that the size of this fraction seems to depend on the type of parties involved in the claim. So, they develop a theory to explain these phenomena. Like Farmer and Pecorino, their proposed model describes bargaining between a risk-neutral defendant, who plays the litigation game repeatedly, and a risk-averse plaintiff, who is involved in litigation once. This model predicts a partial bargaining and the dependence of offer frequency on plaintiff type, as observed in data on English litigation bargaining. Our intuition is that the same features exist in the French system, and we have now to collect data to test this theory of civil litigation beyond the deadline effect.

The second problem concerns procedural conditions *stricto sensu*. This problem arises when we consider that the judge, acting as arbitrator, is able to improve the information of the interested parties. We have argued in this paper that the source of the deadline effect lies in asymmetries of information. So, the nature of the procedure is certainly fundamental to appreciate civil litigation claims and the date of their resolution. In practice, two different procedures exist: The first, *inquisitorial procedure*, prevails in countries in the tradition of Roman civil law in which judges take an active role in
investigating the circumstances of the case; and the second, *adversarial procedure*, predominates in countries of common law in which partisan advocates present their cases to an impartial jury. Shin (1998) seeks to answer the following question: Should arbitrators adjudicate on the basis of their own investigation or invite the interested parties to make their cases and decide on the basis of the information so gathered? The author adopts a normative perspective to demonstrate the superiority of the adversarial procedure: “The source of (this) superiority lies in a nonconvexity. The marginal benefit to the arbitrator of an improvement in the information of one of the interested parties is not constant. It depends on how well informed this party is relative to the other. In particular, the marginal increase in the arbitrator’s payoff is larger if the information of the better informed party is improved further. If the arbitrator had the choice, he would choose to exacerbate the disparity in information between the two parties rather than to arrange a level playing field. In contrast, the payoff of the arbitrator increases linearly in its own information. No such increasing returns exist under the inquisitorial procedure.”

Our empirical analysis of the French legal system seems to validate Shin’s model. In particular, the weakness of settlement rates would be the manifestation of the lesser efficiency of inquisitorial procedure in terms of minimization of the social cost of conflict resolution. Moreover, we can refer to Shin’s analysis to offer an explication of the weakness of the deadline effect in France. The author insists on the respective virtues and drawbacks of the two different procedures. Thus, the relative efficiency of the two procedures depends on the rate at which the judge can trade off the total amount of relevant information with his utilization of this information. In the United States for instance, under the adversarial procedure, the judge adjudicates only when he has uncovered all the information that each party accepts to disclose. On the contrary, the French judge has to use the information as soon as he obtains it to try to conciliate the parties (Article 21 of the NCCP). Thus, we think that settlements are consequently more spread out in the French legal system. This prediction is validated in our study for most civil conflicts (particularly in the TGI with the inventory judge) for which the deadline effect is weaker than it is under common law.

*The Role of the Advocates*

Another factor explaining the rarity of the deadline effect in the cases brought before the TGI may be that of the role of lawyers. In the TI, the parties are entitled to defend themselves or to make use of a third party. It is not mandatory to use a lawyer. However, lawyers, due to their experience, have information that can be of use to their clients. They advise them and can convince them of the advantage of reaching a settlement...
without the imminence of the trial influencing their remarks. By facilitating their client’s access to relevant information, lawyers can contribute to the reaching of agreements at any moment and not only on the steps of the courthouse. Conversely, when the parties are not represented by a lawyer, only their own investigations enable them to increase the quality of relevant information. As a matter of fact, access to information being more difficult and probably more costly in time and money, the imminence of the trial may be the only variable prompting the parties to negotiate. Agreements are thus reached essentially in the ultimate phase of negotiations.

In fact, the presence of lawyers, due to their tendency to accelerate the distribution of information, would seem to further settlements, whatever the time limit placed on negotiations. Conversely, in their absence, the parties seem to be more influenced by the imminence of the trial than by the information that remains to be discovered. As long as the trial seems distant, they continue discussions with the intent of discovering more about their opponent; as the date approaches, some of them will accept the offer of settlement, as Spier’s analysis shows. Our analysis provides illustrative support for the belief that lawyers have the ability to persuade the litigants to approach the settlement-versus-trial decision from an economic perspective. This leads to the conclusion that lawyers can facilitate settlement in cases in which parties would probably not reach agreement on their own. Moreover, Gilson and Mnookin (1995) show, in a situation of prisoner’s dilemma, that the lawyer’s reputation may serve to bond a client’s cooperation in the litigation process because the choice of a cooperative lawyer allows the client to make a credible commitment to cooperation. It confirms that an attorney’s presence would facilitate settlement. In fact, lawyers can promote efficiency in dispute resolution, but, as noted by Korobkin and Guthrie (1997), they do not do so necessarily or automatically.

The difficulty presented here is the agreement on optimal fees in the context of an agency relationship in which the lawyer and client are involved. Particularly, one may wonder whether the lawyer can accept that the fees he is to receive should be determined, in part or in whole, by the outcome of the litigation. In fact, several systems are possible:

- A fixed fee is decided inclusively, whatever the result and time spent on the case.
- The fees are calculated on the basis of time spent on the case at an hourly rate.
- The fee by result (or *palmarium*); at the outset it is agreed that the fee shall by increased by a set amount if the client’s goal is attained.
- The contingent fee (*quota litis* pact): the fee is calculated on the basis of a percentage of the increase in value of the client’s wealth thanks to the lawyer’s intervention. There is a strong aversion to systems that make the fee dependent on the outcome of the trial. The *quota litis* pact is, indeed, forbidden in numerous countries such as France and Great Britain.

In this context, Hay (1997) tries to find the optimal contingent fee structure for the client in a world of settlement, Miller (1987) examines the best fee arrangement for both client and attorney, and Miceli and Segerson (1991) and Miceli (1994) measure the impact of fees on litigation and accident prevention. Unfortunately, to our knowledge, there is no study of how the attorney’s remuneration could influence settlement dates, supporting the idea that lawyers accelerate the distribution of information and, thereby, the length of settlements.
References


