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New York International Arbitration Center
The Paris International Commercial Courts
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You all know, from your extensive experience in the matter, that **Paris is a major venue for arbitration**. Indeed, the Paris-based international chamber of commerce – for which 2019 marks a centennial anniversary – set up early on a court of arbitration that has **achieved worldwide renown**. France has long recognized that companies value the opportunity to make use of arbitration, and has, accordingly, taken the necessary legal steps for such arbitration to flourish.

Over the past few years, however, we in France have **become increasingly aware that the alternative between traditional, court-based justice and arbitration might not properly meet everyone’s needs**. On the one hand, court-based justice has been criticized for its **lack of flexibility** in applying rules both of substance and of procedure, and for its insufficient awareness of business issues². On the other hand, arbitration has tended to fall short of companies’ expectations, mainly because of its **cost and lack of swiftness**.

It became apparent that **a new kind of arrangement for dispute resolution could better meet companies’ needs**.

Brexit and its consequences were also major factors that France had to take into account.

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² Yet French judges, in any case, must seek the applicable foreign law and precedent when litigants have entered into contracts based on foreign law. Furthermore, following the major overhaul of contract law brought into force on October 1st 2016, judges must comply with the common intention expressed by parties to a contract, and refrain from interpreting clauses which are otherwise clear and precise.

As soon as the United Kingdom leaves the EU, it will be impossible for it to benefit from the mutual recognition of court-decisions handed down in countries covered by the 2012 *regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*. **British judgements, most notably those of the famous London Commercial Court, one of the world's foremost forum for settling international business disputes, will not be enforceable in any EU Member country** without going through a specific enforcement procedure called *exequatur*.

An *exequatur* procedure – even pursuant to The Hague Convention – is a somewhat unwieldy burden that makes it unsuited to today's business world, in which justice is expected to be, of course, of a high standard, but also to be efficient and to issue swiftly enforceable decisions. **A decision issued in an EU Member State that can be enforced throughout Europe immediately and automatically (*i.e.* without long and costly procedural complications) should be much more efficient** than one issued in the United Kingdom.

In France, we therefore set our minds to thinking of a way to make justice amenable to all these needs.

We studied examples abroad, not only to seek inspiration but also to find new, better ways to meet companies' needs. Germany and the Netherlands, which are civil-law countries, have been experimenting with international courts comprised of judges selected for their knowledge of international business law and proficiency in English. Dubai, Doha and Singapore have, for their part, set up international courts that include British judges and follow Common Law. In effect, **civil-law justice and common-law justice seemed to converge towards two procedural principles: the use of English in proceedings and a preference for oral rather than predominantly written procedure. As you are well aware, those principles also underpin arbitration.**

In France, however, the use of French is mandatory before courts for certain procedural acts, and procedure is largely a written one. We thought it advisable to leverage these two components to bring French

justice closer to what is common in arbitration and Anglo-American law.

To that end, **we set our sights on the existing international chamber in the Paris Commercial Court, and decided to put in place an international chamber within the Paris Court of Appeal, as of March 1st 2018. Thus, international-commercial-court judgments are appealable.** The courts – namely the international chambers at first-instance- and appellate level – have **jurisdiction basically over international commercial disputes and disputes relating to transactions on financial instruments and to the interpretation of market master agreements³.**

The *International Swaps and Derivatives Association (ISDA)* – the world’s leading association in derivatives – published its first master agreement for derivatives governed by French law in June 2018. This has recently been supplemented by the publication of a full set of standard collateral documentation governed by French law. Many such contracts have now been signed and progresses are made daily. Talking of a market worth billions of dollars, this is set to be a major change for Paris, which is the chosen jurisdiction under this new master agreement.

At the first-instance level, **judges are well-attuned to business issues, because of their business and banking background** and because they only rule on disputes in areas with which they are familiar. You may be surprised to learn that they are not, in fact, professional judges. But **the rate of appeals levelled against their judgements is no different from the rate observed as regards professional judges**, which is no doubt evidence of sound justice. **Any legal or factual error would, at any rate, be corrected by the Court of Appeal**, which comprises only professional judges. **In France, unlike the U.S., appellate judges have broad authority to review the decisions of a trial court, both with respect to findings of fact and conclusions of law.** Despite this broad

³ Transnational commercial disputes include disputes related to: International commercial contracts and the termination of commercial relations; Transport; Unfair competition; Anti-competitive commercial practices; Transactions in Financial Instruments, Market Standard Master Agreements, as well as Financial Contracts, Instruments and Products.

power of review on appeal, very few of the decisions of the Paris Commercial Court are reversed on appeal.

We made sure that English and oral procedure were able to find their way into the international courts. **Litigants may use English, provided that they subscribe to a procedural protocol to that effect.** The same is true of their counsel, so long as a Paris bar lawyer is present during hearings. **An American lawyer could therefore very well argue a case in English before the Paris Commercial Court or the Paris Court of Appeal. English may also be used for bringing evidence, thus limiting translation costs.** For now, however, English is not the default-language, since it was preferable at first to put the courts to work without any change of legislation. Written submissions must therefore be in French, although they can be accompanied by an English translation. Courts provide a simultaneous English translation of judgments.

Amendments to existing legislation may prove necessary, depending on the needs which come to light as ever-more businesses bring their cases before these courts⁴. Our firm intention is to be pragmatic and to adapt to businesses' needs.

Moreover, the judge assigned to the supervision of the case shall from **the very beginning set a detailed procedural timetable**, up to the date of closure of the proceedings and the date of deliverance of the decision of the Court.

It should also be noted that proceedings before the Paris Commercial Court are oral, which means that litigants may present their cases freely during hearings. Before the Court of Appeal, though procedure is in mostly written form, the judges in the international court have decided to also make room for discussion, by allowing litigants and their counsels to meet with the judge on a regular basis.

⁴ Should the procedural choices mentioned in the contract (namely abiding by the Protocoles relating to the Paris International Courts) be made binding as choice of jurisdiction clauses are ?

We are well-aware that France and common-law jurisdictions have very different methods for bringing evidence. Written evidence is paramount to us, whereas oral evidence is rather rare in French court-proceedings. French law nevertheless allows judges to hear witnesses, though they seldom do in practice. **As a way of closing the gap between current practice and the practice of arbitration, the protocols on procedure before the Paris international courts draw extensively on the International Bar Association *Rules on the taking of evidence in international commercial arbitration*. Fact witnesses and experts will have the option to testify in open court, if litigants make such a request. They may testify in English, provided that the litigants accept the protocol's terms. And of course litigants can make oral arguments in both French and English.**

As regards the burden of proof, French law requires that anyone intending to make a claim must bring evidence to that end. A judge cannot take the party's place in that respect. What a judge can do, nonetheless, is compel a third-party or the opposing party to supply a piece of evidence which they are withholding. That may be a specific piece of evidence or **any specifically identified “categories” of documents (as opposed to identified documents)**. A court-order on that point is enforceable, and therefore of the utmost effectiveness. Judges in the international courts have chosen to pay special attention to this matter, and make full use of the provisions our civil procedure code, in cases where it proves necessary for evidentiary purposes. **As far as possible, they will make sure that the evidence brought before them is the same as an arbitrator would have.**

That said, we will not go so far as to allow U.S. style discovery or English disclosure before the international courts. In terms of cost and efficiency, it does not seem to be in line with what businesses expect.

Thus we have sought to come close, in France, to methods which, broadly speaking, stem from the common-law heritage and which are widespread in arbitration. And we have done so without straying from the French legal tradition. We hope we have set in

motion a process that will enhance cross-pollination between court-based justice and arbitration.
