



Legal high Committee for
Financial markets of Paris

RECOMMENDATIONS FOR THE CREATION OF SPECIAL TRIBUNALS FOR INTERNATIONAL BUSINESS DISPUTES

3 May, 2017



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Introduction

1. Prompted by a desire to adapt the French court system to the contemporary international economic and legal context, in a letter dated 7 March 2017,² the Minister for Justice, *Garde des Sceaux*, requested the *Haut Comité Juridique de la Place Financière de Paris* (HCJP - Legal High Committee for Financial Markets of Paris) to conduct a preliminary study and to submit, before 1 May 2017, “*after having defined the relevant legal framework, recommendations for rapidly setting up judicial tribunal sections³, within specifically designated courts, capable of hearing technical disputes, applying foreign law principles and holding proceedings under the most efficient conditions, in particular with respect to language, with the aim of offering economic operators the possibility, in the event of a dispute, to submit their matter to courts in France able to readily decide cases applying the law they have chosen, in the language of their business relationship*”.

2. As defined, the objective of the study is to identify the eligible disputes, to propose practices, in particular with respect to language, which would enable them to be handled most effectively within the framework of existing procedural rules, and to determine the human, technical and physical resources to be made available to the designated courts. If necessary, the study may generate proposals to improve the existing legal framework.

3. The study was conducted in light of the current legal context in which general private international law principles, international conventions and European Union (EU) law cause the French courts to hear disputes of an international nature requiring the application of rules other than the domestic law. In particular, the Hague Convention of 15 June 1955⁴ on the law applicable to international sales of goods and European Regulation Rome I of 17 June 2008 on the law applicable to contractual obligations⁵ define cases in which national courts may apply foreign law to a dispute, and the conditions for doing so. Regulation Rome II of 11 July 2007 does the same for non-contractual obligations.⁶

4. On a global level, the jurisdiction of national courts to hear cross-border commercial disputes is also determined by principles of private international law and certain international conventions.⁷ In Europe, the allocation of jurisdiction between the courts of Member States has been successively governed by the Brussels Convention of

² Appendix 01. The study was carried out in cooperation with Mr Christian Noyer, Honorary Governor of Banque de France, who was appointed by the Prime Minister to conduct a study on the attractiveness of the financial markets in Paris in the context of Brexit.

³ In this document, tribunal section will be understood as one of the possible formation of the court a tribunal is composed of.

⁴ Convention of 15 June 1955 on the law applicable to international sales of goods.

⁵ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

⁶ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

⁷ Hague Convention of 30 June 2005 on choice of court agreements.



1968,⁸ which was replaced by the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters,⁹ which entered into force on 1 March 2002, and which was recently re-adopted as Recast Brussels I Regulation, which entered into force on 10 January 2015.¹⁰

5. In international contracts, these general and European rules allow contracting parties to choose both the law applicable to their business relationship and the courts that will resolve any disputes such relationship may generate. As a result, there is a worldwide, as well as European, competition between courts that, in order to protect the sovereignty of our judicial system and for economic reasons, requires French courts with jurisdiction in various business law fields to project authority and attractiveness by the quality of the service they provide.

6. Although sufficient in and for themselves, the general reasons for improving the international competitiveness of the French commercial courts have taken on additional import as a result of the decision of the United Kingdom (UK) to withdraw from the EU, because this event will challenge the predominance of London as a forum for resolving commercial disputes arising anywhere in the world. As shown by the HCJP's report of the 30 January 2017 on the implications of Brexit on judicial cooperation in civil and commercial matters in Europe,¹¹ the attractiveness of the London Commercial Court¹² is due, in addition to the fact that it is indisputably well-qualified, to the UK's access to the common judicial area set up by the EU, which offers it the legal certainty of a system that clarifies the rules on judicial jurisdiction, determines the rules applicable by the courts and facilitates the recognition and enforcement of judgements by the EU Member States. This significant advantage will be lost when the UK becomes a third country to the EU. In particular, unless new forms of cooperation are negotiated with the EU, to be enforced in the various Member States, court decisions rendered in London will have to comply with the *exequatur* procedures in effect in each Member State, which will deprive such judgements of the efficiency of automatic enforcement throughout the EU. Our country should therefore offer domestic and European economic operators a highly effective judicial system providing them with access to the legal certainty concerning judgment and enforcement afforded by the EU's judicial area.

⁸ Brussels Convention of 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

⁹ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters.

¹⁰ Council Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition of judgements in civil and commercial matters.

¹¹ Report on the implications of Brexit on judicial cooperation in civil and commercial matters, Haut Comité Juridique de la Place Financière de Paris (Legal High Committee for Financial Markets of Paris), 30 January 2017: https://ibfi.banque-france.fr/fileadmin/user_upload/banque_de_france/HCJP/Rapport_05_F.pdf.

¹² According to the statistics of the London Commercial Court, in about 80% of the cases submitted to it at least one party is foreign, and in nearly 50% of cases all parties are foreign. The value of the disputes is generally in the six- to seven-figure range. The court hears around 1,000 cases each year, of which nearly 200 involve parties from the continent (Prof. Dr. Dres. h.c. Burkhard Hess, Executive Director Max Planck Institute Luxembourg for Procedural Law, <http://conflictoflaws.net/2017/the-justice-initiative-frankfurt-am-main-2017-law-made-in-frankfurt>).



7. The HCJP is continuing its work to determine the consequences of Brexit on the effectiveness of clauses conferring jurisdiction on the courts in London that are found in various model financial contracts proposed by international organisations. Another working group, tasked with studying the legal feasibility of developing an interest rate derivative trading and settlement system in Paris, has stressed the need to substantially enhance the capacities of the French financial courts in order for them to offer a credible alternative jurisdiction to the courts in London for disputes arising from these contracts that raise highly technical legal issues.

8. These general and contextual factors have led the HCJP to suggest that such specialised tribunal sections be rapidly set up within the civil and commercial courts in Paris to hear these specific disputes, and that they be staffed with judges who have extensive training and experience in these technical issues, specific expertise in the foreign law customarily applied in international commercial relationships, which is essentially the common law, and who speak the language of such law.¹³

9. Raising the standards of the capital's commercial courts to international levels is particularly necessary because Paris is an important, active and innovative financial market. Five of the twenty largest European banks are headquartered in Paris, as well as three insurance companies in the top twenty-five worldwide. Paris also holds a predominant position in the bond issue market in continental Europe, as it ranks third worldwide in corporate bond issues, with a total of USD 606 billion, and accounts for 33% of the total amount in circulation in Europe, ahead of the United Kingdom (29%) and Germany (10%). Paris is the leading asset management center in continental Europe. Our financial market has EUR 3,600 billion in assets under management, which is the largest volume after London. The asset management sector in France is also characterised by the diversity of its ecosystem. It has four asset managers in the top twenty-five worldwide, significant international expertise and regularly sees the creation of successful entrepreneurial ventures that are recognised and visible internationally, and that convey a positive image of "French boutiques", contributing to the growing influence of the French financial industry. Paris has a liquid and deep labour pool specialised in banking and financial services, and holds the top spot in the *Financial Times*' ranking of the best Masters in Finance programmes worldwide, with six French schools in the top twelve. The demand for specialised judicial services to regulate this activity is therefore very high.¹⁴

10. Paris also has a very significant offer of international legal services: 33 British law firms and 16 US law firms have offices in Paris, employing 2,600 lawyers and generating annual average turnover of

¹³ Memorandum on the creation of international tribunal section before the civil and commercial courts in Paris, Guy Canivet, 9 January 2017, Appendix 02.

¹⁴ See Paris Europlace, "The financial markets in Paris" (*La place financière de Paris*), <http://www.paris-europlace.com/fr/la-place-financiere-de-paris>.



EUR 1,560 billion. In addition, French law firms that have an international practice employ 500 lawyers and generate annual average turnover estimated at EUR 300 million. The total business of these international law firms represents 60% of the total turnover of Paris lawyers. Furthermore, the Paris Bar has 1,800 lawyers who are also members of a foreign bar, and estimates that 1,500 of its members also practice in London.¹⁵ There is therefore a significant number of lawyers who are “bi-legal” and bilingual and, therefore, in a position to practice before an international commercial court sitting in Paris.¹⁶

11. Several countries around the world have already created judicial forums for business law matters, which aim to attract major international disputes by offering courts that apply specially adapted procedures and that are comprised of judges of diverse nationalities who are known for their experience with the common law and who speak English. This is the case in Dubai, which has established the “Dubai International Financial Center” (DIFC), Doha, which has created the “Qatar International Court and Dispute Resolution Center” (QICDRC) and Singapore, which has set up the “Singapore International Commercial Court” (SICC). Initiatives that are more consistent with national judicial traditions, but that also aim to attract foreign litigants, have been undertaken in Germany¹⁷ and the Netherlands, where specialised tribunal sections have been set up in various courts to hear specific disputes, in particular cases involving maritime law and intellectual property law. Moreover, in both countries government bills have been drafted to expand and standardise these practices.¹⁸ A critical review of these various experiences led the working group to adjust the proposals made in this report.

12. Within the short time allotted to submit the proposals requested, the working group¹⁹ endeavoured to hear the views of the main stakeholders: Chief Judges of courts, associate judges, professional lawyers’ organisations, representatives of various interests, specialised associations and experts. Due to a lack of time, these interviews were not exhaustive, but the interview process should be continued if it is decided to implement the proposals in this report. The working group also studied experiments abroad, particularly in Europe, where similar projects have been devised. It reviewed the learned commentary and case-law on the various legal issues this project raises. All

¹⁵ Interview with Mr Frédéric Sicard, President of the Paris Bar Association, on 5 April 2017. Figures provided by the professional practice department of the Paris Bar Association.

¹⁶ If “Greater Paris” is considered, the resources of other bar associations, in particular the Hauts de Seine Bar, should also be included.

¹⁷ The Justice Initiative Frankfurt am Main 2017, by Matthias Weller on March 31, 2017, by Prof. Dr. Dres. h.c. Burkhard Hess, Executive Director Max Planck Institute Luxembourg for Procedural Law, <http://conflictoflaws.net/2017/the-justice-initiative-frankfurt-am-main-2017-law-made-in-frankfurt/>.

¹⁸ Study conducted by the comparative law office of SAEI – April 2017. Appendix 03 - Christoph A. Kern, English as a Court Language in Continental Courts, *Erasmus Law Review*, 3, (2012):187-209, http://www.erasmuslawreview.nl/tijdschrift/ELR/2012/3/ELR_2210-2671_2012_005_003_005.

¹⁹ The composition of the working group is listed in Appendix 04.



of these actions and research²⁰ were carried out with the active and efficient operational support of the Ministry of Justice staff designated to provide assistance for this study. These actions were taken (I) to assess the need for setting up specialised commercial courts for the various eligible disputes – which we will refer to as “international commercial tribunal sections” – and to examine the possibility of doing so, in order to (II) develop proposals for the creation of such structures to resolve cross-border business law disputes.

²⁰ The list of interviews, meetings and consultations held and the documentation reviewed appears at the end of the report.



I - Need and possibility for specialised courts to resolve cross-border business law disputes

13. The first phase of the study consisted in confirming HCJP's initial observations on the need to create specialised judicial tribunal sections, with specific resources, that follow procedural rules adapted to the different types of international business law disputes involving foreign laws or foreign languages. Thereafter, the working group considered whether the necessary adjustments would be compatible with the rules specific to our legal system.

A – Need to create specialised judicial tribunals

14. The need for specialised courts to resolve cross-border business law disputes must be assessed in light of the disputes likely to be heard, of the objectives and of the possible procedural adjustments.

1 - Eligible disputes

15. The interviews the working group held with the Chief Judges of the Paris courts, lawyers' associations and corporate counsel all together confirmed the need to enhance the expertise and judging methods of the courts with jurisdiction over international business law matters. The need more specifically exists for proceedings involving international commercial contracts which are governed by domestic law or a foreign law, most frequently common law, drafted in a foreign language, generally English. It may also be relevant to proceedings concerning commercial relationships governed by international conventions, in particular in the field of transport, and more specifically maritime transport.

16. In particular, there is no doubt that hearing disputes concerning financial contracts (such as the model contracts of the ISDA,²¹ LMA²² and other organisations) requires specific expertise. These are complicated contracts, due to the complexity of the financial instruments they govern and of the legal instruments they use; those contract models are prepared by professional international organisations applying the common law, are drafted in English and are used by operators worldwide, which dispose of highly specialised staff to conduct negotiations concerning these instruments. It is precisely the technical expertise of the London Commercial Court that has enabled it to acquire a near-monopoly in handling these disputes, on the basis of contractual clauses that confer jurisdiction on that court. Although the modernisation of the French bond law justifies the optimism that these economic and financial actors may change their customary practices in favour of our law, it is true that, as matters stand, if our courts wish to offer equivalent judicial services, they must raise the level of their expertise and implement appropriated judging methods.

²¹ International Swaps and Derivatives Association, Inc. <http://www2.isda.org/>.

²² Loan Market Association www.google.fr/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=Loan+Markeet+association.



17. Other disputes may require the review of documents in English, such as cases involving the international shipment of goods, and in particular maritime transport, or intellectual property disputes. Such kinds of disputes led to procedural adaptations allowing the use of English in the German and Dutch experiments.²³

18. Paris is an important center for international arbitration, due to the fact that the International Chamber of Commerce located its headquarters there and international contracts frequently choose its International Court of Arbitration to administer arbitration proceedings.²⁴ As a result, numerous international arbitration awards are rendered in Paris and, pursuant to Article 1519, paragraph 1, of the *Code de procédure civile* (Code of Civil Procedure), appeals to set aside an arbitration award are heard by a specialised tribunal section (Division 1, Chambre 1) of the *Cour d'appel de Paris* (Paris Court of Appeal). This court has acquired an undisputed international reputation in dealing with these types of disputes, which deserves to be promoted and developed.

19. Firstly, to rationalise their handling, all international arbitration disputes should be brought before the *Cour d'appel de Paris*. This would require amendments to the provisions of the *Code de procédure civile* specific to this field,²⁵ as well as to the *Code de l'organisation judiciaire* (Judicial Organisation Code),²⁶ to designate the *Cour d'appel de Paris* as the sole court with jurisdiction over all appeals to set aside an international arbitration award rendered in France, appeals against decisions that refuse to recognise arbitration awards or refuse *exequatur* and appeals to set aside decisions that grant *exequatur*,²⁷ as well as summary proceedings before the Chief Judge of the Court of Appeal ruling on the suspension or modification of immediate enforcement orders of such awards²⁸ and decisions of the Chief Judge of the Court of Appeal or the case management judge ordering immediate enforcement.²⁹

20. Secondly, if the appeal of Paris as a forum for arbitration proceedings is to be reinforced by concentrating international arbitration disputes before a single, specially qualified court in accordance with the proposals of this report, the confusion created for international litigants by the recent decisions of the *Tribunal des conflits*

²³ De Rechtspraak – District Court of Rotterdam – Procedure Rules when opting to conduct legal proceedings in English - Interview with Ms Robine de Lan, Chief Judge of the Rotterdam Court, and Judge Willem Sprenger - 11 April 2017.

²⁴ Report on certain avenues for increasing the competitiveness of Paris in legal matters (*Rapport sur certains facteurs de renforcement de la compétitivité juridique de la place de Paris*), Michel Prada, March 2011.

²⁵ Chapter IV, Title II, Book IV, of the *Code de procédure civile*.

²⁶ Chapter I, Title I, Book III, of the *Code de l'organisation judiciaire*.

²⁷ Articles 1519, 1523 and 1524 of the *Code de procédure civile*.

²⁸ Article 1526 of the *Code de procédure civile*.

²⁹ Article 1525 of the *Code de procédure civile*.

³⁰ *Tribunal des conflits*, 17 May 2012, Inserm, petition No. 375; 11 April 2016, Foxmax petition No. C4043; 24 April 2017 Ryanair, No. 4075.



(Jurisdictional Conflicts Tribunal)³⁰ and the *Conseil d'État*³¹ will first need to be addressed. In international arbitration disputes these decisions have created a parallel jurisdiction of the administrative courts to hear appeals of international arbitration awards.³² The exclusive jurisdiction of the *Cour d'appel de Paris* should therefore apply even if the arbitration raises issues of public law.

Proposal 1 – Conferring jurisdiction over business law disputes that are international in nature to an international commercial tribunal section set up at each court level.³³

2 - Objectives

21. Discussions with lawyers who are accustomed to cross-border disputes confirm that adapting our commercial courts to meet the requirements of a competitive handling of international commercial cases would entail the achievement of several quality objectives. Firstly, access to the French courts should be simplified for international parties by allowing them to express themselves in English – the language predominantly used in international commerce – to review evidence in that language and thus to understand the proceedings, by avoiding the complexity and expense of translators and interpreters to the extent possible. For this purpose, proceedings could be held in certain foreign languages, as is currently the case in the *Tribunal de commerce de Paris* (Paris Commercial Court). However, common sense dictates that to launch the project under consideration this possibility should be limited to the use of English, the language that is most frequently used in commercial relationships.

Proposal 2 – Allowing the use of English at the various stages of proceedings, within the framework of the procedural rules in effect.

22. Secondly, it was unanimously felt that to approach international standards, it is clear that our courts must raise the bar in terms of meeting the timeframes required to resolve cases with high financial stakes. In general, speed and punctuality are regarded as essential to the international appeal of a legal system, in particular when handling international commercial matters. This would require our commercial courts to reduce the duration of proceedings at all levels, by strictly enforcing timeframes through procedural mechanisms and scheduling firm dates for pronouncing judgment.

Proposal 3 – Setting up procedural mechanisms that reduce the duration of proceedings and enable the judgment date to be set with certainty.

³¹ *Conseil d'Etat*, 19 April 2013, *Smac* No. 352750; *CE Ass.*, 9 November 2016, *Fosmax LNG*, No. 388806; *Conseil d'Etat* press release: *Administrative Courts and International Arbitration (Juridictions administratives et arbitrage international)* <http://www.conseil-etat.fr/Actualites/Communiqués/Juridictions-administratives-et-arbitrage-international>.

³² See, *Opinion of the Comité français de l'arbitrage (French Arbitration Committee) on the case INSERM v. Fondation Letten F.Saugstad*, *Avis-CFA-22.02.2011%20(1).pdf*.

³³ *Internationality is a concept recognised in international private law which refers to a situation that involves more than one legal system or that raises issue of international commerce. Horatia Muir Watt and Dominique Bureau, International Private Law (Droit international privé), Volume 1, TUF, Thémis, 3rd ed, 2014, § 550.*



23. Thirdly, to meet these same standards, the judicial proceedings should offer credible and rigorous means for an *inter partes* review of evidence: discussions of exhibits, hearing of witnesses, technical investigations, etc., while avoiding the costly and unpleasant extremes of the US discovery and English disclosure procedures.

Proposal 4 – Reinforcing and simplify the practices for producing and reviewing evidence.

24. Fourthly, hearings should enable parties to gain a clearer understanding of the court's consideration of all aspects of the proceedings: a more thorough discussion of the oral arguments, interaction between the court and the parties, possibility for their representatives to be heard, *inter partes* examination of witnesses, etc.

25. Fifthly, without departing from the general provisions applicable in civil and commercial proceedings, it would be possible to choose application methods that are the best suited to specific international commerce disputes, and to set them out in a document available in the form of guidelines, explaining the customary practices of the court and informing parties of what can be expected at the various stages of the proceedings.

Proposal 5 – Including in the guidelines the rules of procedure applied before the international commercial tribunal section.

26. Lastly, to be immediately enforceable in a maximum number of States throughout the world, the decision rendered should be immediately available in English.

Proposal 6 – Together with the judgment rendered in French, providing a sworn translation into English.

27. All of these objectives must be achieved pragmatically, by paying particularly close attention to the demands of international commerce and finance litigants, while complying with national procedural principles and rules and, therefore – at least initially – without amending the laws currently in force, but simply optimising their application. In any event, the goal is not to systematically transpose in France the rules and methods of the common law courts and, in particular, of the London Commercial Court,³⁴ but, as stated in the assignment letter, to incorporate into our legal system a mechanism adapted to hearing international business law disputes.

³⁴ The Commercial Court is a sub-division of the Queen's Bench Division of the High Court of Justice, the major civil court in England and Wales. It is based in the Rolls Building, the world's largest dedicated business dispute resolution center: www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/high-court/queens-bench-division/courts-of-the-queens-bench-division/commercial-court/.



Proposal 7 – Soliciting the views of lawyers and corporate counsel who customarily deal with international commercial disputes on how to advantageously apply ordinary rules of procedure to the cases handled by the international commercial sections of the *Tribunal de Commerce* and the *Cour d'appel de Paris*.

3 - Suggested adjustments

28. The implementation of these objectives will be examined at the various stages of the proceedings: production of evidence and objections thereto, court communication with the parties, exchanges of written submissions, holding hearings and rendering judgment.

29. At the first stage, written evidence in English could be produced and challenged, provided such evidence can be understood by all parties and the court. This principle could also apply to affidavits executed by witnesses and to witness testimony, if necessary, as well as to expert assessments and expert's reports and the testimony of persons with technical expertise. This facility would be a considerable advantage in all cases involving numerous and voluminous exhibits in English and/or if it is necessary to hear English-speaking parties or third parties.

30. During the second stage, if the parties have requested or agreed that the proceedings may be conducted in English, all court communication with the parties could be in English if they agree. This principle would also apply to the written submissions filed by the parties. Subject to the same proviso, hearings could also be held in English, for purposes of oral argument, the testimony of witnesses and parties and discussion between the court and counsel. This possibility would be particularly useful in all cases in which the parties and their lawyers are English speakers and, in particular, for major operators established in London or New York.

31. Lastly, at the third stage, although it is not possible for judgment to be rendered in English, a sworn translation into English should be made available when judgment is pronounced. This would also enable the judgment to be immediately classified and commented on in English-language treatises.

Proposal 8 – Offering parties options for the use of English depending on the needs of the case, with respect to:

- producing and challenging evidence;
- producing written submissions and correspondence between the court and the parties;
- holding hearings and oral argument.



B – Possibility of creating specialised judicial tribunals

32. To be acceptable, the implementation of these objectives to make the French commercial courts more attractive to litigants must be compatible with the public service principles of the justice system. In addition, the practical difficulties of doing so must be taken into account, as well as the need to modify certain practices of our courts.

1 - Issues of principle

33. With respect to applicable legal principles, the main matters to be considered are language issues, the requirement of equality of parties before the courts and the public nature of proceedings.

1°) Use of French

34. The use of a foreign language for the general interest purpose of adapting the public service provided by the justice system to international requirements must, firstly, be reconciled with Article 2, paragraph 1, of the Constitution, which sets out the principle that “*The language of the Republic is French*”.³⁵ The *Conseil constitutionnel* (Constitutional Council) has interpreted this provision in a case arising from an international agreement that allows a legal instrument drafted in a foreign language to be reviewed by the French courts.³⁶ In that case,³⁷ it held that pursuant to the constitutional provision at issue, “*the use of French is required by public law legal entities and private law persons in the performance of public service duties*” and that “*. . . individuals are not entitled to assert, in their relations with government agencies and the public services, the right to use a language other than French, nor may they be obliged to use a language other than French*”. However, it held the agreement reviewed to be consistent with the Constitution because neither its “*purpose nor its effect is to oblige public law legal entities or private law persons in the performance of public service duties to use a language other than French and, furthermore, it does [did] not confer on individuals, in their relations with government agencies and the public services . . . the right to use a language other than French*”. In other words, according to that decision, although Article 2 of the Constitution prohibits a party from

³⁵ Analytical note of the Documentation, Studies and Reports Department of the Cour de cassation “Memorandum analysing issues raised by the project to create specialised tribunal sections within the Tribunal de commerce de Paris, the Tribunal de grande instance de Paris and the Cour d’appel de Paris to hear technical financial disputes of an international nature” (Note d’analyse relative aux questions soulevées par le projet de création au sein du Tribunal de commerce de Paris, du Tribunal de grande instance de Paris et de la Cour d’appel de Paris de Chambres spécialisées pour connaître de contentieux techniques financiers à caractère international) - Appendix 05.

³⁶ The aim of the agreement on the grant of European patents, which was signed in London on 17 October 2000, is to reduce, at the patent approval stage, the translation requirements imposed by Article 65 of the Convention on the Grant of European Patents. For contracting States whose national language is German, French or English, the official languages of the European Patent Office, Article 1 of the agreement provides that only the “claims” section of patents must be translated into their national language in accordance with Article 14 of the convention.

³⁷ Decision No. 2006-541 DC of 28 September 2006, Decision No. 2006-541 DC of 28 September 2006.



asserting against other parties and the public service of the courts does not have the right to use a language other than French, it does not prevent the courts from allowing the use of a foreign language in certain cases, with the agreement of all parties. The right to use English before the national courts is therefore subject to two conditions: the agreement of all parties to the case and the approval of the court, in view of its own familiarity with that language and the specificity of the litigation.

35. Nevertheless, the law may impose additional restrictions on the use of a language other than French before the courts. On this point, the case-law of the *Cour de cassation* (Court of Cassation) treats as a legislative act the *Ordonnance de Villers-Cotterêts* of 25 August 1539, whose Articles 110 and 111 have not been repealed. Based on that ordinance, which required court documents to be drafted in French rather than Latin to render them comprehensible, the *Cour de cassation* has developed a case-law requiring court decisions to be drafted in French. This is a public policy requirement from which there can be no exception.

36. However, that case-law holds that the Royal Ordinance applies only to the court documents in the proceedings. Therefore, it does not prevent documents in a foreign language from being produced, without translation, in civil or commercial proceedings, provided the other party expressly agrees and the judge, exercising his/her discretionary power, allows it. This focus on the judge's power implies, firstly, that he/she is able to understand the document in its original language and, secondly, that producing it in a language other than French does not diminish the equality of the parties or the comprehensibility of the proceedings. In such a case, however, the court must specify in the grounds for its decision, which must necessarily be in French, the significance and probative value it attributes to such documents. Subject to the same conditions, it appears that testimony and technical evidence in a foreign language may also be admitted without translation.³⁸

37. With respect to the court documents in the proceedings, such as statements of claim and written submissions, the *Cour de cassation* considers that the Ordinance of 1539 requires that they be drafted in French. However, the production of such a document in a foreign language is merely grounds for claiming invalidity due to a procedural defect,³⁹ which is governed by Article 112 *et seq.* of the *Code de procédure civile*. In principle, nothing prevents the parties from waiving the right to assert such grounds.⁴⁰ Therefore, they could do so in a joint agreement that the court acknowledges at the start of the proceedings.⁴¹

38. The issue of holding hearings in English is easier to resolve. In civil matters, it is governed by the case guidelines applicable in all courts, which provide that at hearings “*The judge is not required to use an interpreter if he/she is familiar with the language spoken by the parties*”.⁴² This also applies to the testimony of third parties.

³⁸ Analytical note of the Documentation, Studies and Reports Department of the *Cour de cassation*, previously cited - Appendix 05.

³⁹ Cass., Ch. Mixte, 7 July 2006, *Bulletin 2006 Mixt.* No. 6 p. 18.

⁴⁰ A court may not *sua sponte* raise a grounds for invalidity due to a procedural defect (Cass. Civ. 2, 23 October 1991, No. 90-14.334).

⁴¹ Analytical note of the Documentation, Studies and Reports Department of the *Cour de cassation*, previously cited - Appendix 05.

⁴² Article 23 of the *Code de procédure civile*. In such case, how the clerk of the court will prepare the record of the hearing must be specified.



39. Nevertheless, to be consistent with the national language policy, the use of foreign languages in court proceedings cannot be generalised, meaning that an exhaustive list of matters in which such use is justified would need to be drawn up. The policy of defending continental law is not affected because allowing a limited option concerning the language of court proceedings has, in principle, no impact on the applicable law, and may even promote the use of French law in international contracts if it makes our courts more attractive.⁴³

Proposal 9 – In all cases, conditioning the use of English in proceedings on the agreement of the parties and the approval of the court.

Proposal 10 – Conditioning the possibility of producing court documents and/or receiving correspondence from the court in English on the parties' waiver of their right to claim invalidity due to a procedural defect on such grounds.

Proposal 11 – Drawing up an exhaustive list of matters in which English may be used before the court.

2°) Public hearings

40. The principle that hearings should be public, which was introduced in France by the laws of 16 and 24 August 1790, is now one of the fundamental principles of a “fair trial” and is guaranteed by international conventions.⁴⁴ At the outset, this principle was intrinsically linked to criminal trials, but the *Conseil constitutionnel* has applied it in such cases on numerous occasions on the grounds of Article 16 of the Declaration of 1789.⁴⁵ However, it also concerns civil proceedings, with certain minor differences, as provided in Articles 22 and 433 of the *Code de procédure civile*. Compliance with this principle requires that hearings be held in a language that the public can understand, and an issue as to whether it is effectively applied may arise if all or part of a hearing is held in a foreign language.⁴⁶ In fact, the difficulty is more theoretical than practical. The European experiments observed have dealt with this issue pragmatically. Moreover, the guidelines of the *Code de procédure civile* on hearings do not seem to preclude the possibility of holding hearings without interpreters in exceptional cases.⁴⁷ Therefore, the issue of public hearings should be dealt with in a relative manner, avoiding the systematic use of cumbersome and costly simultaneous interpretation arrangements at all hearings.

⁴³ Interview with Ms Laure Bélanger, General Director of the Continental Law Foundation, and Ms Marie Goré, Professor at Université Paris II (Panthéon-Assas) and member of the Paris Comparative Law Institute.

⁴⁴ Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 47 of the Charter of Fundamental Rights of the European Union.

⁴⁵ Sandrine Roure, “The enlargement of the principle of public judicial hearings: a judicialisation of public debate” (*L'élargissement du principe de publicité des débats judiciaires : une judiciarisation du débat public*), *Revue française de droit constitutionnel* 2006/4 (No. 68), p. 737-779. DOI 10.3917/rfdc.068.0737.

⁴⁶ Analytical note of the Documentation, Studies and Reports Department of the Cour de cassation, previously cited - Appendix 05.

⁴⁷ See the link between Articles 22 and 23 of the *Code de procédure civile* in a section devoted to the guidelines for civil proceedings applicable to hearings.



Proposal 12 – Making appropriate arrangements for the interpretation of hearings if members of the public are present.

3°) Equality of citizens before the courts

41. The equality of citizens before the public service provided by the courts is protected by Articles 6 and 16 of the Declaration of 1789. The *Conseil constitutionnel* has deduced from this principle that “*the legislator may adopt procedural rules that differ depending on the circumstances, situations and persons to which they apply, provided such differences are not based on unjustified distinctions and litigants are ensured equal protection, such as respect for the principle of the rights of the defence, which include in particular the existence of a just and fair trial guaranteeing that the rights of the parties are balanced*”.⁴⁸ This principle, which applies essentially in criminal matters, does not preclude that, in civil matters before the same court, certain cases be assigned to a specific tribunal section that allows the use of a foreign language for certain matters in view of the international nature of a dispute and at the request of the parties, and that the court specify the particular application of the ordinary rules of procedure to certain types of disputes.⁴⁹ Therefore, the criteria for assigning cases to the chamber in question must be objectively defined and, furthermore, it must be ensured that no party finds itself – for example by intervening in a case – in a position of having to use a foreign language without its consent.

Proposal 13 – Establishing objective criteria for assigning cases to the international commercial sections of the Commercial Court and Court of Appeal.

2 - Practical issues

42. The practical issues needing to be considered are, firstly, the expertise of judges in the law of international finance and commerce and their ability to apply a foreign law and work in a foreign language and, secondly, the practices adopted by the court with respect to the production of evidence and holding hearings. Lastly, consideration must be given to the human, physical and technical resources that will ensure that the process is organised in an effective manner.

1°) Expertise of judges

43. The issue of the judges’ expertise differs at the first and second levels of the courts. The *Tribunal de commerce de Paris* has a panel of commercial court judges who are former counsel for banks or multinationals, who have experience in international business and who are used to working in English,

⁴⁸ See, for example, *Conseil constitutionnel* decision No. 2010-612 DC of 5 August 2010 “Law adapting the criminal law to the creation of the International Criminal Court”.

⁴⁹ See, for example, in the field of employment disputes, *Conseil constitutionnel* decision No. 2012-243/244/245/246 QPC of 14 May 2012, “*Société Yonne républicaine et autre*” (Mandatory submission to the journalists’ arbitration commission and compensation regime for termination of employment contract).



which makes it possible, as is currently the case, to assign them to tribunal sections that handle international disputes. The judges assigned to the commercial tribunal sections of the Court of Appeal are members of the bench with standard legal qualifications, who have become specialised in the disputes they handle through the training programmes offered by the *Ecole Nationale de la Magistrature* (National School for the Judiciary), and who have professional experience of varying duration.⁵⁰ Although many are familiar with English, few speak it regularly in the course of their professional activities. For these judges, therefore, strict selection criteria should be adopted and rigorous programmes to reinforce their technical and language skills should be put in place. In particular, training sessions and internships should be designed and organised with the support of professional organisations in the international commerce and finance sectors and of specialised universities.

44. Pursuant to legislation on the status of the judiciary,⁵¹ judges who have specific technical expertise can be recruited by soliciting applications for specific positions with the aim of selecting, from among the applicants, the judges who have the most appropriate profiles. Due to the specificity of the positions, language tests could be administered along the lines of the tests organised in connection with the recruitment of

⁵⁰ Currently, as part of their initial training at the *Ecole Nationale de la Magistrature*, future judges take courses in private international law and may attend three-week international internships in common law countries or countries with a mixed legal system.

Judges, regardless of the manner in which they are recruited, have access to continuing education programmes, such as English classes or courses that are taught in English focusing on topics related, in particular, to international judicial co-operation.

As part of their initial training, future judges at the *Ecole Nationale de la Magistrature* take two hours per week of required English classes. The content of these classes focuses on legal English from the Common European Framework of Reference. Future judges also attend lectures in English on judicial process (in England and the United States), as well as the judicial system of other European countries and international mutual assistance in criminal, civil and commercial matters. They may also attend workshops that increase their knowledge of US legal culture (if they are already sufficiently proficient in English).

The continuing education programme offers language classes focusing on legal English and the common law, which have a language instruction component (beginner, intermediate and advanced) and a component that studies, in English, comparative professional practices (e.g. “The Fabric of American and English Justice” on the civil and criminal judicial process in England and the US).

In addition, as a member of the European Judicial Training Network (EJTN), the *Ecole Nationale de la Magistrature* participates in numerous sessions, most of which are held in English. Online classes, as well as classes requiring attendance, are available (for example, the EJTN catalogue offers courses in “Language training on the vocabulary of judicial cooperation in civil matters” and “Applicable law to contractual obligations”, and the ERA catalogue includes a course in English on European Regulation Brussels II bis).

The *Ecole Nationale de la Magistrature* has stated that it has applied to create an online course entitled “Jus lingua in English”. The idea is to develop an online training programme with partner countries in order to facilitate understanding of foreign legal systems and to work on legal English. This online training programme would include remote support by a judge from the relevant country, teaching in English, in order to promote discussion (in English) about the country’s legal system.

If necessary, the training offer of the *Ecole Nationale de la Magistrature* could be supplemented in light of plans to create an international chamber specialising in common law, by setting up specific programmes for the judges assigned to that tribunal section.

⁵¹ Order No. 58-1270 of 22 December 1958 adopting the Organic Law on the status of the judiciary.



liaison judges.⁵² This selection process should be conducted in conjunction with the *Conseil Supérieur de la Magistrature* (High Council for the Judiciary), as it will be required to express an opinion on proposed appointments submitted to it by the Minister for Justice.⁵³

45. The reinforcement of the court's technical capabilities will also require that its judges be assisted by highly qualified support staff, as is the case in international courts and in most major foreign courts.

Proposal 14 – Adopting a selective process for appointing and assigning *Cour d'appel de Paris* judges to sit on the international commercial section

Proposal 15 – Setting up enhanced training programmes in international business law and common law, as well as advanced English language courses, for *Cour d'appel de Paris* judges who will sit on the international commercial section

46. This selection and training process should be extended to the court registry staff who will handle exhibits and written submissions and issue court documents in English.

Proposal 16 – Adopting a selective process for assigning staff with sufficient knowledge of English to the registries of the international commercial sections of the *Tribunal de commerce de Paris* and the *Cour d'appel de Paris* (two registrars and two reception counter members of staff).

2°) Adjustment of procedural rules

47. Equally important, French court practices must be adjusted to meet the standards for judging international commercial cases. The fact that the civil and commercial courts are continually overloaded has led the courts to prefer written production of evidence and written submissions in reply, and to limit hearings to brief oral arguments, in accordance with a restrictive litigation practices to which lawyers have resigned themselves. As a result, the resources made available by the *Code de procédure civile* for the preparation and judgment of cases are significantly underused. Although this minimalist approach to proceedings can be explained by the need to deal with a volume of litigation that exceeds the capacity of the courts, it disconcerts foreign litigants, who are used to the more detailed case preparation phases and hearings available in the common law courts, and who may view our judging methods as superficial. In addition, schedules that are not met and erratic hearing dates generate uncertainty about the foreseeable timeframe. To offer a credible judicial system to international litigants, the practice before our courts must be revised by making use of available procedural tools to enable more thorough production of evidence, hold more complete *inter partes*

⁵² Judges who perform judicial co-operation missions abroad.

⁵³ Article 15 of Organic Law No. 94-100 of 5 February 1994 on the *Conseil supérieur de la magistrature*.



oral discussions, and allow witnesses and experts to testify orally at the parties' request, as well as permitting oral argument to be completed without any time constraints. Similarly, greater rigour is required in terms of the timeframe for proceedings and holding hearings. To be visible, these substantial changes to the practice before our courts must be set out in guidelines that describe the procedural rules in use before the relevant tribunal sections, explain in detail how such procedural rules are applied and describe case preparation methods and types of hearings available to the parties.

48. To ensure that they are truly appropriate for the cases that each level of the court system will handle, these specific procedural rules could be discussed with relevant practitioners, lawyers and corporate counsel for banks and other companies. The guidelines should also set out the requirements for assigning or reassigning a case to the international tribunal section, the various procedures for allowing exhibits, written submissions, hearings and oral argument in English, the case preparation methods in use before the tribunal section, compliance with the timeframe for proceedings and dates set, and the methods for organising and holding hearings. This document, which could offer several options concerning the use of English at various stages of the proceedings, should be submitted to the parties and accepted at the time the tribunal section is seized. The experience of the *Tribunal de commerce de Paris* and the foreign courts visited shows that parties' demand for the use of English varies depending on the uses offered: examination of evidence, filing of written submissions or oral arguments.

3°) Additional resources

a) Human resources

49. Reinforcing the procedural regime of the international tribunal section will be possible only if it is provided with the necessary human, physical and technical resources.⁵⁴ At the *Cour d'appel de Paris*, these human resources consist, firstly, in increasing the court's staff by a sufficient number of judges to handle the cases assigned to the tribunal section, taking into account the additional work induced by the new case preparation and judgment methods. The Chief Judge of the Court of Appeal estimates that three additional tribunal section presiding judges would be required. These judicial positions should be supplemented by hiring assistants who are qualified in international business law, who have experience with the common law and who are conversant with legal English. Five associate legal officer positions would need to be created. In addition, bilingual court registry and reception desk staff should be assigned to these tribunal sections.

Proposal 17 – Increasing the number of *Cour d'appel de Paris* judges by a sufficient number to form the international commercial tribunal section (three presiding judge positions).

⁵⁴ List and cost of resources required – Appendix 06.



Proposal 18 – Hiring staff who are specialised in international business law and common law, and who are fully conversant with legal English, to assist the judges of the international commercial section of the *Cour d'appel de Paris* (five associate legal officer positions).

b) Physical resources

50. In terms of physical resources, these tribunal sections must be provided with premises and equipment enabling the utilisation of all new information and communication technologies for court use: electronic communication between the court and lawyers, recording equipment for hearings, video equipment allowing appearances and the taking of testimony remotely, a dedicated website, online publication of decisions rendered, etc. The *Cour d'appel de Paris* Chief Judge and the Chief Prosecutor both stressed the need to resolve these issues before the project is rolled out.⁵⁵ The resources necessary have been catalogued and valued, and are listed in an appendix⁵⁶ to this report.

51. Appropriate documentation should be included in the necessary physical resources.⁵⁷ The legal texts relevant to this type of case, such as codes, specific laws and international conventions, should be available in both languages. Making bilingual versions of the laws commonly referred to by the parties and courts is indispensable to avoid translation uncertainties and to understand legal terms and concepts. Bilingual versions of the decisions handed down by these courts and the learned commentary that discusses them should also be available.

Proposal 19 – Providing the international commercial tribunal sections of the *Tribunal de commerce de Paris* and the *Cour d'appel de Paris* with appropriate premises equipped with electronic communication systems, tools for recording hearings, and interpretation and videoconference systems.

Proposal 20 – Publishing translations of the codes and other legal texts commonly used in international business law.

Proposal 21 – Publishing the decisions rendered by the international tribunal sections in both languages, on appropriate media, together with the related learned commentary.

52. Some of these procedural adjustments will generate additional costs, which can be assessed as litigation expenses and costs in accordance with appropriate methods.⁵⁸

⁵⁵ Interviews with Ms Chantal Arens, Chief Judge of the *Cour d'appel de Paris* and Ms Catherine Champrenault, Chief Prosecutor before the *Cour d'appel de Paris*.

⁵⁶ List and cost of resources required, previously cited – Appendix 06.

⁵⁷ A translation of the major codes is available on the Légifrance website www.legifrance.gouv.fr/Traductions/Liste-des-traductions-Legifrance.

⁵⁸ In civil matters, translation expenses are advanced by the parties, who may obtain reimbursement as litigation costs (Article 695 (2) or (9) of the *Code de procédure civile*) or expenses not included in litigation costs (Article 700 of the *Code de procédure civile*). Interpreters and translators are free to set the price for their work, which may be significantly higher than the rates awarded as litigation costs (Article R 122 and A 43-7 of the *Code de procédure pénale* (Code of Criminal Procedure)).



Proposal 22 – Setting up a specific process for assessment and allocation of litigation expenses and costs.

53. Lastly, the creation of these international tribunal sections should be accompanied by a carefully produced communication campaign aimed at all national and international publics concerned.

Proposal 23 – Setting up an appropriate communication system aimed at the publics concerned, informing them of the existence of the international commercial tribunal sections and their operating rules.

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II – Setting up specialised courts to resolve cross-border business law disputes

54. The main request of the assignment letter is that (A) proposals be made for setting up specialised courts to hear the disputes concerned within the framework of existing rules and, alternatively, if necessary, that (B) proposals be made to improve the current legal framework.

A – Rapid setup within the framework of existing procedural rules

55. The main thrust of the project, therefore, is to insert these specialised judicial tribunal sections into the existing legal framework and to adapt it to the specific requirements of international business law disputes, and then to fine tune these adjustments to the two lower court levels and to the *Cour de cassation*.

1 - Relevant court framework

56. Therefore, the relevant court framework must be determined on the basis of both the structures of the current judicial organisation and the procedural rules in effect.

1°) Judicial organisation

57. Maintaining the present judicial organisation, the project would therefore not create specialised courts but would merely insert into the existing framework a specific mechanism suitable for handling the disputes at issue, keeping in mind the specificities of the current judicial organisation, at the first level, for the Commercial Courts⁵⁹ and, possibly, for the *Tribunal de grande instance* (District Court),⁶⁰ at the second level, for the Court of Appeal⁶¹ and, under specific conditions, for the *Cour de cassation*.⁶² Before the Commercial Court, as well as before the *Cour d'appel de Paris*, these judicial panels would be formed as tribunal sections, as has been the case since 2010 in the *Tribunal de commerce de Paris*, where a collegial panel called the “international and European chamber” is already dedicated to these disputes. At the *Court of Cassation* level, the appellate rules applied in the chambers to which the designated cases are assigned, in particular, the first and second chambers and the commercial, economic and financial chamber, would require adjustment.

2°) Procedural rules

58. The procedural rules currently in effect before the civil and commercial courts contain provisions concerning compliance with a timeframe for proceedings, production of evidence, oral argument of cases

⁵⁹ Articles L. 722-1 to L. 722-5 and R. 722-1 to R. 722-6 of the *Code de commerce* (Commercial Code).

⁶⁰ Articles L. 212-1 to L. 212-5 and R. 212-3 to R. 212-11 of the *Code de l'organisation judiciaire*.

⁶¹ Articles L. 312-1 to L. 312-3 and R. 312-1 to R. 312-8 of the *Code de l'organisation judiciaire*.

⁶² Articles L. 431-1 to L. 431-4 and R. 431-1 to R. 431-10 of the *Code de l'organisation judiciaire*.



and judgments, which, if judiciously applied and coordinated, would make our judicial system as attractive as the common law courts to hear international commercial matters.

a) Interim measures

59. Firstly, it should be noted that petitions for emergency measures, interim measures, protective measures and reinstatement measures, as well as petitions for advance payment and enforcement, may be submitted before trial, including on very short notice, to the Chief Judges of the civil and commercial courts ruling in summary proceedings.⁶³ Although these decisions are subject to appeal, which are also handled expeditiously, they are in all cases enforceable immediately. The efficacy of this mechanism should be extended by delegating the power to rule in summary proceedings⁶⁴ to the presiding judges of the international commercial tribunal sections of the Commercial Court and the Court of Appeal.⁶⁵

Proposal 24 – Conferring on the presiding judges of the international commercial section of the *Tribunal de commerce de Paris* and of the *Cour d'appel de Paris* jurisdiction to hear summary proceedings in the disputes assigned to such tribunal sections.

b) Compliance with timeframes

60. The *Code de procédure civile* contains guidelines⁶⁶ and specific provisions that regulate the duration of proceedings before the Commercial Court, the Court of Appeal and the *Cour de cassation* by allowing, on the one hand, the parties to request that a matter be heard by the Commercial Court or the Court of Appeal at short notice,⁶⁷ to obtain a hearing date, if necessary without having taken evidence, and, on the other hand, the judge to bind the matter over directly for a judgment hearing⁶⁸ and to set a schedule for producing evidence and written submission.⁶⁹ If the courts have the will and resources to apply them,

⁶³ Articles 808 to 811 of the *Code de procédure civile* before the District Court, and Articles 872 to 873-1 of the *Code de procédure civile* before the Commercial Court.

⁶⁴ These delegations may be made by an order of the Chief Judge of the court.

⁶⁵ In practice, these judges ruling in summary proceedings could consider issuing protective measures in the form of injunctions, which would have the same impact as the very effective injunctive relief that common law courts may grant. On this issue, see: Horatia Muir Watt and Dominique Bureau, *International Private Law (Droit international privé)*, Volume 1, TUF, Thémis, 3rd ed, 2014, § 150.

⁶⁶ Among the guidelines for proceedings that apply before all civil and commercial courts, Article 2 of the *Code de procédure civile* provides: “The parties shall conduct the proceedings in accordance with the duties incumbent upon them. They are required to perform all procedural acts in accordance with the required forms and deadlines” and Article 3 provides: “The judge shall supervise the proper progress of the proceedings. He/she has the authority to set a schedule and order the necessary measures”.

⁶⁷ Article 861, paragraph 1, of the *Code de procédure civile* for the Commercial Court, Articles 753, 788 to 792 of the *Code de procédure civile* for the District Court, Articles 917 to 925 of the *Code de procédure civile*.

⁶⁸ Article 760 and 761 of the *Code de procédure civile* for the District Court, Article 861, paragraph 2, for the Commercial Court, Article 905 of the *Code de procédure civile* for the Court of Appeal.

⁶⁹ The *Code de procédure civile* contains numerous provisions that grant powers for this purpose to the District Court case management judge (*juge de la mise en état*) (Articles 763 to 781), the judge of the Commercial Court charged with preparing the matter for trial (Articles 861-3 to 871) and the Court of Appeal case management judge. The deadlines for filing written submissions before the *Cour de cassation* are set, on pain of forfeiture or inadmissibility, by the provisions governing appeals before the *Cour de cassation* (Articles 974 to 982 for proceedings with mandatory representation, Articles 983 to 995 for proceedings without mandatory representation), and Article 1009 empowers the Chief Justice of the *Cour de cassation* to reduce the deadlines provided in the statutes for filing written submissions and documents.



these provisions suffice to meet the requirement for speed that is particularly desirable when dealing with the disputes at issue.

Proposal 25 – Including in the guidelines followed by the international commercial tribunal section, the specific provisions applied, pursuant to the rules of the *Code de procédure civile*, to ensure compliance with the schedule for producing evidence and filing written submissions and to ensure that the hearing date is not vacated.

c) Production of evidence

61. The procedural rules that permit producing and challenging evidence are equally complete. They set out the powers of the judge⁷⁰ and the obligations of the parties,⁷¹ imposing on parties a joint obligation to assist in proving the facts each one alleges. They grant the judge effective powers to take evidence in accordance with the provisions of Articles 143 to 154 of the *Code de procédure civile*, including before the start of the proceedings.⁷² These rules are clearly stated for each type of evidentiary tool: production of evidence by parties, obtaining evidence held by third parties, production of evidence held by parties, personal verifications by the judge, personal appearance of the parties, third-party statements, and measures for which persons with technical expertise are appointed, in particular expert assessments. Depending on the situation, these measures are more or less formal. For example, in the case of third-party statements, the measures range from the production of affidavits⁷³ to depositions of witnesses before the judge⁷⁴ and the immediate questioning of witnesses.⁷⁵ There is a similar range of measures available for evidence produced by persons with technical expertise.⁷⁶ Ultimately, the *Code de procédure civile* clearly organises the production of evidence methods available, but in this area, as in others, their implementation depends on the actions of the parties and the possibilities afforded by the courts on the basis of their resources.

⁷⁰ Among the guidelines for proceedings concerning the production of evidence, Article 9 of the *Code de procédure civile* provides: “The judge has the power to order *sua sponte* all production of evidence measures permissible by law”.

⁷¹ In the same guidelines, Article 9 adds: “The parties are required to cooperate with measures for the production of evidence, and the judge may draw all conclusions from their failure or refusal to do so. If a party holds evidence, at the request of the other party, the judge may order that party to produce it, if necessary subject to a fine for non-compliance. At the request of any party, the judge may request or order, if necessary subject to a fine for non-compliance, the production of all documents held by third parties if there are no legitimate grounds preventing such production”.

⁷² Article 145 of the *Code de procédure civile*: “If prior to any legal proceedings there is a legitimate reason to preserve or establish proof of the facts upon which the resolution of a dispute depends, the production of evidence measures permissible by law may be ordered at the request of any interested party, pursuant to an *ex parte* petition or in summary proceedings.”

⁷³ Articles 200 to 203 of the *Code de procédure civile*.

⁷⁴ Articles 222 to 230 of the *Code de procédure civile*.

⁷⁵ Article 231 of the *Code de procédure civile*.

⁷⁶ In the case of experts, it will be necessary to identify on the lists established by the *Cour d’appel de Paris* those that are able to conduct expert assessment operations and prepare their reports in English, which is generally the case in the fields of commerce and finance.



Proposal 26 – Including in the guidelines followed by the international commercial tribunal section the practices specifically applied to take evidence in cases assigned to that tribunal section.

Proposal 27 – Identifying, under the relevant headings of the list of experts, the persons with technical expertise able to conduct expert assessment operations and prepare their reports in English.

d) Hearings

62. One of the most frequent criticisms of our judicial system is the summary nature of hearings. However, the *Code de procédure civile* grants the presiding judge significant discretion to organise and direct hearings that are as complete as necessary.⁷⁷ He/she has the power to order evidentiary measures at the hearing,⁷⁸ and in particular to hear the testimony of witnesses or experts.⁷⁹ He/she may also order the personal appearance of the parties.⁸⁰ The parties, even when represented or assisted by a lawyer, may themselves present oral observations.⁸¹ In addition, the presiding judge has full discretion to organise the oral argument of the lawyers. The presiding judge or the associate judges may invite them to provide any factual or legal explanations they deem necessary or to clarify what they consider unclear.⁸² Therefore, there is no obstacle to taking as much evidence at the hearing as the dispute requires and the parties' desire.⁸³ All that is needed therefore, at this stage as well, is an appropriate application of the rules of civil procedure which are themselves sufficient.

Proposal 28 – Including in the guidelines followed by the international commercial tribunal section the practices specifically applied to take evidence at hearings and to organise oral argument and the questions the courts may ask lawyers.

e) Mediation and conciliation

63. One of the advantages our judicial system can offer is its openness to alternative dispute resolution methods. Assisting the parties in settling their dispute, which is a principle set out in the guidelines applicable to civil proceedings,⁸⁴ has been clarified in recent statutes,⁸⁵ which encourage judges, at all stages of the proceedings,

⁷⁷ Article 440 of the *Code de procédure civile*.

⁷⁸ Article 143 of the *Code de procédure civile*.

⁷⁹ Article 231 of the *Code de procédure civile*.

⁸⁰ Articles 184 to 198 of the *Code de procédure civile*.

⁸¹ Article 441 of the *Code de procédure civile*.

⁸² Article 442 of the *Code de procédure civile*.

⁸³ For the provisions specific to oral proceedings, see Articles 446-1 to 446-4 of the *Code de procédure civile*.

⁸⁴ Article 21 of the *Code de procédure civile*: "The role of judges includes encouraging the parties to settle their dispute".

⁸⁵ Decree No. 2015-282 of 11 March 2015 on the simplification of civil procedure, electronic communications and amicable dispute resolution; Decree No. 2016-514 of 26 April 2016 on judicial organisation, alternative dispute resolution methods and ethical duties of commercial court judges.



to attempt to broker an amicable resolution of the dispute themselves, to appoint a judicial conciliator to do so, or to refer the matter to a mediator. On the basis of these provisions, it would be desirable to set up a group of judicial conciliators and mediators available to the commercial tribunal sections to be created, specifically qualified to competently act in the matters handled by these tribunal sections.

Proposal 29 – Setting up a group of judicial conciliators and mediators available to the international commercial tribunal sections, who have experience in international business law and who speak English.

f) Litigation expenses and costs

64. Comparing the costs of the various international commercial court systems is indisputably to the advantage of the French courts. No fee is charged for filing suit. The amount of lawyers' fees is regulated by law.⁸⁶ Litigation expenses and costs are also regulated. If disputed, they are verified in accordance with appropriate procedures.⁸⁷ Although a recent report by the *Sénat* (Senate)⁸⁸ proposes to partially abrogate the principle of free access to the public service provided by the courts,⁸⁹ regulating the costs of proceedings could be initially attempted by a more realistic assessment and allocation of the expenses of proceedings not included in litigation costs. In general, these expenses are awarded as a flat amount at the end of judgments, without any justification, on the basis of the parties' often vague requests. However, the assessment of expenses incurred in major economic and financial cases should be handled in a more methodical way. In particular, as is the case before certain supranational and foreign courts, litigation costs could be assessed and allocated at a hearing held after the judgment resolving the dispute has been pronounced, at which a decision would be made after considering supporting documentation produced and challenges thereto, which would be permissible under the current provisions of the *Code de procédure civile*.

Proposal 30 – Providing in the guidelines followed by the international commercial tribunal section for the holding of a hearing, after the case has been judged, for the purpose of assessing and allocating litigation expenses and costs.

⁸⁶ Law No. 71-1130 of 31 December 1971 reforming certain judicial and legal professions.

⁸⁷ Articles 695 to 725-1 of the *Code de procédure civile*.

⁸⁸ Information report No. 495 (2016-2017) of Mr Philippe Bas, chairman-rapporteur, Ms Esther Benbassa, Messrs Jacques Bigot, François-Noël Buffet, Ms Cécile Cukierman, Messrs Jacques Mézard and François Zocchetto, submitted in the name of the Commission des Lois (Laws Commission) - 4 April 2017 <http://www.senat.fr/notice-rapport/2016/r16-495-notice.html>.

⁸⁹ Page 251: Reinstating "stamp duty" for filing suit, which would vary depending on the type of case.



2 - Application to the various court levels

65. The various adjustments suggested above to the judicial organisation and procedural rules for the purpose of hearing international commerce and finance disputes must be discussed with respect to the two lower court levels and then for the *Cour de cassation*.

1°) First-level courts

66. At the first level, an international tribunal section should be set up along the lines of the experiment undertaken by the *Tribunal de commerce de Paris* since 2010. In addition, the utility of creating a similar section within the *Tribunal de grande instance de Paris* (Paris District Court) should be considered in light of the international economic matters that can be brought before that court.

a) *Tribunal de commerce de Paris*

67. In 2010, the *Tribunal de commerce de Paris* set up a section dedicated to handling disputes of an international nature. These disputes are identified on the basis of their nature or the foreign nationality of certain parties. The Chief Judge's order that distributes cases and assigns judges refers to this tribunal section as the *Chambre commerciale internationale et européenne* (International and European Chamber). It is comprised of nine judges who have experience in international business law and who speak foreign languages, in particular English. If necessary, it may be supplemented by other members of the court, depending on the specificity of the matters to be heard. Cases are assigned to this tribunal section by the "placement" section, which is responsible for distributing suits filed with the court. No particular measures exist with respect to the court registry.

68. The documentation published by the Commercial Court states that it is possible to use certain languages before this tribunal section: English, Italian and Spanish. However, the conditions under which such languages may be used are not formally described. In general, use of a foreign language is limited to the production of documents without translation, if the parties agree. It may also include permitting the parties or witnesses to testify at hearings in their own language, without the use of an interpreter, and allowing the Chief Judge to speak with such persons. No case is mentioned in which written submissions were filed or oral arguments made in a foreign language.

69. Undoubtedly, this approach has the advantage of being flexible: the use of a foreign language is permitted, without any particular formalities, depending on the circumstances. Nevertheless, it remains exceptional. Although no statistics are kept, the Chief Judge of the court estimates that hearings are partially held in a foreign language in only a few cases each year. It appears that this practice has not generated any particular difficulties and, in general, is favourably viewed by lawyers and economic operators.



70. To take full advantage of this experience, this experiment should undeniably be consolidated by adopting a more precise organisation and more explicit rules. In particular, the procedures and criteria for assigning cases to this tribunal section, as well as for the use of English at the various stages of the proceedings, should be indicated. Furthermore, the existence of this tribunal section deserves to be given greater visibility in the court's internal documents and official communications.

71. The Chief Judge of the Commercial Court is in favour of a clearer institutionalisation of this tribunal section with special jurisdiction. For this purpose, in accordance with the approach described above, the specific procedural rules applied before the tribunal section should be formally transcribed and such guidelines should be publicised, in particular on the court's website. This special tribunal section should also be clearly mentioned on the court's website, as well as in the court's directory and in a specific brochure describing the tribunal section. In addition, these publications could present the judges comprising the tribunal section.

72. Other major commercial courts also allow evidence to be produced and, in certain cases, parties or witnesses to testify, in English, without translation or interpretation. This is the case, for example before the Marseille and Le Havre Commercial Courts, which specialise in maritime transport disputes, in which large numbers of documents in English are produced. As there is no impediment to these practices if the parties are in agreement and the court approves, as stated above, they deserve to be supported and encouraged everywhere.

Proposal 31 – Consolidating the existence and operation of the international section of the *Tribunal de commerce de Paris* by more specifically promoting it in the court's official communications and by publishing guidelines explaining the particular rules of procedure applied by that tribunal section.

b) *Tribunal de grande instance de Paris*

73. In an interview with the Chief Judge of the *Tribunal de grande instance de Paris* (Paris District Court), a discussion was held about the desirability of extending the project to certain disputes heard by that court, in particular in the field of patents.⁹⁰ Although such an extension should not be excluded out of hand, it seems preferable to postpone it and to draw on the lessons learned from the experience acquired by the Commercial Court and the Court of Appeal,⁹¹ as well as from the establishment of the Unified Patent Court.⁹²

⁹⁰ The resolution of disputes involving European patent law, for which one of several European languages may be chosen as the language of the proceedings, is in the process of being organised with the creation of a Unified Patent Court, one of whose divisions at first instance will sit in Paris - Protocol to the Agreement on a Unified Patent Court on provisional application, www.unified-patent-court.org/sites/default/files/Protocol_to_the_Agreement_on_Unified_Patent_Court_on_provisional_application.pdf.

⁹¹ Interview with Mr Jean-Michel Hayat, Chief Judge of the *Tribunal de grande instance de Paris*.

⁹² Agreement on a Unified Patent Court.



2°) *Cour d'appel de Paris*

74. At the *Cour d'appel de Paris*, the cases that may be assigned to the international commercial tribunal section are currently allocated to tribunal section 1-1 of Division 1, which has jurisdiction over matters involving international law, EU law, general private international law and international arbitration, and to various commercial tribunal sections of Division 5, which has jurisdiction over economic matters.

75. From among these disputes, cases that meet the internationality factors discussed above should be assigned to the tribunal section to be created. This collegial tribunal section and its jurisdiction should be listed in the annual “judge rotation” order, and judges specially selected and trained to handle these disputes should be assigned to the tribunal section, in accordance with the requirements of the *Code de l'organisation judiciaire*.⁹³

76. As stated above, associate legal officers⁹⁴ specially selected due to their expertise should be appointed to assist the judges of this tribunal section. Moreover, this tribunal section must be provided with the premises, equipment and technical resources necessary to handle, in accordance with modern standards, the disputes assigned to it.

77. The existence of the commercial tribunal section of the Court of Appeal, its composition, jurisdiction and method of operation should be included in the institutional communication materials of the Court of Appeal, and of the Commercial Court. Furthermore, it would be highly beneficial if the communication programmes concerning the creation of the commercial tribunal sections were common to both courts. Lastly, in accordance with the approach described above, guidelines covering the particular procedural rules applied before this tribunal section should be adopted in consultation with relevant practitioners.

78. All of these provisions are within the powers of the Chief Judge of the *Cour d'appel de Paris*, who is in favour of the creation of this tribunal section, if it is provided with the necessary human and budgetary resources.

Proposal 32 – Creating an international commercial tribunal section within the *Cour d'appel de Paris*, in accordance with the terms set out in the preceding proposals.

3°) *Cour de cassation*

79. With respect to the *Cour de cassation*, the creation of international commercial tribunal sections raises two issues. The first issue is whether the procedural practices of these tribunal sections, in particular the use

⁹³ Articles L121-3, L 121-4, L312-1 L312-2, R 321-1, R 121-2 and R 132-3 of the *Code de l'organisation judiciaire*.

⁹⁴ Article L123-4 of the *Code de l'organisation judiciaire*. Associate legal officers are appointed to assist the judges of the tribunaux d'instance (municipal courts), district courts and courts of first instance, courts of appeal and Cour de cassation. They must hold a doctorate in law or a diploma conferred for legal training of at least five years of post-baccalaureate university-level studies. In addition, they must have two years of professional experience in the legal field and expertise that specifically qualifies them to perform these duties. Associate legal officers may work on a part-time or full-time basis, for a maximum period of three years, which may be renewed once.



of English, would be consistent with the case-law of the *Cour de cassation*. The second issue concerns the modifications required to the rules for appealing matters to the *Cour de cassation* in the case of appeals filed against the decisions rendered in these particular disputes by the international commercial section of the *Cour d'appel de Paris*.

80. With respect to the first issue, the proposals made in this report have endeavoured to take into account the existing case-law, as set out in an analytical note prepared by the Documentation and Studies Department of the *Cour de cassation*.⁹⁵

81. On the second issue, it will be up to the *Cour de cassation* to decide if it can rule on appeals on the basis of documents and pleadings in English or if, on the contrary, it will require translations thereof. In a letter dated from 27 April 2017, the Chief Justice stated that, like any other court, the *Cour de cassation* discretionarily determine if it is sufficiently familiar with a foreign language to be able to understand and, if necessary, clarify the meaning of documents produced, and that a similar reasoning could apply to the court documents in the proceedings before the courts hearing issues of fact and law. The Chief Justice and the presiding judges of the tribunal sections met specifically to review the project and concluded that, in light of the objectives at stake, the *Cour de cassation* would certainly be open and sympathetic to the initiative of the international commercial tribunal sections⁹⁶.

3 - Management and oversight of the experiment

82. The success of the specialised courts set up to hear international business disputes is conditioned on their ability to meet the requirements of such disputes and the demand of economic operators. This requires that the progress of the experiment be carefully monitored, in conjunction with these economic operators, in order to make any adjustments that may seem necessary after the first cases are handled. Therefore, it would be beneficial if a steering committee were set up at the *Cour d'appel de Paris* level, comprising the Commercial Court and Court of Appeal judges and the group of lawyers concerned, with the contribution of the relevant departments of the Ministry of Justice, to periodically assess the operation of these tribunal sections. These meetings could produce assessments reporting on the cases handled, which would render the initiative transparent and inform stakeholders of its progress.

Proposal 33 – Setting up a steering committee at the Court of Appeal level to monitor the experiment and publish its assessments thereof.

⁹⁵ Analytical note of the Documentation, Studies and Reports Department of the *Cour de cassation*, previously cited - Appendix 05.

⁹⁶ Letter of the Chief Justice of the *Cour de cassation*, dated 27 April 2017, Appendix 07.



B – Proposals for improving the current legal framework

83. As requested in the assignment letter, the working group considered the possibility of modifying the existing legal framework. In this respect, three types of adaptations may be considered: (1) grouping certain disputes before the *Cour d'appel de Paris*, (2) consolidating the applicable procedural rules and (3) expanding human resources.

1 - Grouping certain commercial disputes before the *Cour d'appel de Paris*

84. With the goal of rationalising and optimising the use of the judicial resources allocated to the international commercial tribunal section created within the *Cour d'appel de Paris*, the exclusive jurisdiction conferred on that court⁹⁷ could be extended to other international business law fields. In particular, its jurisdiction could be extended to international arbitration disputes and international carriage of goods disputes.

85. As stated above,⁹⁸ in the field of international arbitration,⁹⁹ grouping appeals before the *Cour d'appel de Paris* has two aspects. The first concerns all judicial decisions rendered in connection with the appeals allowed by the *Code de procédure civile* against international arbitration awards, whether rendered in France¹⁰⁰ or abroad,¹⁰¹ or whether common to either of these types of arbitration awards.¹⁰² These provisions can be amended by decree. However, a law would have to be adopted to create a block of jurisdiction that would group before the judicial courts, and specifically before the *Cour d'appel de Paris*, all appeals in international arbitration matters, even if such arbitration awards include public law aspects.¹⁰³

Proposal 34 - Conferring on the Court of Appeal exclusive jurisdiction over appeals in international arbitration matters (amendment of Article L. 310 *et seq.* and Article D. 311-8 *et seq.* of the *Code de l'organisation judiciaire*, and Article L. 1504 *et seq.* of the *Code de procédure civile*).

86. To achieve the same rationalisation objective, appeals filed against judgments rendered in matters governed by international transport law could also be grouped under the jurisdiction of the *Cour d'appel de Paris*. All of these disputes, which entail reviewing specific legal and technical arguments, and involve economic operators from around the world who do business in a field in which English is used for communications, and whose case files are made up of

⁹⁷ Article R. 420-5 of the *Code de commerce* in the case of anti-competitive practices and Article D. 442-3 of the *Code de commerce* in the case of practices that restrict competition.

⁹⁸ Sections 17 to 19.

⁹⁹ Article 1504 of the *Code de procédure civile* provides: "An arbitration matter is international if it raises issues of international commerce".

¹⁰⁰ Articles 1518 to 1524 of the *Code de procédure civile*.

¹⁰¹ Article 1525 of the *Code de procédure civile*.

¹⁰² Articles 1526 and 1527 of the *Code de procédure civile*.

¹⁰³ Section 19.



documents drafted in English, are particularly appropriate matters for a court with international jurisdiction.

Proposal 35 – Conferring on the Court of Appeal exclusive jurisdiction over appeals from judgments deciding cases pursuant to international conventions in the transport field (amendment of Article L. 310 *et seq.* and Article D. 311-8 *et seq.* of the *Code de l'organisation judiciaire*, and Article L. 1504 *et seq.* of the *Code de procédure civile*).

2 - Consolidating the procedural rules applied in international commercial disputes involving business law

86. If based on practical experience, or due to positions adopted by the *Cour de cassation*, it becomes apparent that the rules of civil procedure referred to above should be consolidated, various amendments could be considered:

- to specify the conditions and procedures for using foreign languages at the various stages of proceedings: production and review of exhibits, testimony of witnesses, technical evidence, language used for court documents and for correspondence with the court registry, holding hearings and making them public;
- to reinforce and increase the effectiveness of the powers of the judge charged with preparing the case, the Commercial Court, the case management judge and the Court of Appeal to compel the production of evidence held by the parties or third parties. These additional case preparation powers should be extended to all civil and commercial courts;
- to include in the litigation expenses and costs to be assessed against the parties the expenses specific to the judgment methods of the international commercial sections of the *Tribunal de commerce de Paris* and the *Cour d'appel de Paris*.¹⁰⁴

Proposal 36 – If necessary, consolidating the rules applicable to the use of foreign languages at the various stages of the proceedings. (Redraft and amend by statute the *Ordonnance de Villers-Cotterêts* of 1539, and add specific provisions on the use of foreign languages in the proceedings guidelines applicable to all civil courts – Chapter 1, Title 1, Book 1, of the *Code de procédure civile*).

Proposal 37 – If necessary, consolidating the procedural rules for:

- obtaining evidence (Article 132 *et seq.* of the *Code de procédure civile*).
- assessing litigation costs (Article 695 *et seq.* of the *Code de procédure civile*).

¹⁰⁴ In particular, this would require taking into account expenses incurred to set up the technical measures planned: recording of hearings, videoconferences, interpreting and translations services, etc.



3 - Expanding the human resources allocated to the international commercial tribunal of the Court of Appeal

87. The Chief Judge of the Court of Appeal insisted on the importance of the selection process for the judges assigned to the highly specialised tribunal sections of the *Cour d'appel de Paris*, their training and the need to provide them with the support of qualified staff. According to this judge, these points are an indispensable pre-condition to any project that aims to establish the authority of a court created for the purpose of hearing cases of global importance in the fields of commerce and finance. Although the current method for appointing judges to the *Cour d'appel de Paris* does not preclude selective recruitment of judges and putting together teams of assistants to provide support to the court, these possibilities under the current status of the judiciary should be supplemented.

88. Firstly, the right to recruit advisors on special assignment (*conseillers en service extraordinaire*), which is currently limited to the *Cour de cassation*, should be extended to the Court of Appeal. This would provide the international tribunal section, as well as the other tribunal sections of the Court of Appeal, with the services of lawyers recognised for their extensive experience acquired in highly specialised fields, such as banking and insurance, or with the legal departments of major companies.¹⁰⁵

Proposal 38 – Creating a status of “advisor on special assignment” for the Courts of Appeal (in the provisions on full-time temporary positions: Chapter V *bis*, section 1, add a sub-section 2: Advisors to the Court of Appeal on special assignment, after Article 40-7 of Order No. 58-1270 of 22 December 1958 adopting the Organic Law on the status of the judiciary).

89. Secondly, as provided by the Order of 22 December 1958, as amended by the Organic Law of 8 August 2016,¹⁰⁶ and clarified by the Decree of 27 December 2016,¹⁰⁷ the status of temporary judges could be modified to allow the *Cour d'appel de Paris* to hire the services of working professionals who can furnish highly qualified assistance in complex economic and financial matters, provided strict measures are taken to prevent potential conflicts of interest.

Proposal 39 – Amending the status of temporary judges for the benefit of the Courts of Appeal (amendment of Article 41-10 of Order No. 58-1270 of 22 December 1958 adopting the Organic Law on the status of judges).

¹⁰⁵ Articles 40-1 to 40-7 of the amended order creating the status of the judiciary http://www.metiers.justice.gouv.fr/art_pix/conseillers_et_avocats_generaux_Cour_de_cassation_service_extraordinaire.pdf.

¹⁰⁶ Articles 41-10 to 41-16 of Order No. 58-1270 of 22 December 1958 adopting the Organic Law on the status of judges.

¹⁰⁷ Decree No. 2016-1905 of 27 December 2016 adopting provisions on the status of the judiciary in application of Organic Law No. 2016-1090 of 8 August 2016; Circular S.J.17-105 RHM1/29.03.17 http://www.metiers.justice.gouv.fr/art_pix/dossier_de_candidature_magistrat_a_titre_temporaire_2015.pdf.



90. Thirdly, the body of associate legal officers created by the Law of 18 November 2016,¹⁰⁸ could also be modified to increase the level of its expertise in international business law matters and its experience of common law, in order to provide appropriate support for the members of the international commercial section of the *Cour d'appel de Paris*.

Proposal 40 – Adapting the position of associate legal officer in line with the legal and technical specificities of the international commercial tribunal sections (amendment of Article L123-4 of the *Code de l'organisation judiciaire*).

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¹⁰⁷ Article 24 of Law No. 2016-1547 of 18 November 2016 modernising the 21st century system of justice.



Conclusions

91. Each of the persons interviewed clearly understood that the crucial points of the initiative were the care and resources devoted to its implementation, both with respect to the expertise of judges, the adjustments to be made to the procedural and language rules, and the premises, equipment and technical resources to be put in place. Offering a commercial court with international stature in Paris would be of utility only if it earns the confidence of the actors in the international commerce and finance sectors and persuades practitioners in these areas to use its services. Although at this time practitioners unanimously encourage the creation of such a court, when it is in place, they must incorporate its existence into their contractual and litigation strategies. For that reason, the creation of these specialised tribunal sections should be preceded by in-depth consultations with the relevant professional organisations, the bar association, companies, credit institutions, financial organisations and insurance companies in order to ensure their support for a concrete project that challenge customary practice and a system that promotes the influence of the common law courts. The HCJP is prepared to continue its work towards that goal once decisions have been taken on the resources to be implemented.

Proposal 41 – Preceding the creation of the international commercial tribunal sections of the Commercial Court and Court of Appeal by in-depth consultations with all relevant professional bodies and organisations.

92. This report has not addressed the substantive factors specific to our legal culture that would contribute to procuring even greater international authority to our justice system in commercial matters: the stability of the case-law, a more rigorous legal conception of compliance with contractual commitments and greater realism in the assessment of damages. It is up to the courts themselves to keep these factors in mind. An increased professionalism of the courts, combined with the determination of the parties and upgraded economic and financial expertise tools, will undoubtedly contribute thereto.

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III - Summary of Proposals

1 - Setting up specialised tribunals to hear international business disputes

Proposal 31 – Consolidating the existence and operation of the international and European section of the *Tribunal de commerce de Paris* by more specifically promoting it in the court's official communications and by publishing guidelines explaining the particular rules of procedure applied by that tribunal section.

Proposal 32 – Creating an international commercial tribunal section within the *Cour d'appel de Paris*, in accordance with the terms set out in the proposals that follow.

2 - Eligible disputes

Proposal 1 – Conferring jurisdiction over business law disputes that are international in nature to an international commercial tribunal section set up at each court level.

Proposal 13 – Establishing objective criteria for assigning cases to the international commercial sections of the Commercial Court and Court of Appeal.

Proposal 34 – Conferring on the Court of Appeal exclusive jurisdiction over appeals in international arbitration matters (amendment of Article L. 310 *et seq.* and Article D. 311-8 *et seq.* of the *Code de l'organisation judiciaire*, and Article L. 1504 *et seq.* of the *Code de procédure civile*).

Proposal 35 – Conferring on the Court of Appeal exclusive jurisdiction over appeals from judgments rendered pursuant to international conventions in the transport field (amendment of Article L. 310 *et seq.* and Article D. 311-8 *et seq.* of the *Code de l'organisation judiciaire*, and Article L. 1504 *et seq.* of the *Code de procédure civile*).

Proposal 24 – Conferring on the presiding judges of the international commercial sections of the *Tribunal de commerce de Paris* and of the *Cour d'appel de Paris* jurisdiction to hear summary proceedings in the disputes assigned to such tribunal sections.

3 - Appropriate language rules

Proposal 20 – Publishing translations of the codes and other legal texts commonly used in international business law.



Proposal 2 – Allowing the use of English at the various stages of proceedings, within the framework of the procedural rules in effect.

Proposal 36 – If necessary, consolidating the rules applicable to the use of foreign languages at the various stages of the proceedings (Redraft and amend by statute the *Ordonnance de Villers-Cotterêts* of 1539, add specific provisions on the use of foreign languages in the proceedings guidelines applicable to all civil courts – Chapter 1, Title 1, Book 1, of the *Code de procédure civile*).

Proposal 11 – Drawing up an exhaustive list of matters in which English may be used before the court.

Proposal 8 – Offering parties options for the use of English depending on the needs of the case, with respect to:

- producing and challenging evidence;
- producing written submissions and correspondence between the court and the parties;
- holding hearings and oral argument.

Proposal 9 – In all cases, conditioning the use of English in proceedings on the agreement of the parties and the approval of the court.

Proposal 10 – Conditioning the possibility of producing court documents and/or receiving correspondence from the court in English on the parties' express waiver of their right to claim invalidity due to a procedural defect on such grounds.

Proposal 12 – Making appropriate arrangements for the interpretation of hearings if members of the public are present.

Proposal 6 – Together with the judgment rendered in French, providing a sworn translation into English.

Proposal 21 – Publishing the decisions rendered by the international tribunal sections in both languages, on appropriate media, together with the related learned commentary.

4 - Effective procedural practices

Proposal 7 – Soliciting the views of lawyers and corporate counsel who customarily deal with international commercial disputes on how to advantageously apply ordinary rules of procedure to the cases handled by the international commercial sections of the *Tribunal de Commerce* and the *Cour d'appel de Paris*.



Proposal 5 – Including in the guidelines the rules of procedure applied before the international commercial tribunal section.

Proposal 3 – Setting up procedural mechanisms that reduce the duration of proceedings and enable the judgment date to be set with certainty.

Proposal 25 – Including in the guidelines followed by the international commercial tribunal section the specific provisions applied, pursuant to the rules of the *Code de procédure civile*, to ensure compliance with the schedule for producing evidence and filing written submissions and to ensure that the hearing date is not vacated.

Proposal 4 – Reinforcing and simplify the practices for producing and reviewing evidence.

Proposal 26 – Including in the guidelines followed by the international commercial tribunal section the practices specifically applied to take evidence in cases assigned to that tribunal section.

Proposal 28 – Including in the guidelines followed by the international commercial tribunal section the practices specifically applied to take evidence at hearings and to organise oral argument and the questions the courts may ask lawyers.

Proposal 22 – Setting up a specific process for assessment and allocation of litigation expenses and costs.

Proposal 30 – Providing in the guidelines followed by the international commercial tribunal section for the holding of a hearing, after the case has been judged, for the purpose of assessing and allocating litigation expenses and costs.

Proposal 23 – Setting up an appropriate communication system aimed at the publics concerned, informing them of the existence of the international commercial tribunal sections and their operating rules.

Proposal 37 – If necessary, consolidating the procedural rules for:

- obtaining evidence (Article 132 *et seq.* of the *Code de procédure civile*);
- assessing litigation costs (Article 695 *et seq.* of the *Code de procédure civile*).



5 - Human resources

Proposal 17 – Increasing the number of *Cour d'appel de Paris* judges by a sufficient number to form the international commercial tribunal section (three presiding judge positions).

Proposal 14 – Adopting a selective process for appointing and assigning *Cour d'appel de Paris* judges to sit on the international commercial section.

Proposal 15 – Setting up enhanced training programmes in international business law and common law, as well as advanced English language courses, for *Cour d'appel de Paris* judges who will sit on the international commercial section.

Proposal 38 – Creating a status of “advisor on special assignment” for the Courts of Appeal (in the provisions on full-time temporary positions: Chapter V *bis*, section 1, add a sub-section 2: Advisors to the Court of Appeal on special assignment, after Article 40-7 of Order No. 58-1270 of 22 December 1958 adopting the Organic Law on the status of the judiciary).

Proposal 39 – Amending the status of temporary judges for the benefit of the Courts of Appeal (amendment of Article 41-10 of Order No. 58-1270 of 22 December 1958 adopting the Organic Law on the status of judges).

Proposal 18 – Hiring staff who are specialised in international business law and common law, and who are fully conversant with legal English, to assist the judges of the international commercial section of the Court of Appeal (five associate legal officers).

Proposal 40 – Adapting the position of associate legal officer in line with the legal and technical specificities of the international commercial tribunal sections (amendment of Article L123-4 of the *Code de l'organisation judiciaire*).

Proposal 16 – Adopting a selective process for assigning staff with sufficient knowledge of English to the registries of the international commercial sections of the *Tribunal de commerce de Paris* and the *Cour d'appel de Paris* (two registrars and two reception desk staff).

Proposal 29 – Setting up a group of judicial conciliators and mediators available to the international commercial tribunal sections, who have experience in international business law and who speak English.

Proposal 27 – Identifying, under the relevant headings of the list of experts, the persons with technical expertise able to conduct expert assessment operations and prepare their reports in English.



6 - Physical resources

Proposal 19 – Providing the international commercial tribunal sections of the *Tribunal de commerce de Paris* and the *Cour d'appel de Paris* with appropriate premises equipped with electronic communication systems, tools for recording hearings, and interpretation and videoconference systems.

7 - Project implementation and oversight

Proposal 41 – Preceding the creation of the international commercial tribunal sections of the Commercial Court and Court of Appeal by in-depth consultations with all relevant professional bodies and organisations.

Proposal 33 – Setting up a steering committee at the Court of Appeal level to monitor the experiment and publish its assessments thereof.

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Interviews, meetings, consultations, documentation

Ministry of Justice

- Technical notes and interview reports prepared by the judges of the Civil Matters Division (*Direction des affaires civiles et du sceau*), the Judicial Services Department (*Direction des services judiciaires*), the European and International Affairs Unit (*Service des affaires européennes et internationales*) and by the liaison judges in Germany and the Netherlands.

Conseil constitutionnel

- Documentation compiled by the Documentation Department on the case-law of the *Conseil constitutionnel* on Article 2, paragraph 1, of the Constitution.

Cour de cassation

- Interview with Mr Bertrand Louvel, Chief Justice.
- Letter from Mr Bertrand Louvel, Chief Justice, dated 27 April 2017.
- Interview with Mr Jean-Claude Marin, Chief Prosecutor.
- Working meeting with Mr Bruno Pireyre, Chamber Presiding Judge, director of the *Cour de cassation* Documentation, Studies and Reports Department (*Service de documentation, d'études et du rapport*) and the judges of that department, Mr Christian Belhôte, secretary general of the Chief Justice's office, and Ms Emmanuelle Proust, referee (*conseiller référendaire*) and special advisor.
- Documentation compiled by the Documentation, Studies and Reports Department:
 - Information on the principle of official use of French;
 - Public nature of hearings and use of a foreign language;
 - Summary of the case-law of the *Cour de cassation* on the *Ordonnance de Villers-Cotterêts*;
 - Analytical note on the issues raised by the project to create specialised tribunals within the *Tribunal de commerce de Paris*, the *Tribunal de grande instance de Paris* (Paris District Court) and the *Cour d'appel de Paris* (Paris Court of Appeal) to hear technical financial disputes of an international nature.

Cour d'appel de Paris

- Interview with Ms Chantal Arens, Chief Judge.
- Interview with Ms Catherine Champrenault, Chief Prosecutor.



Tribunal de grande instance de Paris

- Interview with Mr Jean-Michel Hayat, Chief Judge.

Tribunal de commerce de Paris

- Interview with Mr Jean Messinesi, Chief Judge.
- Working meeting with the Chief Judge, Vice-Chief Judge and associate judges of the *Tribunal de commerce de Paris*.
- Note on the matters handled by the international chamber of the *Tribunal de commerce de Paris*, interview with Mr Jean-Pierre Elguedj, presiding judge of the section.

Conférence générale des juges consulaires de France (General Conference of Commercial Court Judges of France)

- Telephone interview with Mr Georges Richelme, Chairman.
- Telephone interview with Mr Yves Lelievre, former Chairman.

National Council of Bar Associations

- Working meeting with Mr Louis Degos, Chairman of the Prospective Commission, Mr Philippe-Henri Dutheil, Chairman of the European and International Affairs Commission, and Ms Géraldine Cavaillé, Director of the Legal Division.

Paris Bar Association

- Interview with Mr Frédéric Sicard, President of the Paris Bar Association.

Paris Ile-de-France Chamber of Commerce and Industry

- Telephone interview with Ms Anne Outin-Adam, Director of legal and economic policies.
- Written contribution of Ms Anne Outin-Adam, Director of Legal and Economic Policies.

Paris Place de droit / Paris Place d'arbitrage international (Paris, City of Law / Paris, Home of International Arbitration)

- Telephone interview with Mr Elie Kleiman, lawyer, Chairman of *Paris Place d'arbitrage international*, and member of the Board of Directors of *Paris Place de droit*.



Fondation pour le droit continental (Continental Law Foundation)

- Interview with Ms Laure Bélanger, General Director of the *Fondation pour le droit continental*, and Ms Marie Goré, Professor at Université de Paris II, Head of the Master 2 French and European Legal Culture research programme.

Experts

Interviews with:

- Ms Cécile Chainais, Professor at Université de Paris II, Director of the Justice and Dispute Resolution Research Center,
- Mr Daniel Cohen, Professor at Université de Paris II, Director of the Master 2 programme in Law of International Economic Relations and of the International Business Law LL.M.,
- Mr Dominique Hascher, Associate Judge of the *Cour de cassation*,
- Mr Charley Hannoun, Member of the Paris Bar, Professor at Université Cergy-Pontoise,
- Mr Charles Jarrosson, Professor at Université de Paris II (Panthéon-Assas), Director of the Master 2 programme in Litigation, Arbitration and Alternative Dispute Resolution Methods, Director of *La Revue de l'arbitrage*,
- Ms Horatia Muir Watt, Professor at the Sciences Po School of Law, Editor of *Revue critique de droit international privé*, member of the International Law Institute.

Institut des hautes études sur la justice (Judicial Studies Institute)

- 8th meeting of the working group on economic justice.

Conventions

- *Conventions* reflection workshop: “How to increase the attractiveness of the Paris marketplace after Brexit”.

Foreign experiences

- Comparative law note prepared by the European and International Affairs Department of the Ministry of Justice.

Germany

- Mission to the Cologne Court of Appeal and working meeting with Ms Dr Gabriele Morawitz, Chamber Presiding Judge, Ms Britta Lincke, Head of the Civil Proceedings and Business Law Office of the North Rhine-Westphalia Ministry of Justice, Ms Dr Elisabeth Stöve, Chamber Presiding Judge of the Düsseldorf *Landgericht*, Mr Harald Wulff, judge of the Cologne *Landgericht*.



- Documentation compiled by the Cologne Court of Appeal and Ms Stéphanie Kass-Danno, liaison judge in Berlin.

- Telephone interviews with Mr Gilles Cuniberti, Professor of Comparative Law at Université de Luxembourg, and Mr Burkhard Hess, Professor at Université de Luxembourg and Director of the Max Planck Institute of Luxembourg.

Netherlands

- Mission to the Netherlands

- Working meeting at the Ministry of Security and Justice with Mr Pieter Verbeek, judge of the Hague Court of Appeal, Ms Anne-Marie Terhorst, legal counsel with the legislative department in charge of the government bill on the Netherlands Commercial Court, and Mr Paulien van der Grinten, Senior legislative lawyer in charge of legislative coordination in the legislative department.
- Working meeting at the Netherlands Council of State with Mr Piet Hein Donner, Vice-Chairman, and his assistants charged with reviewing the government bill on the Netherlands Commercial Court.
- Working meeting at the Rotterdam Maritime Court with Ms Robine de Lan, Chief Judge of the Court, and Willem Sprenger, judge of the court.
- Documentation compiled by Mr Michaël Girh, liaison judge in the Hague.

Canada

- Interview with Mr Fabien Gélinas, Professor at McGill University, Montreal, Canada.
- Documentation compiled by Professor Fabien Gélinas.