

IMPORT – EXPORT

International sale of goods and arbitration in Europe



Part B: International arbitration

Prof. Jochen Bauerreis

Attorney in France and Germany
Certified specialist in international and EU law
Certified specialist in arbitration law

ABC International ALISTER
Strasbourg (France) – Kehl (Germany)

Structure of the presentation

- **Arbitration and ADR system in International Business (International Arbitration Survey) (I.)**
- **French International Arbitration law (II.)**

I. Arbitration and ADR system in international Business

- **Definition of arbitration and the arbitrability of a dispute**
- **Classifications of arbitration**
- **Advantages and disadvantages of arbitration**

I. Arbitration and ADR system in international Business

- **Definition of arbitration and the arbitrability of a dispute**
 - Definition of arbitration
 - Arbitrability of a dispute

I. Arbitration and ADR system in international Business

- **Definition of arbitration and the arbitrability of a dispute**

- Definition of arbitration

- *"Arbitration is a method aimed at obtaining the answer to a question concerning the relationship between two or more persons, by one or more persons - the arbitrator or arbitrators - who derive their powers from a private agreement and who adjudicate on the basis of that agreement, without being entrusted with that task by the State. »*

(René DAVID, L'arbitrage dans le commerce international, Economica, 1987, n° 2, p. 9)

- *"Arbitration is the institution by which a third party settles the dispute between two or more parties, exercising the jurisdictional mission entrusted to it by both parties. »*

(Charles JARROSSON, La notion d'arbitrage, LGDJ, 1987, p. 372)

I. Arbitration and ADR system in international Business

- **Definition of arbitration and the arbitrability of a dispute**

- Qualifying criteria

- Condition: existence of a dispute (= legal dispute)
 - "Alternative dispute resolution" (ADR) mode
 - (yes): alternative to state justice
 - (no): alternative to the jurisdictional method
 - Expression of private justice: contractual procedure (inter partes)
 - Procedure answering (first and foremost) legal questions
 - Binding nature of the arbitrator's decision (award)

I. Arbitration and ADR system in international Business

- **Definition of arbitration and the arbitrability of a dispute**

- Distinction with related notions

- Transaction (art. 2044 C. civ.)

- Common mandate

Article 1592 Civil Code

"However, it (= the selling price) can be left to the assessment of a third party; if the third party is unwilling or unable to make the assessment, then there shall be no sale. »

- Mediation (Directive 2008/52/EC of 21 May 2008)

- Conciliation

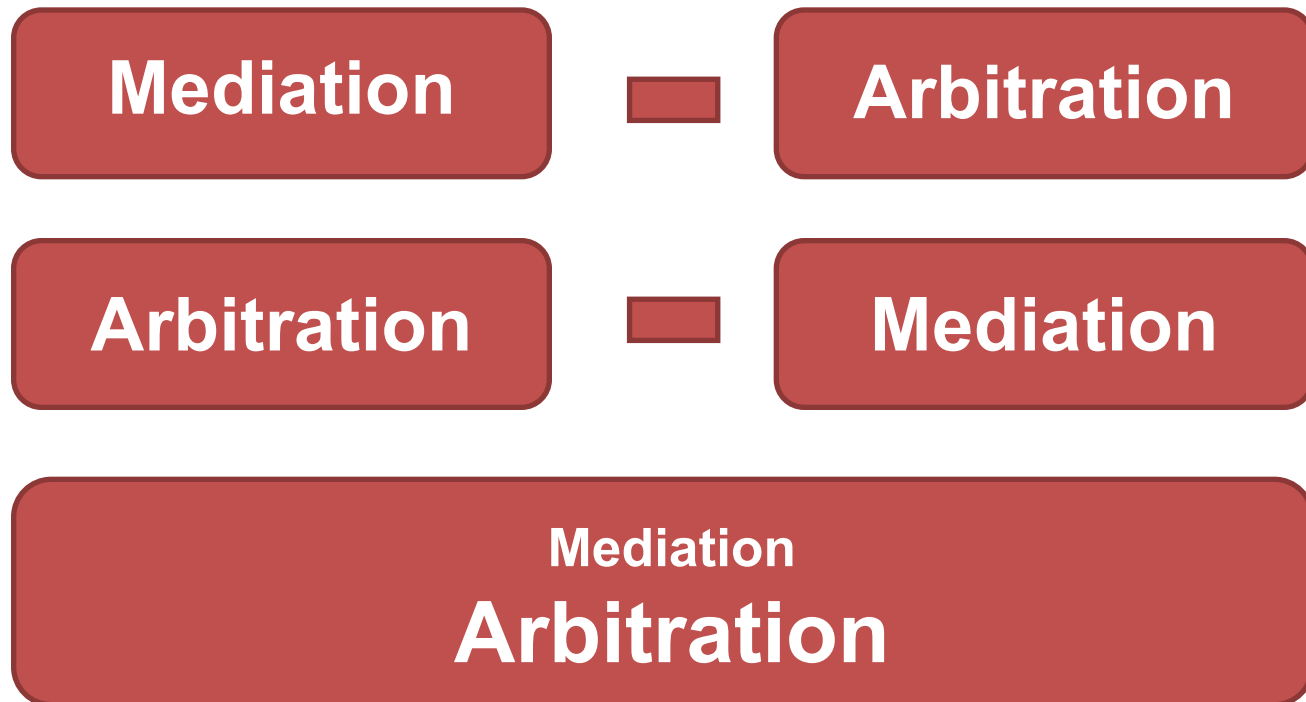
- Expertise

I. Arbitration and ADR system in international Business

- **Definition of arbitration and the arbitrability of a dispute**
 - Definition of arbitration - ADR
 - **Alternative dispute resolution** refers to procedures for settling disputes by means other than litigation before national courts
 - Most established are **arbitration and mediation**
 - They are **not mutually exclusive**: mediation often attempted before arbitration

I. Arbitration and ADR system in international Business

- Definition of arbitration and the arbitrability of a dispute
 - MED-ARB phenomenon



I. Arbitration and ADR system in international Business

- **Definition of arbitration and the arbitrability of a dispute**
 - State justice vs. private justice

	Traditional justice - State justice	Alternative justice - Private justice
Jurisdictional procedure	Traditional judicial litigation (TGI, TC, etc.)	Arbitration
non-jurisdictional procedure	Judicial Mediation / Conciliation	Contractual mediation

I. Arbitration and ADR system in international Business

- **Definition of arbitration and the arbitrability of a dispute**
 - Definition of arbitration
 - **Mediation:**
 - attempt to settle a legal dispute
 - through the active participation of a third party (mediator)
 - who works in order to help parties reach a conclusive and mutually satisfactory agreement
 - **Arbitration:**
 - consists in the submission of the dispute to one or more arbitrators
 - the proceedings usually end with a decision called an “award”
 - an award has essentially the same value as an ordinary judicial judgment

I. Arbitration and ADR system in international Business

- **Definition of arbitration and the arbitrability of a dispute**
 - Arbitrability of a dispute
 - Parties can submit their dispute to arbitration
 - by introducing an **arbitration clause** in their initial contract or
 - by concluding an **arbitration agreement** once a dispute arises
 - Arbitration is mostly used for disputes resulting from legal relationships dealing with international commerce
 - Arbitration is generally used in complex trans-border transactions
 - Therefore arbitration is appropriate for CISG governed transactions

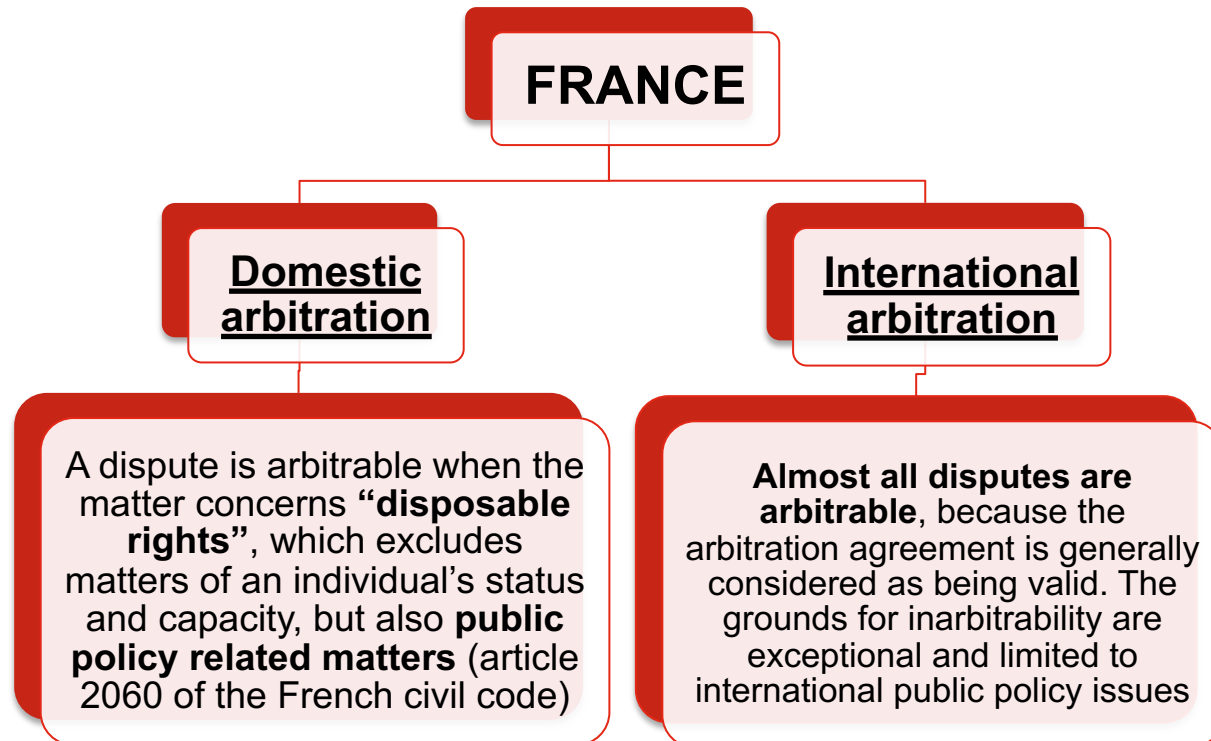
I. Arbitration and ADR system in international Business

- **Definition of arbitration and the arbitrability of a dispute**
 - Arbitrability of a dispute
 - However subject matter must be **arbitrable**:
 - International conventions have not laid out the requirements for arbitrability
 - Has been left to national legislation of each State

I. Arbitration and ADR system in international Business

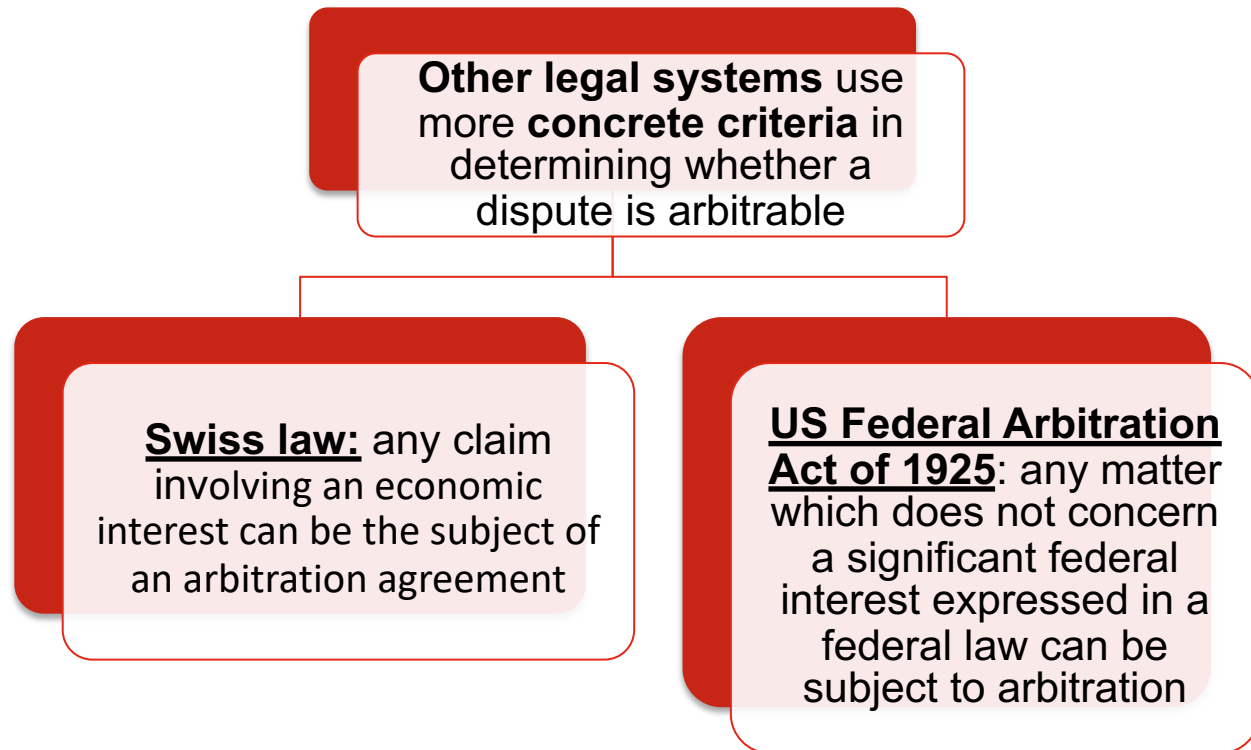
- Definition of arbitration and the arbitrability of a dispute

- Arbitrability of a dispute



I. Arbitration and ADR system in international Business

- Definition of arbitration and the arbitrability of a dispute
 - Arbitrability of a dispute



I. Arbitration and ADR system in international Business

- **Classifications of arbitration**
 - Domestic vs. international arbitration
 - *Ad hoc* vs. institutional arbitration

I. Arbitration and ADR system in international Business

- **Classifications of arbitration**

Domestic vs. International arbitration

Domestic arbitration: deals purely with national or domestic matters: all the elements of the arbitration must be related to one jurisdiction
(art. 1442 – 1503 CPC)

International arbitration: no uniform definition exists. Under rules and practices of arbitration institutions, a dispute may be regarded as international in reference to its nature or its parties (art. 1504 – 1527 CPC)

- Uncitral model law combines both approaches
- In French law, article 1504 CPC is widely drafted: “an arbitration is international when international trade interests are at stake.”

I. Arbitration and ADR system in international Business

- **Classifications of arbitration**

Ad hoc vs. institutional arbitration

Ad hoc arbitration:

- Definition: parties agree on **their own arbitration procedures**: they choose not only the location, the language, the applicable law, the number of the arbitrators, but also the administrative rules
- The role of national courts: if parties cannot agree on the administrative modalities for setting up the procedure, they can seek assistance from national courts (“judge acting in support of the arbitration” - *juge d’appui*) whose powers are imperatively limited to administration issues.

Institutional arbitration

- Definition: parties can choose to designate an **arbitral institution**, who will
 - **apply pre-established procedures** and **administer the arbitration** according to its own rules
 - provide the parties with purely administrative services
- Examples of arbitral institutions: ICC, AAA, Beijing Arbitration Commission (BAC)

I. Arbitration and ADR system in international Business

- **Classifications of arbitration**
 - *Ad hoc* vs. institutional arbitration: advantages of institutional arbitration
 - **Often parties opt for institutional arbitration**, because *ad hoc* arbitration does not offer an organisation framework for conducting the arbitration procedure
 - **However *ad hoc* arbitration comes with several advantages**

I. Arbitration and ADR system in international Business

- **Classifications of arbitration**

- *Ad hoc* vs. institutional arbitration: advantages of *ad hoc* arbitration

- **Economical interest:**

- ad hoc arbitration is generally less expensive than institutional arbitration
 - since the parties do not have to pay a private or commercial institution and fees of national courts (if any) are very low

I. Arbitration and ADR system in international Business

- **Classifications of arbitration**

– *Ad hoc* vs. institutional arbitration: advantages of *ad hoc* arbitration

- **Legal security:**

- in case of an institutional arbitration, only the arbitral institution will settle the controversy between the parties, whereas in an *ad hoc* arbitration the national “judge acting in support of the arbitration” will intervene and make a procedural decision
- The intervention of the arbitral institution is not final, as opposed to the decision made by the national judge in case of an *ad hoc* arbitration, since the risk that one party brings an action for annulment of the award before the national judges will persist

I. Arbitration and ADR system in international Business

- **Advantages and disadvantages of arbitration**
 - Advantages
 - Disadvantages

I. Arbitration and ADR system in international Business

- **Advantages and disadvantages of arbitration**

- Advantages of arbitration

- The parties can directly choose the arbitrator and ensure he is an expert in the area of law regarding the dispute
 - Arbitration procedures are time-wise efficient compared to classic procedures in courts which last longer
 - The procedural timetable is set by the arbitrator and the parties depending on their availability → procedure is therefore very flexible

I. Arbitration and ADR system in international Business

- **Advantages and disadvantages of arbitration**
 - Advantages of arbitration
 - Arbitral proceedings can be made confidential
 - The New York Convention of 1958 has facilitated the enforceability of foreign arbitral awards at a global level
 - Arbitration is also characterized by its neutrality, predictability and security

I. Arbitration and ADR system in international Business

- **Advantages and disadvantages of arbitration**
 - Disadvantages of arbitration
 - Economical interest
 - Legal security

I. Arbitration and ADR system in international Business

- **Advantages and disadvantages of arbitration**
 - Disadvantages of arbitration
 - **Economical interest:** arbitration is considered as being more expensive than proceedings before national courts
 - However, national proceedings are in most cases much longer, because there are several instances which is not the case in arbitration
 - And before national courts there can be the need for translating drafted legal documents in the court's language which produces further costs

I. Arbitration and ADR system in international Business

- **Advantages and disadvantages of arbitration**

- Disadvantages of arbitration

- **Legal security:** the problem can arise that an arbitral tribunal cannot include a third party in the proceedings, who has not given its consent.

Because it is not bound by the arbitration agreement (for instance in group of contracts), this problem can be solved in different ways:

- The parties can of course insert the same arbitration clause in each individual contract, which is however in practice not very easy to achieve
 - National judges can intervene in favour of arbitration by extending the individually concluded arbitration clause to the whole contractual grouping
 - National judges can order the production of evidence, if party requesting the measure has obtained the arbitral tribunal's invitation

I. Arbitration and ADR system in international Business

- **International Arbitration Survey**
 - International arbitration
 - Evolution of seats and institutions
 - Arbitrators
 - Future of international arbitration

I. Arbitration and ADR system in international Business

- **International Arbitration Survey**

- Survey 2018

- Research conducted by White & Case International arbitration group, the School of International Arbitration and Queen Mary University of London
 - **Main objective:** analyse the evolution of international arbitration and its future development according to the principal drivers and stakeholders
 - **Participants:** in-house counsels (10%), private practitioners (47%), arbitrators, representatives of arbitral institutions, academics, experts and third party funders



922
respondents
to the
questionnaire

I. Arbitration and ADR system in international Business

- International Arbitration Survey

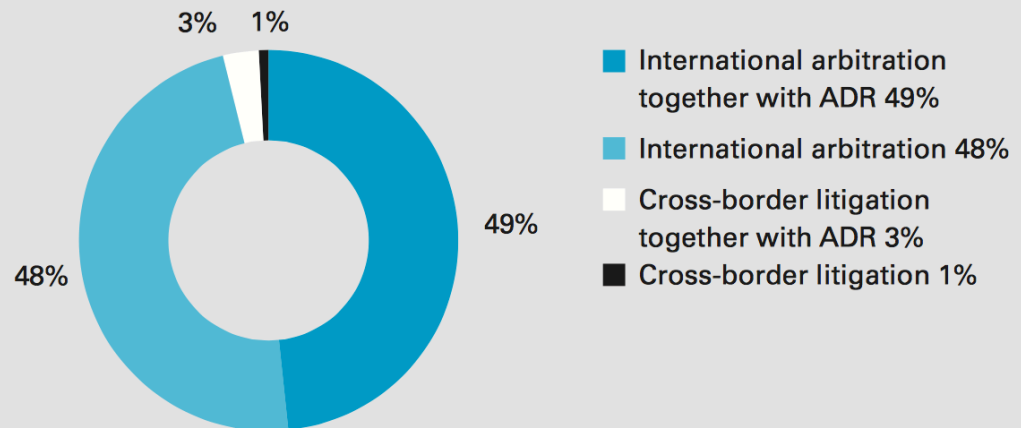
- International arbitration



97%

of respondents expressed that **international arbitration** is their preferred method of resolving cross-border disputes

Chart 1: What is your preferred method of resolving cross-border disputes?

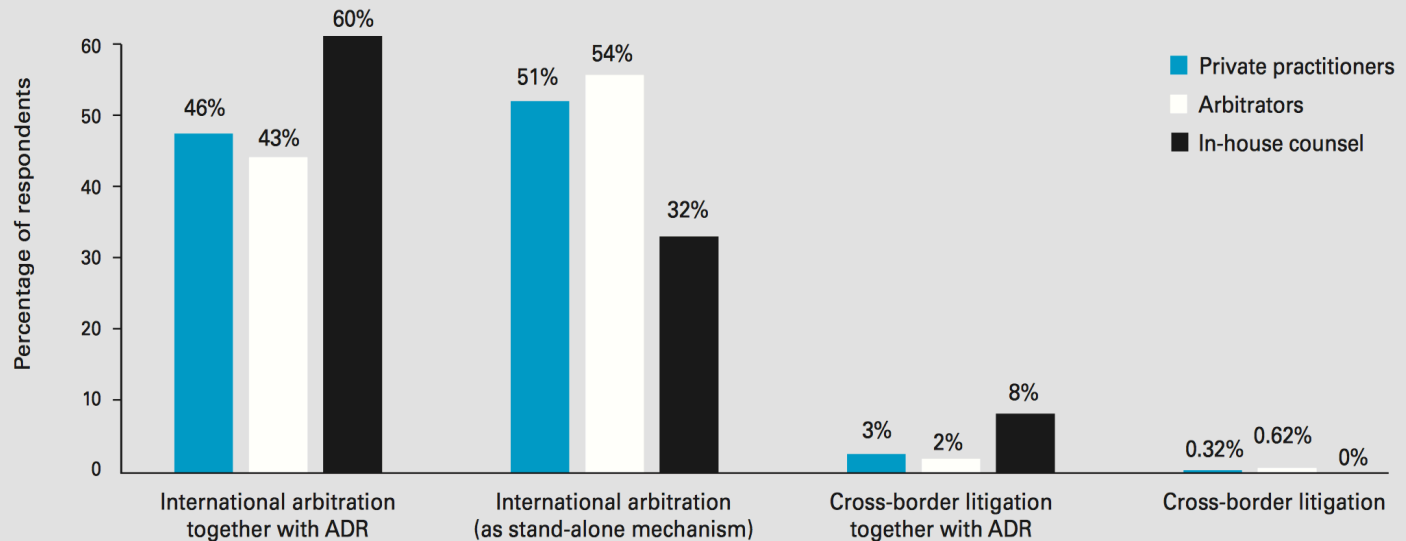


I. Arbitration and ADR system in international Business

- International Arbitration Survey

- International arbitration

Chart 2: Preferred method of resolving cross-border disputes – subgroups based on primary role

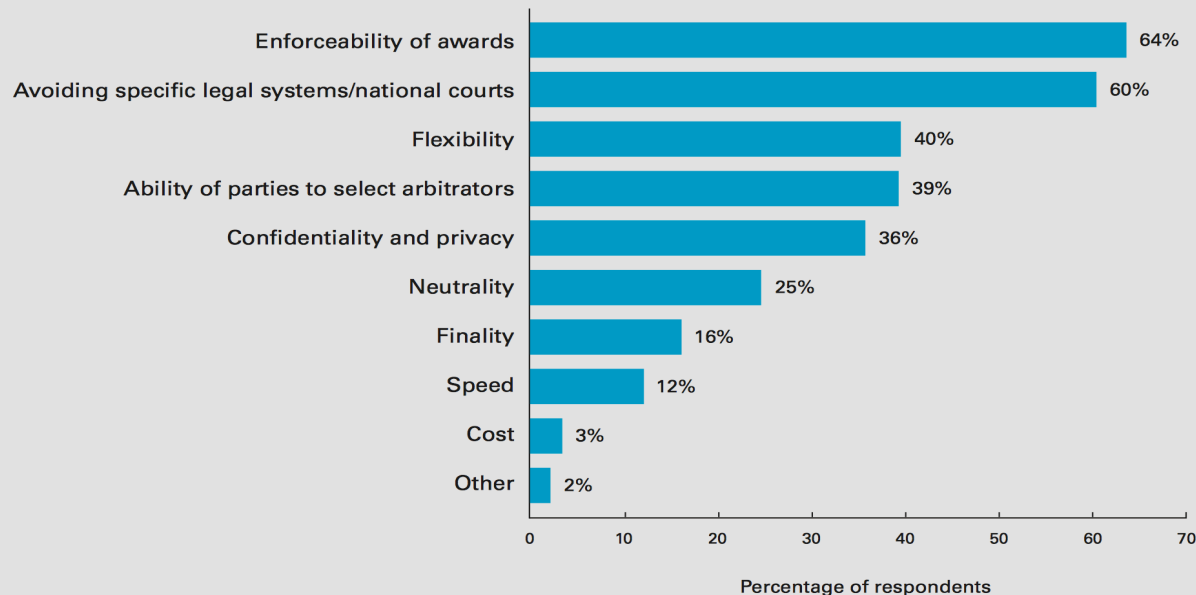


I. Arbitration and ADR system in international Business

- International Arbitration Survey

- International arbitration

Chart 3: What are the three most valuable characteristics of international arbitration?

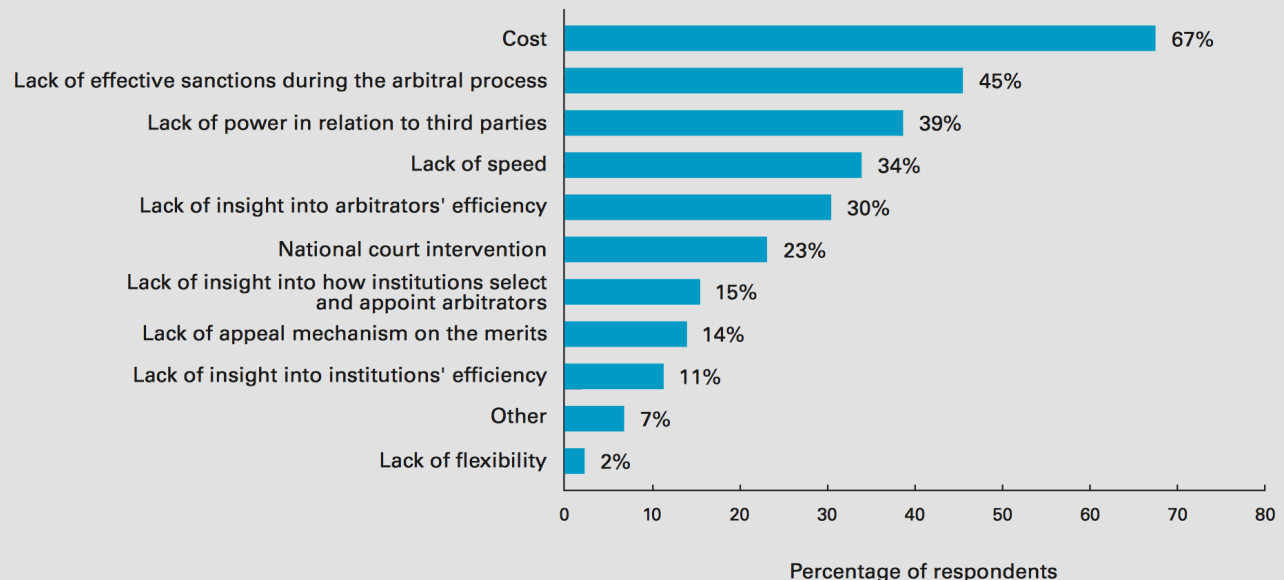


I. Arbitration and ADR system in international Business

- **International Arbitration Survey**

- International arbitration

Chart 4: What are the three worst characteristics of international arbitration?

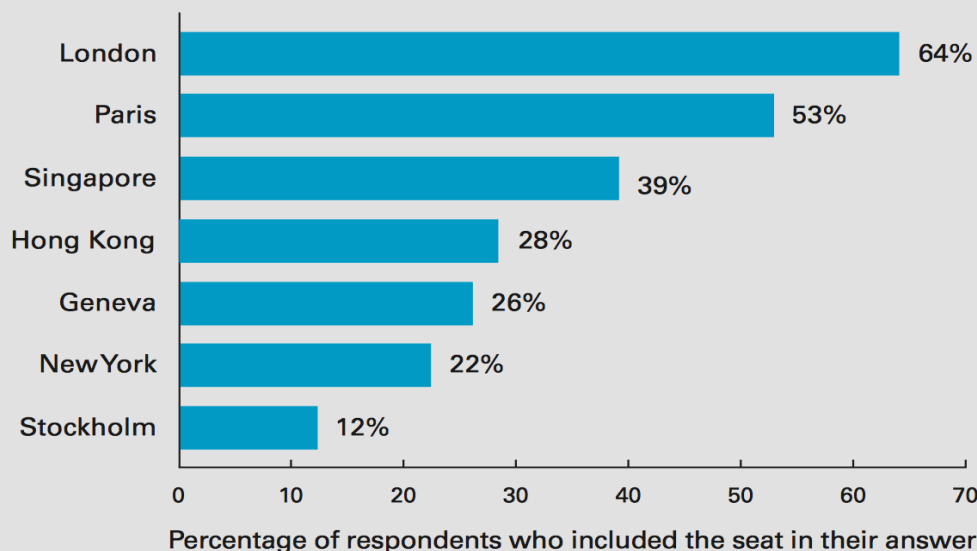


I. Arbitration and ADR system in international Business

- International Arbitration Survey

– Evolution of seats and institutions

Chart 6: What are your or your organisation's most preferred seats?



ption of the legal
ortant reasons why

I. Arbitration and ADR system in international Business

- International Arbitration Survey

- Evolution of seats and institutions

- London was selected as the most preferred seat by respondents in all regions



55%

of respondents think that **Brexit** is unlikely to impact the use of London as a seat



70%

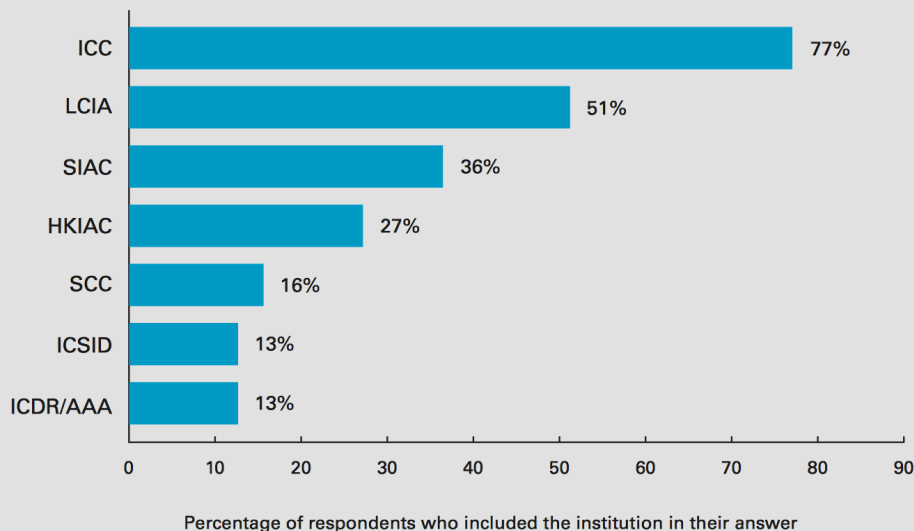
of respondents think **Paris** is the seat that will most benefit from the impact of Brexit

I. Arbitration and ADR system in international Business

- International Arbitration Survey

- Evolution of seats and institutions

Chart 12: What are your or your organisation's most preferred institutions?



➤ Preference determined by **general reputation and recognition**, followed by a **high level of administration** and the **previous experience of the institution**

➤ Parties are likely to select an institution capable of handling arbitrations conducted in a multiple of locations around the world

I. Arbitration and ADR system in international Business

- **International Arbitration Survey**

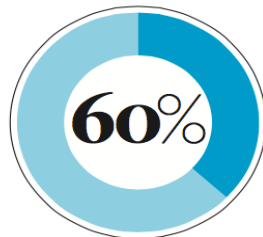
- Arbitrators

- There is no clear causal relationship between diversity across an arbitration tribunal and the quality of its decision-making
 - The most used sources of information for the appointment of the arbitrators include “word of mouth”, “internal colleagues” and “publicly available information”



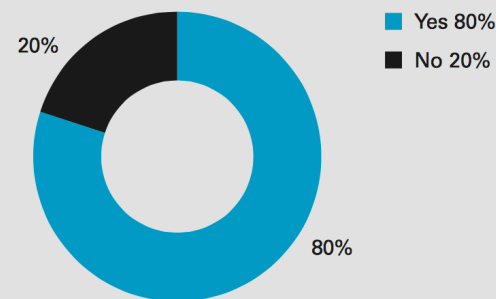
37%

of respondents disagree that progress has been made in recent years in relation to **ethnic diversity**



of respondents agree that progress has been made in recent years in relation to **gender diversity**

Chart 22: Would you like to be able to provide an assessment of arbitrators at the end of a dispute?

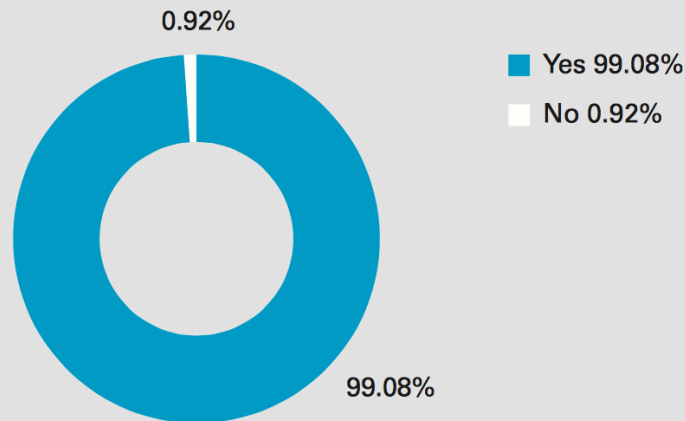


I. Arbitration and ADR system in international Business

- **International Arbitration Survey**

- Future of international arbitration

Chart 5: Are you likely to choose or recommend international arbitration to resolve cross-border disputes in the future?



➤ The use of arbitration is likely to increase in the **Energy, Construction/Infrastructure, Technology, and Banking and Finance** sectors

I. Arbitration and ADR system in international Business

- International Arbitration Survey

- Future of international arbitration



80%

of respondents would welcome arbitration rules regulating the **conduct of arbitrators**



73%

of respondents think that the **conduct of the parties and their counsel** should be subject to specific arbitration rules

- Parties in factually and legally uncomplicated cases have a desire for a more rapid resolution.
- The idea of imposing deadlines for issuing awards enjoyed a particular popularity among respondents.

II. French international Arbitration law

- **Arbitration in France since the 2011 reform**
- **Arbitration clause**
- **Proposal and appointment of the arbitrator**
- **Arbitration procedure**
- **Memorandums and arbitral awards**
- **Enforcement and appeal possibilities**

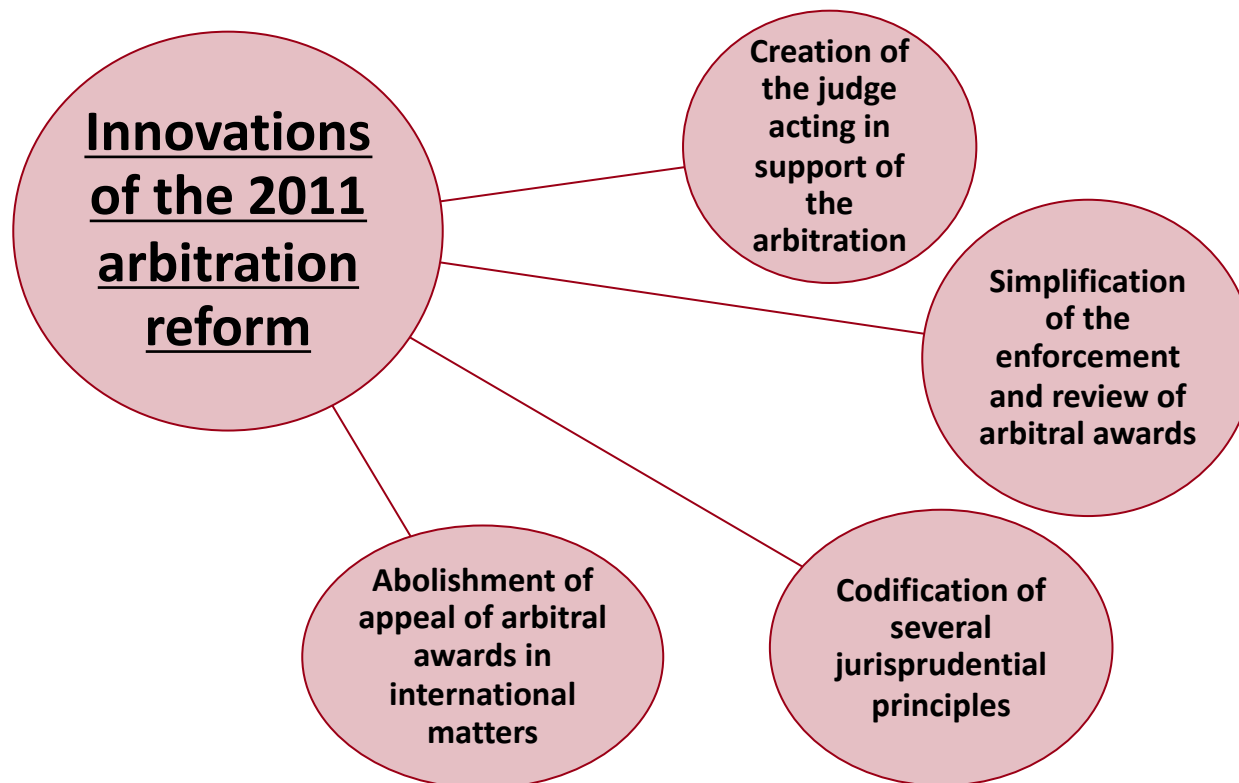
II. French international Arbitration law

- **Arbitration in France since the 2011 reform**
 - Important innovations of the 2011 arbitration reform
 - Differences between domestic and international arbitration

II. French international Arbitration law

- **Arbitration in France since the 2011 reform**

- Important innovations of the 2011 arbitration reform



II. French international Arbitration law

- **Arbitration in France since the 2011 reform**
 - The creation of the judge acting in support of the arbitration
 - The role of the judge acting in support of the arbitration:
 - It is a concept originally borrowed from Swiss law
 - But already known by the French doctrine and jurisprudence
 - In France the “judge acting in support of the arbitration” is generally the President of the Paris’ “Tribunal de Grande Instance”
 - He assists the parties in case they do not agree upon certain administrative matters, such as the constitution of the arbitral tribunal

II. French international Arbitration law

- **Arbitration in France since the 2011 reform**
 - The creation of the judge acting in support of the arbitration
 - The scope of the assistance of the judge:
 - According to article 1452 of the French code of civil procedure, the judge will only intervene on a **subsidiary basis**, if the parties have not opted for an institutional arbitration. In case of an institutional arbitration, only the institution has the authority to hear and decide on challenges brought against arbitrators
 - The judge is limited to giving assistance **for merely administrative matters**, for instance to appoint an arbitrator, **and will not give any legal appreciation and decision on the dispute** itself or the **validity of the arbitration agreement**

II. French international Arbitration law

- **Arbitration in France since the 2011 reform**
 - The creation of the judge acting in support of the arbitration
 - The areas of intervention of the judge:
 - He intervenes when the parties have **selected France** as the place of arbitration, **French law** as the **applicable law** to the arbitration procedure, or **French courts as having jurisdiction** in the matter
 - But he also has a **universal competence**, if one of the parties is exposed to the risk of a **denial of justice**, even if the dispute is not linked to the French legal order (article 1505 CPC)

II. French international Arbitration law

- **Arbitration in France since the 2011 reform**
- Simplification of the enforcement and review of arbitral awards
 - According to article 1526 CPC, in international arbitration, an award rendered in France **will always be enforceable, even if a party has filed an action to set aside the award**
 - In practice, the application of this rule has a great impact: the losing party will not be able to file an action to set aside the award for the only purpose of delaying the award's enforcement

II. French international Arbitration law

- **Arbitration in France since the 2011 reform**
 - Codification of several jurisprudential principles
 - The 2011 arbitration reform has also asserted some important principles that have already been established by the jurisprudence before, such as:
 - **The competence-competence principle**: according to this principle, the arbitral tribunal rules on its own jurisdiction (art. 1465 CPC)
 - **The principle of procedural estoppel**: according to this principle, a party who has not objected to a procedural irregularity during the arbitration proceedings as well as the parties and their legal advisors must not invoke this irregularity before a national court (art. 1466 CPC)
 - **The principle of celerity**: aims at ensuring that the arbitral tribunal, as well as the parties and their legal advisors act efficiently and without delay (art. 1464 par. 3 CPC)
 - **The principle of independence and impartiality**: according to this principle, the arbitrators have to disclose potential objections to the parties (art. 1456 CPC)

II. French international Arbitration law

- **Arbitration in France since the 2011 reform**
 - Difference between domestic and international arbitration

	Domestic arbitration	International arbitration
Validity of the arbitration agreement	<ul style="list-style-type: none">➤ Legislator has given a definition➤ The arbitration agreement is required in writing➤ The number of arbitrators must be uneven and they cannot be legal entities.	<ul style="list-style-type: none">➤ No definition➤ Legislator permits that arbitration agreement is not subject to any requirements as to its form

II. French international Arbitration law

- **Arbitration in France since the 2011 reform**
 - Difference between domestic and international arbitration

	Domestic arbitration	International arbitration
Confidentiality of the arbitration proceedings	<ul style="list-style-type: none">➤ According to article 1464(4) of the French code of civil procedure, arbitral proceedings shall be confidential	<ul style="list-style-type: none">➤ No equivalent article in the chapter dedicated to international arbitration➤ This means that the arbitral proceedings are not necessarily confidential➤ Reason: international public investment issues are often governed by transparency rules➤ However, the parties can expressly stipulate in the arbitration agreement that they wish the procedure to be confidential

II. French international Arbitration law

- **Arbitration in France since the 2011 reform**
 - Difference between domestic and international arbitration

	Domestic arbitration	International arbitration
Annulment of the arbitral award	<ul style="list-style-type: none">➤ The action for annulment of the arbitral award has a suspensive effect on the award	<ul style="list-style-type: none">➤ The action for annulment of an arbitral award has not a suspensive effect➤ This means that the award is enforceable even if an action of annulment is brought before a court

II. French international Arbitration law

- **Arbitration in France since the 2011 reform**
 - Difference between domestic and international arbitration

	Domestic arbitration	International arbitration
Appeal of arbitral award	➤ The parties can appeal an award, if they have agreed upon it	➤ The parties can only set aside (action for annulment) and not appeal an arbitral award

II. French international Arbitration law

- **Arbitration in France since the 2011 reform**
 - Difference between domestic and international arbitration

	Domestic arbitration	International arbitration
Appeal of arbitral award	<ul style="list-style-type: none"> ➤ The parties can appeal an award, if they have agreed upon it 	<ul style="list-style-type: none"> ➤ The action for annulment is only permitted for a limited number of specific reasons: <ul style="list-style-type: none"> • the arbitral tribunal wrongly upheld or declined jurisdiction • the arbitral tribunal was not properly constituted • the arbitral tribunal ruled without complying with the mandate conferred upon it • due process was violated • recognition or enforcement of the award is contrary to international public policy

II. French international Arbitration law

- **Arbitration in France since the 2011 reform**
 - Difference between domestic and international arbitration

	Domestic arbitration	International arbitration
Appeal of arbitral award	➤ The parties can appeal an award, if they have agreed upon it	➤ The appeal is exceptionally possible if the parties have waived any right to set aside the award (action for annulment)

II. French international Arbitration law

- Arbitration clause
 - Legal definition
 - Domestic arbitration: art. 1442 CPC
 - arbitration clause
 - compromise

Art. 1442 CPC

"The arbitration agreement shall take the form of an arbitration clause or a compromise.

An arbitration clause is an agreement by which the parties to one or more contracts undertake to submit to arbitration any disputes that may arise in relation to that or those contracts.

The compromise is the agreement by which the parties to an existing dispute submit it to arbitration. »

II. French international Arbitration law

- Arbitration clause
 - Legal definition
 - International arbitration:
 - The legal definition provided in Art. 1442 CPC does not apply (Art. 1506 CPC)
 - The concept of "arbitration agreement" is presumed in international arbitration (art. 1507-1508 CPC)
 - Lack of definition: single legislation governing the arbitration clause and the compromise regarding international matters

II. French international Arbitration law

- Arbitration clause
 - Autonomy of the arbitration agreement
 - Domestic arbitration:
 - Autonomy with regard to the main contract
 - International arbitration:
 - Autonomy with regard to the main contract,
 - Autonomy from State regulations,
 - Autonomy enshrining a "principle of validity".

II. French international Arbitration law

- Arbitration clause
 - Autonomy of the arbitration agreement
 - Autonomy with regard to the main contract: art. 1447 CPC
 - substantive autonomy, independence, severability
 - Case law "Gosset" of May 7, 1963 regarding international matters

“with regard to international arbitration, the arbitration agreement, whether concluded separately or included in the legal act to which it relates, shall always, save in exceptional circumstances which are not alleged in the case, have full legal autonomy, thus excluding that it may be affected by the possible invalidity of the act. »
 - Rule recognized by a vast majority of foreign laws.

II. French international Arbitration law

- Arbitration clause
 - Autonomy of the arbitration agreement
 - Autonomy with regard to State laws
 - Autonomy with regard to domestic law
 - Principle of prohibition of the arbitration clause except in commercial matters under former art. 2061 CC (before the NRE Act of May 15, 2001)
 - Case law "Hecht" of July 4, 1972: unenforceability of the former art. 2061 CC when dealing with international matters
- "having noted the international nature of the contract binding the parties and recalled that in international arbitration matters the arbitration agreement is completely autonomous, the contested judgment rightly concluded that the disputed clause should be applied in the present case."*

II. French international Arbitration law

- Arbitration clause
 - Autonomy of the arbitration agreement
 - Autonomy with regard to State laws
 - Autonomy from any applicable State law
 - Case law "Dalico" of Dec. 20, 1993 :

“pursuant to a substantive rule of international arbitration law, the arbitration clause is legally independent of the main contract in which it is directly or by reference included and (...) its existence and effectiveness are to be assessed, subject to the mandatory rules of French law and international public policy, according to the common will of the parties, without the necessity to refer to a State law”.

II. French international Arbitration law

- Arbitration clause
 - Autonomy of the arbitration agreement
 - Autonomy with regard to State laws
 - Autonomy from any applicable State law
 - Enshrinment of a substantive rule of international private law
 - ✓ consent (common will) between the parties,
 - ✓ respect of international public order
 - Waiver of the conflict-oriented method (cf. art. 1.2. lit. e) Reg. Rome I)
 - Case law "Uni-Kod" of March 30, 2004: suppletive nature of the rule (the parties may choose a State law in respect of the arbitration clause)

II. French international Arbitration law

- Arbitration clause
 - Autonomy of the arbitration agreement
 - Autonomy with regard to State laws
 - Autonomy enshrining a "principle of validity"
 - Case law "Zanzi" of January 5, 1999
 - ✓ Principle: the arbitration agreement is always valid (without any formal requirements),
 - ✓ Exception: unless it is contrary to international public order.
 - Cf. the European rules regarding attributive jurisdiction clauses (Art. 25 para. Brussels I Regulation + Recital 20)

"(...) unless the validity of the agreement conferring jurisdiction is null and void as to its substance under the law of that Member State. »

II. French international Arbitration law

- Arbitration clause
 - Form of the arbitration agreement

➤ Domestic arbitration: written form

Art. 1443 CPC

"Under penalty of invalidity, the arbitration agreement must be drafted in written form. It may result from an exchange of written correspondence or a document referred to in the main agreement."

➤ International arbitration: no formal requirements

Art. 1507 CPC

"The arbitration agreement is not subject to any formal requirements".

II. French international Arbitration law

- Arbitration clause
 - Purpose of the arbitration agreement
 - Domestic arbitration:
 - Compromise: determines the subject matter of the dispute, under penalty of invalidity (art. 1443 CPC)
 - Arbitration clause: designates the arbitrator(s) or provides for the modalities of their appointment, where applicable by reference to arbitration rules (art. 1444 CPC)
 - International arbitration: contractual freedom

art. 1508 CPC

"The arbitration agreement may, directly or by reference to arbitration rules or procedural rules, appoint the arbitrator or arbitrators or provide for the conditions of their appointment."

II. French international Arbitration law

- Arbitration clause
 - Transmission of the arbitration agreement
 - Mechanisms of obligation law
 - assignment of receivables,
 - Subrogation,
 - provision for third parties,
 - accessory theory (domestic law),
 - Art. 2061 para. 1 CC (version of the Law of November 18, 2016)

"The arbitration clause must have been accepted by the party to whom it is opposed, unless the latter has replaced the party who initially accepted in its rights and obligations."

II. French international Arbitration law

- Arbitration clause
 - Principle of “competence-competence”
 - Positive effect of the “competence-competence” principle

Art. 1465, 1506 CPC

“The arbitral tribunal has exclusive jurisdiction to rule on objections relating to its jurisdiction.”

II. French international Arbitration law

- Arbitration clause
 - Principle of “competence-competence”
 - Negative effect of the “competence-competence” principle

Art. 1448 al. 1 and 2, 1506 CPC

*“When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable.
A court may not decline jurisdiction on its own motion.”*

II. French international Arbitration law

- Proposal and appointment of the arbitrator
 - Qualifications required for an arbitrator
 - The qualities of independence and impartiality
 - The duty of disclosure

Art. 1456 para. 2, 1506 CPC

"It is the arbitrator's responsibility, before accepting his mission, to disclose any circumstance likely to affect his independence or impartiality. He is also required to disclose without delay any circumstances of the same nature that may arise after the acceptance of his mission".

II. French international Arbitration law

- Proposal and appointment of the arbitrator

- The appointment of the arbitrator(s)

- Appointment of the sole arbitrator

- Appointment of a panel of arbitrators

Art. 1452, 1506 CPC

"In the absence of agreement between the parties on the modalities of the appointment of the arbitrator(s):

1° In the event of arbitration by a sole arbitrator, if the parties do not agree on the choice of the arbitrator, the latter shall be appointed by the person responsible for organising the arbitration or, if no such person is appointed, by the supporting judge;

2° In the event of arbitration by three arbitrators, each party shall choose one and the two arbitrators so chosen shall appoint the third arbitrator; if one party does not choose an arbitrator within a period of one month from receipt of the other party's request or if the two arbitrators do not agree on the third within a period of one month from the date on which they accept their appointment, the person responsible for organising the arbitration or, failing that, the supporting judge shall make such appointment".

II. French international Arbitration law

- Arbitration Procedure
 - The „juge d’appui“ (supporting judge)
 - Domestic arbitration: President of the TGI – “High Court” (in principle)

Art. 1459 CPC

"The competent supporting judge is the president of the High Court.

However, if it is expressly provided for in the arbitration agreement, the President of the Commercial Court shall have jurisdiction to hear claims brought pursuant to Articles 1451 to 1454. In such a case, he or she may apply article 1455.

The territorially competent judge shall be the one designated by the arbitration agreement or, in the absence of such a designation, the one within whose jurisdiction the seat of the arbitral tribunal has been fixed. In the absence of any provision in the arbitration agreement, the judge having territorial jurisdiction shall be the judge of the place where the defendant or defendants to the incident reside or, if the defendant does not reside in France, the place where the plaintiff resides".

II. French international Arbitration law

- Arbitration Procedure
 - The „juge d’appui“ (supporting judge)
 - International arbitration: President of the TGI of Paris

Art. 1505 CPC

“In international arbitration, and unless otherwise stipulated, the judge acting in support of the arbitration shall be the President of the High Court of Paris when:

- 1° The arbitration takes place in France; or*
- 2° The parties have agreed that French procedural law shall apply to the arbitration; or*
- 3° The parties have expressly granted jurisdiction to French courts over disputes relating to the arbitral procedure; or*
- 4° One of the parties is exposed to a risk of a denial of justice.”*

II. French international Arbitration law

- Arbitration Procedure
 - Precautionary and temporary measures – evidence
 - Before the constitution of the arbitral tribunal

Art. 1449, 1506

“The existence of an arbitration agreement, insofar as the arbitral tribunal has not yet been constituted, shall not preclude a party from applying to a court for measures relating to the taking of evidence or provisional or conservatory measures.

Subject to the provisions governing conservatory attachments and judicial security, application shall be made to the President of the High Court or of the Commercial Court who shall rule on the measures relating to the taking of evidence in accordance with the provisions of Article 1452 and, where the matter is urgent, on the provisional or conservatory measures requested by the parties to the arbitration agreement.”

II. French international Arbitration law

- Arbitration Procedure
 - Precautionary and temporary measures – evidence
 - After the constitution of the arbitral tribunal
 - Jurisdiction of the arbitral tribunal
 - measures of investigation (art. 1467, para. 1, 1506 CPC)
 - evidence held by a party (art. 1467 al. 3, 1506 CPC)
 - Precautionary or temporary measures (art. 1468 al. 1 phrase 1, al. 2, 1506 CPC)

II. French international Arbitration law

- Arbitration Procedure
 - Precautionary and temporary measures – evidence
 - After the constitution of the arbitral tribunal
 - Jurisdiction of the arbitral tribunal

Art. 1467 al. 1 et 3, 1506 CPC

“The arbitral tribunal shall take all necessary steps concerning evidentiary and procedural matters, unless the parties authorize it to delegate such tasks to one of its members.

If a party is in possession of an item of evidence, the arbitral tribunal may enjoin that party to produce it, determine the manner in which it is to be produced and, if necessary, attach penalties to such injunction.”

Art. 1468 al. 1 phrase 1, al. 2, 1506 CPC

“The arbitral tribunal may order upon the parties any conservatory or provisional measures that it deems appropriate, set conditions for such measures and, if necessary, attach penalties to such order.

The arbitral tribunal has the power to amend or add to any provisional or conservatory measure that it has granted.”

II. French international Arbitration law

- Arbitration Procedure
 - Precautionary and temporary measures – evidence
 - After the constitution of the arbitral tribunal
 - Jurisdiction of the « State Court »
 - Precautionary seizures
 - Legal securities

Art. 1468 al. 1 phrase 2, al. 2, 1506 CPC

“However, only courts may order precautionary attachments and judicial security.

The arbitral tribunal has the power to amend or add to any temporary or precautionary measure that it has granted.”

II. French international Arbitration law

- Arbitration Procedure
 - Precautionary and temporary measures – evidence
 - After the constitution of the arbitral tribunal
 - Competence of the President of the TGI: evidence held by a third party

Art. 1469, 1506 CPC

“If one of the parties to arbitral proceedings intends to rely on an official (acte authentique) or private (acte sous seing privé) deed to which it was not a party, or on evidence held by a third party, it may, upon leave of the arbitral tribunal, have that third party summoned before the President of the High Court for the purpose of obtaining a copy thereof (expédition) or the production of the deed or item of evidence.

Articles 42 through 48 shall determine which High Court has territorial jurisdiction in this regard.

Application shall be made, heard and decided as for expedited proceedings (référé).

If the president considers the application well-founded, he or she shall order that the relevant original, copy or extract of the deed or item of evidence be issued or produced, under such conditions and guarantees as he or she determines, and, if necessary, attach penalties to such order.

Such order is not readily enforceable.

It may be appealed within fifteen days following service (signification) of the order.”

II. French international Arbitration law

- Arbitration Procedure
 - The principal of arbitration procedure
 - Principle of loyalty (art. 1464 para. 3, 1506 CPC)
 - Principle of promptness (art. 1464 (3), 1506, 1463, 1477 CPC)
 - Principle of contradiction (1464 para. 2, 1510 CPC)
 - Principle of confidentiality (art. 1464 para. 4 CPC)
 - Principle of estoppel (art. 1466, 1506 CPC)

II. French international Arbitration law

- Arbitration Procedure
 - The principal of arbitration procedure
 - The guiding principles of arbitral proceedings in domestic arbitration

Art. 1464 para. 1 - 4 CPC

"Unless the parties have agreed otherwise, the arbitral tribunal shall determine the arbitral procedure without being bound by the rules established for State courts.

However, the trial guidelines set out in Articles 4 to 10, the first paragraph of Article 11, the second and third paragraphs of Article 12 and Articles 13 to 21, 23 and 23-1 shall always apply.

The parties and the arbitrators shall act expeditiously and fairly in the conduct of the proceedings.

Subject to legal obligations and unless otherwise provided by the parties, the arbitral proceedings shall be subject to the principle of confidentiality. »

II. French international Arbitration law

- Arbitration Procedure
 - The principal of arbitration procedure
 - The deadlines to be respected (with respect to domestic arbitration)

Art. 1463 para. 1 CPC

"If the arbitration agreement does not set a time limit, the duration of the arbitral tribunal's mission shall be limited to six months from the date of its referral. »

Art. 1463 para. 2, 1506 CPC

"The statutory or contractual time limit may be extended by agreement between the parties or, where there is no such agreement, by the judge acting in support of the arbitration."

Art. 1477 CPC

"The expiry of the arbitration period shall result in the termination of the arbitral proceedings".

II. French international Arbitration law

- Arbitration Procedure
 - The principal of arbitration procedure
 - The principle of estoppel

Art. 1466, 1506 CPC

“A party which, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity.”

II. French international Arbitration law

- Arbitration Procedure
 - Stay and interruption of proceedings
 - Domestic and international arbitration
 - Verification of the incident / verification of clerical or forgery (art. 1470, 1506, 287 – 294, 299, 313 CPC)
 - Interruption of proceedings (art. 1471, 1506, 369 – 372 CPC)
 - Deferment of the award and stay of proceedings (art. 1472, 1506 CPC)
 - Domestic arbitration (exclusively)
 - Stay of proceedings if an arbitrator is unavailable (art. 1473 – 1475 CPC)
 - death
 - impediment - abstention - resignation
 - recusal - revocation

II. French international Arbitration law

- Arbitration Procedure
 - Applicable law (procedure vs. underlying dispute)
 - Domestic arbitration
 - Mandatory French procedure
 - Law applicable to the underlying dispute
 - Principle: (French) rules of law
 - Exception: mission to rule as an amicable compounder

Art. 1478 CPC

"The arbitral tribunal shall settle the dispute in accordance with the rules of law, unless the parties have entrusted it with the task of ruling in amicable composition. »

II. French international Arbitration law

- Arbitration Procedure
 - Applicable law (procedure vs. underlying dispute)
 - International arbitration
 - Choice of a state law (e.g. French) for the procedure

Art. 1505 n° 2 CPC

“In international arbitration, and unless otherwise stipulated, the judge acting in support of the arbitration shall be the President of the Tribunal de grande instance of Paris when:

1° (...)

*2° The parties have agreed that French procedural law shall apply to the arbitration;
(...)”*

II. French international Arbitration law

- Arbitration Procedure
 - Applicable law (procedure vs. underlying dispute)
 - International arbitration
- Mission to rule as an amicable compounder

Art. 1512 CPC

“The arbitral tribunal shall rule as amiable compositeur if the parties have empowered it to do so.”

II. French international Arbitration law

- Arbitration Procedure
 - Applicable law (procedure vs. underlying dispute)
 - International arbitration
- Law applicable to the underlying dispute

Art. 1511 CPC

“The arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties or, where no such choice has been made, in accordance with the rules of law it considers appropriate. In either case, the arbitral tribunal shall take trade practices into account.”

- Rules of law (vs. Legislative state laws)
 - that the arbitrator considers appropriate (vs. application des règles de conflits)
 - while taking into account commercial usage

II. French international Arbitration law

- Memorandums and arbitral awards
 - Arbitral award
 - Domestic and international arbitration
 - Majority vote (art. 1480, 1513 CPC)
 - Mandatory statements of the award (arts. 1481, 1506 CPC)
 - Statement of claims and means + motivation (art. 1482, 1506 CPC)
 - Ability to interpret the award and to remedy material errors and omissions (arts. 1485, 1486, 1506 CPC)
 - The award has the authority of res judicata and may be subject to provisional enforcement (art. 1484 (1) - (2), 1506 CPC)

II. French international Arbitration law

- Memorandums and arbitral awards
 - Arbitral award
 - Discrepancies between domestic and international arbitration
 - Signing of the award
 - Domestic arbitration: denial of minority rights (art. 1480 CPC)
 - International arbitration: denial of majority: the President rules (art. 1513 para. 3 - 4 CPC)
 - Mandatory content (art. 1483 CPC)
 - Domestic arbitration: Articles 1480 - 1482 CPC statute of limitations under penalty of nullity
 - International arbitration: art. 1480 - 1482 CPC not statute-barred.

II. French international Arbitration law

- Memorandums and arbitral awards
 - Arbitral award
 - Discrepancies between domestic and international arbitration
 - Notification of the award
 - Domestic arbitration: notification through formal notice unless otherwise agreed by the parties (art. 1484 para. CPC)
 - International arbitration: any notification method is permitted

II. French international Arbitration law

- Enforcement and appeal possibilities
 - Exequatur
 - Domestic arbitration (art. 1487 – 1488)
 - Exequatur order issued by the High Court in whose jurisdiction the award was issued (Art. 1487 para. 1 CPC)
 - Request for exequatur: non-adversarial procedure (art. 1487 para. 2 CPC)
 - Filing of a request by the most diligent party at the registry of the High Court with the following documents (art. 1487 para. 3 CPC):
 - the original or authentic copy of the award
 - the original or authentic copy of the arbitration agreement.

II. French international Arbitration law

- Enforcement and appeal possibilities
 - Exequatur
 - Domestic arbitration (art. 1487 – 1488, 1499 – 1500 CPC)
 - Exequatur is granted unless the award is in clear violation of public policy (art. 1488 para. 1 CPC)
 - The exequatur is affixed to the original or authentic copy of the award (art. 1487 para. 4 CPC)
 - The order granting exequatur is not subject to any appeal (art. 1499 para. 1 CPC)
 - The order rejecting the exequatur is motivated (art. 1488 para. 2 CPC).
 - An order refusing exequatur may be appealed within one month of its service (art. 1500 para. 1 CPC)

II. French international Arbitration law

- Enforcement and appeal possibilities
 - Exequatur
 - International arbitration (art. 1514 -1517, 1518 – 1527 CPC)
 - Order of exequatur issued by the High Court in whose jurisdiction the award was made or by the Paris High Court if the award was issued abroad (Art. 1516 para. 1 CPC)
 - Request for exequatur: non-adversarial procedure (art. 1516 para. 2 CPC)
 - Filing of a request by the most diligent party at the registry of the High Court with the following documents (art. 1516 para. 3, 1515 para. 2 CPC):
 - the original or authentic copy of the award
 - the original or authentic copy of the arbitration agreement
 - if applicable: translation of the award (established by a translator authorised for this purpose)

II. French international Arbitration law

- Enforcement and appeal possibilities
 - Exequatur
 - International arbitration (art. 1514 -1517, 1518 – 1527 CPC)
 - The award is recognized or enforced in France (art. 1514 CPC) if:
 - its existence is established by the person who avails herself of it and that
 - recognition or enforcement is not manifestly contrary to international public policy
 - The exequatur is affixed to the original or authentic copy of the award and, where applicable, also to the translation (art. 1517 paras. 1 and 2 CPC)

II. French international Arbitration law

- Enforcement and appeal possibilities
 - Exequatur
 - International arbitration (art. 1514 -1517, 1518 – 1527 CPC)
 - Execution of an award issued in France (cf. domestic arbitration)
 - The order granting exequatur is not subject to any appeal (art. 1524 para. 1 CPC) unless the parties have validly waived their right to an annulment appeal against the award (art. 1522 para. 2 CPC).
 - The order refusing exequatur shall state the reasons on which it is based (art. 1517 para. 3 CPC).
 - An order refusing exequatur (or a decision refusing recognition) may be appealed against within one month of its service (art. 1523 para. 1 -2 CPC)

II. French international Arbitration law

- Enforcement and appeal possibilities
 - Exequatur
 - International arbitration (art. 1514 -1517, 1518 – 1527 CPC)
 - Enforcement of an award issued abroad
 - ➔ *N.B. The New York Convention is not applicable as French regulations are more favourable in respect of recognition and enforcement*
 - The order refusing exequatur shall state the reasons on which it is based (art. 1517 para. 3 CPC).
 - A decision on a request for recognition or exequatur may be appealed within one month of its notification (art. 1525 para. 1 - 2 CPC)
 - The Court of Appeal may refuse recognition or exequatur of the award only in accordance with the criteria applicable with respect to an appeal for annulment (art. 1525 para. 4, 1520 CPC)

II. French international Arbitration law

- **Enforcement and appeal possibilities**
 - Appeal possibilities
 - Appeal
 - Appeal against the award (reformation vs. annulment of the award)
 - Appeal against the order refusing exequatur
 - Appeal against the decision ruling on the application for recognition or exequatur
 - Annulment appeal (art. 1492 - art. 1520 CPC)
 - Other means of appeal

II. French international Arbitration law

- **Enforcement and appeal possibilities**

- Appeal possibilities

- Appeal against the award

- Domestic arbitration: no appeal unless the parties agree otherwise

Art. 1489 CPC

"The award is not subject to appeal unless otherwise agreed by the parties."

- International arbitration: no appeal at all

Art. 1518 CPC

"The award issued in France with respect to international arbitration may only be the subject of an appeal for annulment. »"

II. French international Arbitration law

- **Enforcement and appeal possibilities**
 - Appeal possibilities
 - Appeal against the order ruling on a request for exequatur
 - Domestic arbitration
 - The order granting exequatur is not subject to any appeal (art. 1499 para. 1 CPC)
 - An order refusing enforcement may be appealed (art. 1500 para. 1 CPC)

II. French international Arbitration law

- **Enforcement and appeal possibilities**

- Appeal possibilities

- Appeal against a decision ruling on a request for recognition or exequatur

- International arbitration

- Award issued in France

- The order granting exequatur is not subject to any appeal (art. 1524 para. 1 CPC) - unless the parties to the action for annulment have renounced their right to an annulment appeal (art. 1522 para. 2 CPC)
- The decision refusing recognition or exequatur may be appealed within one month (art. 1523 para. 1-2 CPC)

- Foreign award: such a decision is always subject to appeal within one month (art. 1525 CPC)

II. French international Arbitration law

- **Enforcement and appeal possibilities**

- Appeal possibilities

- Appeal for annulment

- Domestic arbitration

- Unless the parties have elected to appeal (art. 1491 CPC)

- limited number of audit criteria (art. 1492 CPC)
 - erroneous jurisdiction of the arbitral tribunal
 - improper constitution of the arbitral tribunal
 - violation of the mission conferred to the arbitral court
 - non-compliance with the adversarial principle
 - award in violation of public policy
 - formal irregularity of the award (motivation, signature, date, names, vote)

II. French international Arbitration law

- **Enforcement and appeal possibilities**
 - Appeal possibilities
 - Appeal for annulment
 - Domestic arbitration
 - In the event of annulment of the award: the Court of Appeal rules on the substance within the limits of the arbitrator's mission, unless otherwise agreed by the parties (art. 1493 CPC)
 - Principle: suspensive effect of the annulment appeal

II. French international Arbitration law

- **Enforcement and appeal possibilities**

- Appeal possibilities

- Appeal for annulment

- International arbitration

- Only appeal possibility regarding international matters (art. 1518 CPC)
 - Must be exercised before the Court of Appeal within the jurisdiction in which the award was issued within one month of notification of the award (Art. 1519 CPC)
 - The parties may waive the right to seek annulment (art. 1522 CPC)
 - "by special agreement"
 - appeal against the exequatur order possible under the same conditions
 - Appeal for annulment automatically entails an appeal against the order ruling on exequatur (art. 1524 para. 2 CPC)

➡ *N.B.: in principle, there is no suspensive effect of the appeal for annulment* ¹⁰⁰

II. French international Arbitration law

- **Enforcement and appeal possibilities**

- Appeal possibilities

- Appeal for annulment

- International arbitration

- Limited number of audit criteria

Art. 1520

"The annulment appeal may only be filed if:

- 1° The arbitration tribunal has wrongly declared itself competent or incompetent; or*
- 2° The arbitral tribunal was improperly constituted; or*
- 3° The arbitral tribunal has ruled without complying with the mission entrusted to it; or*
- 4° The principle of contradiction has not been respected; or*
- 5° The acknowledgement or enforcement of the award is contrary to international public policy."*

II. French international Arbitration law

- **Enforcement and appeal possibilities**
 - Other remedies against the award
 - Admissible appeals (under certain conditions)
 - Third party opposition (art. 1501 CPC)
 - Review proceedings (art. 1502, 1506 CPC)
 - Inadmissible appeals (art. 1503, 1506 CPC)
 - Opposition
 - Appeal to the Supreme Court

Thank you for your kind attention !