Legal high Committee for
Financial markets of Paris

REPORT
ISDA 2002 MASTER AGREEMENT (FRENCH LAW)

Haut Comité Juridique
de la Place Financière de Paris

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Introduction

In June 2018, the International Swaps and Derivatives Association («**ISDA**»)[1] decided to complete its offer of standard agreements for the documentation of over-the-counter («**OTC**») and cleared derivatives, with two new versions of its 2002 master agreement: one governed by civil law (French law) (hereafter, the «**French Law Master Agreement**») and one by common law (Irish law). Both are primarily designed to document transactions of the European market and to address one the most difficult issue created by the withdrawal of the United Kingdom from the Union («**BREXIT**»), *i.e.* the loss by UK courts decisions of their passport to the Union.

This publication was an extraordinary event which did not come unnoticed. Since 1985, when ISDA was founded, only three versions of the ISDA Master Agreement have been published: the 1987, 1992 and 2002 versions, all governed by common laws. The French Law Master Agreement and its related annexes, most notably its French law governed collateral documentation, is ISDA's first step into civil-law «territories». Among all the civil law jurisdictions available in the Union, ISDA picked French law. This is most certainly a recognition not only of the dynamism of the Paris financial market and its stakeholders, but also of the modernity of French law - which netting and collateral safe harbors notably have been tested and upheld many times in case-law - and of the reliability of its judicial system for complex cross border commercial and financial litigations.

ISDA is the only international market association to publish a standard documentation for cross border derivatives transactions offering the possibility to select a European law as governing law and the jurisdiction of the courts of an EU Member State. We can only hope that this first step will be followed by many others, including for other asset classes or financial transactions and in particular securities lending and repurchase transactions. Such transactions could perfectly be documented under the ISDA standard. Such an extension would allow market participants to benefit from the extended ISDA documentation «library», including the impressive list of legal opinions collected by ISDA for years, from its network of counsels in all major financial markets.

As we said, the publication of the French Law Master Agreement is intending, among other things, to offer its users the possibility to benefit from the European judicial cooperation system which

[1] *Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has more than 900 member institutions from 74 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. (https://www.isda.org/).*

ensures immediate, automatic and free of charge enforcement of any court decisions of the Union on its whole territory. In all likellyhood, English courts will cease to benefit from this system as a result of BREXIT[2]. It is worth here to say a few words about this issue.

The European Council Regulation (EC) No 44/2001 of 22 December 2000, recast in 2012 by European Regulation (EU) 1215/2012 of 12 December 2012, consecrated the free movement of judgments and allowed the automatic and direct enforcement within the Union of all judicial decisions delivered by the courts of jurisprudence of the Member States, without prior *exequatur* procedure.

For any State, the automatic and immediate recognition of the effects of a foreign judicial decision on its territory, and potentially against its own citizens and nationals, implies such a surrender of sovereignty that it is only conceivable within a political union of the type of the Union. The European judicial cooperation has no equivalent anywhere else in the world. And many believe that, whichever form the actual final terms of BREXIT takes, it can hardly be envisaged to extend the European judicial cooperation system in areas such as commercial and financial matters, to any State outside the Union.

This does not mean of course, that court decisions rendered by English courts will never be enforceable in the Union after BREXIT. There are indeed a number of international treaties - of which Annex 2 to this report makes a quick inventory - organizing a form of judicial cooperation between signatory States. However, as of today it is quite unlikely that any of such treaties covers the recognition and enforcement of English court decisions within the Union. And while it is perfectly conceivable that the Union and the United Kingdom may one day reach such an agreement, within the framework of the Hague Judicial Conventions for instance, it is worth noting that such international agreements organizing *exequatur*, on the one hand, and the European judicial cooperation system, on the other hand, are quite different - in fact they are worlds apart. Any such treaties merely harmonize the conditions upon which each signatory State agree to grant *exequatur* to decisions rendered by the courts of another signatory State, often reserving its right to deny such a recognition when both parties in dispute were its own nationals. Such harmonized *exequatur* procedures, often long and costly, can hardly be compared to the automatic, immediate and free of charge enforcement ensured by the European judicial cooperation system.

For the time being, and failure for such an international treaty to exist as between the Union and the United Kingdom, the conditions for the *exequatur* in the Union of an English court decision will from January 1st 2021 be solely determined by each national procedure of each EU Member State where enforcement of the decision is sought. Such a step back to the principles of multiple national

[2] *See the press release issued by ISDA: https://www.isda.org/2018/07/03/isda-publishes-french-and-irish-law-master-agreements/*

exequatur proceedings will cause a number of serious uncertainties, significant delays and not less significant costs. Any *exequatur* decision is subject to appeal, and its final granting is estimated to take between 12 to 36 months. It is costly proceedings. And it is aleatory in nature, as *exequatur* can always be denied. In financial matters, these deadlines, which are already long, are not likely to improve, since English court decisions on the immensity of contracts governed by English law in these matters were not until now subject to such *exequatur* procedures. One can only assume that EU Member States courts responsible for *exequatur* will soon be facing a growing number of requests in respect of English courts decisions which in all likelihood will take even more time to be examined.

The French Law Master Agreement, in providing for the choice of French law and for an election of jurisdiction before the International Chambers of the Paris Commercial Court and Court of Appeal, avoids any such delays, costs and risks. It guarantees, with the greatest certainty to market participants using it, that when a court decision will be rendered in their favor, they will be able to execute such decision against any asset of their counterparty, wherever such assets are located in the whole territory of the Union, and so without any formality or delay.

The publication of the French Law Master Agreement by ISDA is part of a much larger project. ISDA is gradually building a complete ecosystem for the proper documentation, collateralization and clearing of financial transactions under civil law. Besides the French Law Master Agreement, a complete set of French law governed collateral documentation has now been published. This collateral documentation incorporates the latest European regulatory requirements for initial margin (IM) and variation margin (VM)[3]. It has also been supplemented by the publication of a standard amendment agreement[4], which allows market participants to amend their existing English law versions of the 2002 Master Agreements and turn them into French Law Master Agreements, using a single simple form which can be executed with no need to engage in any talk or open any renegotiation about financial or credit terms. ISDA is progressively collecting legal opinions in more than 60 jurisdictions across the world confirming the validity and enforceability of the new French Law Master Agreement and its collateral documentation in such jurisdictions. And ISDA currently considers the possibility to publish execution and clearing addenda, designed to facilitate the use of the French Law Master Agreement for clearing derivatives.

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[3] *1995 ISDA Credit Support Annex (Title Transfer – French law), 2016 ISDA Credit Support Annex for Variation Margin (VM) (Title Transfer – French law), ISDA 2019 Collateral Transfer Agreement for Initial Margin (IM), ISDA 2019 Security Agreement for Initial Margin (IM) subject to French law, Recommended Amendment Provisions for ISDA 2019 Euroclear CTA for use with ISDA French Law Master Agreement, Recommended Amendment Provisions for ISDA 2019 Clearstream CTA for use with ISDA French Law Master Agreement. (See: https://www.isda.org/books/#jump-1).*

[4] *ISDA Amendment Agreement – English law to Irish or French law. (See: https://www.isda.org/book/isda-amendment-agreement-english-law-to-irish-or-french-law/).*

Since the publication of the French Law Master Agreement in June 2018, prime establishments and professional associations (including AFTE[5], AMAFI[6] and AFG[7]) have officially issued recommendations to their members to use the French Law Master Agreement. Despite such recommendations and the authority of their authors, statistics on the use of the French Law Master Agreement in the Union, including in France, suggest a slower start than what we could have wished. Explanations given are many: limited resources available to novate, multiplication of regulatory projects with higher priority, lack of requests from clients, limited litigation risk (something one can challenge) or, but to a lesser extent, costs associated with a modification of all contracts in place. A lot has however been achieved and, on both buy and sell sides, key players are increasingly using the French Law Master Agreement. And let us agree, it was beyond the reach of the French Law Master Agreement to reverse in just a few months thirty years of well-established market practice. The effort of the Paris Place must continue to ensure its promotion and further use, to strengthen legal and operational security in the Capital Markets and Banking Union.

The above-mentioned recommendations deserve all the more attention that French commercial and financial law has undergone over the last few years - and carries on going through - a remarkable reform aiming at making it even more an user-friendly, predictible and modern law. The so-called «PACTE law» has recently further strengthened the financial netting safe harbor in insolvency, by extending its benefit to, and in so neutralizing any bad apple risk for, spot FX and transactions on a number of precious metals, on greenhouse gas emission quotas and on physical commodities when represented by a warehousing receipt. Several recent decisions of French courts have in a remarkable affirmative way confirmed the robustness of the safe harbor by affirming the greatest respect French courts have for the legal characterization given by parties to their agreements.

Two years after the publication of the French Law Master Agreement, the HCJP was asked to make an inventory of its use; to analyze the impediments - real or supposed - to its further development; and to make recommendations to ease a more general use of it.

As the working group began its work, it very quickly came to the conclusion that the most useful way it could achieve these goals was by writing a reasoned and as complete as possible answer to the most commonly encountered objections to the use of French law or election of jurisdiction before French courts, in cross border financial matters.

This report seeks to present, in an pragmatic and concrete way, the main advantages of choosing French law and litigating before French courts. It does so by describing the French legal environment

[5] *Association Française des Trésoriers d'Entreprise (https://www.afte.com/).*

[6] *Association Française des Marchés Financiers (http://www.amafi.fr/).*

[7] *Association Française de la Gestion Financière (https://www.afg.asso.fr/).*

surrounding the French Law Master Agreement (**1**), before rebutting reservations and objections that are often raised about its use and which, as the report demonstrates, are ill-founded (**2**).

The working group chose not to engage however in comparisons with other laws or judicial systems. It has only rarely done so, when it appeared useful to identify similarities or to clarify in a specific way a particular point of the functioning of the French Law Master Agreement. But never has the working group tried to make the vain demonstration of the superiority of any system over another.

This introduction is immediately followed by an «executive summary» that presents in a condensed way our conclusions. Annex 1 to this report sets for each identified reservation / objection to the use of French law or election of jurisdiction before French courts, a summary of our answer. A more detailed analysis - which the most important part of our work - is to be found in Part 2 below.

EXECUTIVE SUMMARY

1- Context

In June 2018, ISDA has published a French law governed version of its 2002 Master Agreement. This is the first ever published civil law governed master agreement by ISDA. This French Law Master Agreement is intended to offer market participants in the Union, the contractual instrument allowing them to manage one of the most complex and challenging issues raised by BREXIT, *i.e.* the loss by English court's decisions in private commercial and financial matters from the benefit of the European judicial cooperation system. The French Law Master Agreement has since its publication been supplemented by a collateral documentation and is now covered by a broad range of legal opinions in most jurisdictions covered by ISDA counsels.

Two years after its publication, it is time to assess its use on the market. While doing so, this working group also wanted to remind the advantages of French law and to shed some light on the robust and pragmatic solutions French law offers to its users when dealing with European counterparties.

2- Codification and modernization

The choice of any law as the governing law of a financial transation of any kind, is a direct function of a series of important issues, among which rank high:

- the modernity of contract law and principles;

- the robusteness of the netting and collateral safe harbors in insolvency; and

- the financial expertise and previsibility of the courts before which any dispute will usually go as a result of this choice.

While in the past, and often in a quite exaggerated way, critics against French law have blamed its alleged lack of pragmatism, the recent reform of its contract law and of its general regime of evidence has made French law one of the most modern and pro business law in the world. The codification that it has made of solutions built up by jurisprudence over an impressive number of issues and subjet matters, acknowledges that French law gives much more consideration to case law that what its critics abusively pretend. But it is also an useful reminder of the two fundamental principles of French contract law, namely:

- the freedom of contract and suppletive nature of the law and of the Civil Code; and

- the legal certainty, respect for the characterizations given by the parties to their contract, and the binding power of contracts principle.

The French financial netting and collateral safe harbors have been codified in the law for nearly thirty years. Their soundness and effectiveness in insolvency have been confirmed many times in case law, including obviously in insolvency.

3- Refutation of reservations made to dissuade from using the French Law Master Agreement

Based on a number of documents, memoranda and opinions communicated to our working group (after they had each been properly anonymized), we have identified a series of common objections sometimes made to dissuade market participants from using French law or from electing jurisdiction before French courts. The working group has determined that it would be useful to answer each of such objections in a detailed and reasoned way. It results from this work a general refutation of untruths and biased presentations.

The first observation which deserves to be made is that the contractual mechanisms and concepts which have for thirty years been constituting the «pillars» of the ISDA contractual framework and documentation are all fully legal, valid and enforceable under French law.

We will only take a few exemple here in this summary, and kindly refer the reader to Part 2 below for further details.

«Potestativity». The sometimes alleged risk of nullity under French law of contractual provisions giving discretionary powers to one party, as agent, to make certain calculations or determinations, on the basis that such provisions would be deemed «*potestatives*», is simply wrong. As we demonstrate:

- discretionary rights given to a calculation agent do not fall within the scope of *purely* potestative conditions - and only *purely* potestative clauses bear such a risk of being declared null under French law;

- nullity of *purely* potestative clauses does not apply to synallagmatic contracts, which is a character generally shared by most financial contracts; and

- invalidity for potestativity is not a permitted course of action in court for any party which has performed the obligation voluntarily and with full knowledge of its terms.

Negative consent. Likewise, French rules applicable to «negative consent» contractual mechanism, which is in frequent use on the markets and designed to infer the consent of a party from its silence (or, more precisely, from its failure to expressely object), have been studied in detail by the working group. This is an important issue for market participants under at least three circumstances:

- for modifying the provisions of a master agreement. But on this issue, the detailed analysis of French law is useless, because all versions of the 2002 ISDA Master Agreement (including the French Law Master Agreement) expressely provide that amendment to the master agreement can only be made in writing. As a result, save for the parties to agree otherwise in their Schedule, silence cannot be deemed an agreement to amend any term of an ISDA Master Agreement ;

- for agreeing to the terms of one or several Confirmations of Transactions. It is important at this stage to remind the usual steps often followed when entering into an OTC Transaction. After

entering into a Transaction, most often by phone, one of the counterparties (the most diligent or the one who has contractually agreed to bear such responsibility) would customarily send to the other party, a written «Confirmation» of the terms of the relevant Transaction. Such Confirmation is not the agreement itself, but the written or electronic transcription of the agreement. It is not rare however for such Confirmation to provide that its terms are binding and would prevail over anything previously said, including as evidenced in any telephone recordings. Its terms and their effective receipt by the other party are therefore an important issue for the parties. It is perfectly possible and valid under French law for the parties to contractually agree when entering into the Master Agreement that for future Transactions, the silence kept by a party for a certain period of time further to the effective receipt of a Confirmation, shall be deemed an agreement to its terms ; and

Finally, modifying the *modus operandi* of a business relationship, when requested by regulatory changes. In recent years examples of such requirements are many, particularly since the financial crisis and the multiple requirements of EMIR[8]. Counterparties to derivative transactions have frequently had to adjust the way they were trading and the documentation of their Transactions, to comply with new regulations. Save for such regulatory changes to be contractually implemented in a simple, fast and cost effective way - including by way of negative consent, when followed by unequivocal conduct or performance of the contract - their relationships may soon be paralyzed or become illegal.

Proof, evidences and electronic signature. When it comes to the issues of proof, evidence and electronic signature - all such issues revealing to be critically important to maintain any business relationships during the COVID-19 lockdown - French law is here again remarkably flexible and safe. Under French law, as a matter of principle, evidence of any obligation or right between professional merchants counterparties, is free, *i.e.* proof may be brought in court in any way. Electronic signature - and not only « qualified » electronic signature - is given under French law the widest effect. It can of course be used to validly execute a French Law Master Agreement or any Confirmation governed thereby. Scanned «pdf» copies of a handwritten signed document will also be accepted as evidence by French courts as between professional merchants conterparties.

Force majeure. The provisions of the French Law Master Agreement relating to *force majeure* - which are identical to the corresponding provisions of the English or New York law versions of the 2002 ISDA Master Agreement - will be given full effect under French law.

ISDA Definitions and Protocols. Finally, it is not only the provisions of the ISDA 2002 Master Agreement or its Credit Support Documentation that are all valid and enforceable under French law but also, far beyond that, the provisions of all other ISDA documentations (including Definitions and Protocoles) that the working group has reviewed.

[8] *Regulation (EU) n° 648/2012 of the European parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.*

We have in particular paid special attention to a number of key «ISDA Definitions», specifically those most in use on the markets. The detailed legal analysis of these Definitions made by the working group has not revealed any provision which would need to be amended or deleted from those Definitions to conform to French law. This is also true for the Credit Derivatives Definitions, which legal terms and concepts determine the pay-off profiles of credit derivatives. It occured to the working group that although the concepts of «payment default», «insolvency», «restructuring», are *legal* concepts, when used by the market they are in fact largely «contractualized» by the very detailed definitions given by ISDA. It is solely on the basis of the ISDA Credit Definitions themselves, and often as interpretated by an ISDA determination committee, that payments and termination values of such credit derivatives transactions are determined - not on the basis of a court decision or of a judicial interpretation of the concepts.

ISDA has in recent years multiplied the number of «Protocols» as a most convenient way for market participants to amend or keep their documentation updated. This technique is making use of the cloud. It is a pretty simple mechanics. Once an ISDA working group has agreed on a balanced draft proposal to either manage the effect of a market event (such as the disappearance of IBOR indices), comply with a regulatory change (Resolution, EMIR / Dodd Franck Act) or implement a new market practice (new updated set of Definitions), this proposal is put online by ISDA and each ISDA member has the option to officially mark their agreement by «adhering» publicly on the ISDA Website to the terms of such proposal. If two ISDA members having entered into an ISDA Master Agreement turn out to have in parallel adhered to the said proposal, the terms of such proposal shall immediately be deemed to consitute an amendment to their contract. Such paralel unilateral adhesions could validly constitute an amendment agreement under French law. It saves a lot of time, money and paperwork.

The working group has reviewed several of the most recent Protocols published by ISDA. None revealed the need for any change to be made to ensure them to be fully valid and enforceable under French law.

All such conclusions were reached unanimously by members of the working group.

The effectiveness and enforceability of the netting provisions of the French Law Master Agreement (*i.e.* Sections 5 and 6: termination provisions and provisions for calculating the damages due by one party to the other as a result of such early termination of their relationships) are confirmed by many legal opinions issued to the benefit of ISDA members in the world's main markets. The list of opinions gathered by ISDA and covering the French law documentation continues to increase. Such legal opinions now cover both the French Law Master Agreement and the French law collateral documentation, allowing all institutions and companies using them to both satisfy their legal compliance obligations and to account net positions for the purpose of calculating their regulatory capital.

4- Pragmatic and predictable

In case of dispute in relation to the agreement, the French Law Master Agreement includes a provision giving exclusive jurisdiction to the Paris Commercial Court and, in case of appeal, the Paris Court of Appeal (in practice, each International Chamber of such courts).

As to the important issue of interpretation of contracts by French courts, one should note the strict guidelines set by the Civil Code. Courts must respect the parties' intent and they are not at liberty to reinterpret the terms of any contract, unless such terms either make no sense or are unclear.

The International Chambers of the Paris Commercial Court and Court of Appeal will have jurisdiction to hear cases relating to the interpration of market master agreements, such as the ISDA Master Agreements. This is pursuant to an express provision of the protocols signed between those courts and the Paris Bar and in consideration of the fact that derivative markets are international by nature. Many judges sitting in both Internationals Chambers are fluent English speakers and have highly technical skills in banking and finance - and often professional life achievements in this industry.

Such International Chambers which are fully operational and running, are key assets of the Paris Place.

The protocols signed by those courts with the Paris Bar make it possible for parties before such Chambers to agree upon shorter time limit (through an agreed procedural timetable with the Chamber) as well as procedural flexibilities allowing a wide use of the English langage (no need to translate any evidence in French, possibility for witnesses and experts to be heard and cross-examined in English, interaction with the Court, and pleadings before it, in English, etc.). More generally, the protocols aims at ensuring a more «Anglo-Saxon» conduct of the trial, by ensuring a much larger share to oral debates. The Chair of the Commercial Court of Paris confirmed this focus and the desire to make things simpler for litigants more accustomed to London or New York courts : «*A greater focus has also been given to hearings: parties will be able to ask experts to be heard by the court and cross-examined by the other party, all in English. Looking ahead, we strongly believe procedural rules globally will further converge and harmonize*»[9].

[9] *IQ ISDA, August 2020, p. 31*

I- Legal environment of the French Law Master Agreement

1.1 - General law

The specificity of the French Law Master Agreement is that it belongs to a civil law system, as opposed to a common law system which is often presented as more suitable for financial transactions. Should this be a concern for derivatives market participants?

It does not seem so, and this for two sets of reasons; the first ones relating to the advantages of civil law, and the second ones to the qualities of French contract law.

1.1.1 - Advantages of civil law; a codified and readable law

It should first be noted that civil law governs two thirds of the world population and is the law of the vast majority of the Member States of the European Union. After BREXIT, only the following three countries out of twenty seven will remain attached to common law: Cyprus, Ireland and Malta, none of which having any financial center comparable to that of Paris or Frankfurt and together weighting 6.5 million inhabitants, out of a total of 446 million in the Union post-BREXIT.

The codification allows building a law which is *certain*. Available for all to read in accordance to a structured plan, and easily accessible (for example online on the Légifrance website[10]), civil law does not require reference to judicial decisions, which can sometimes be complex to identify and analyze. Civil law is easily accessible, which contributes to make it an *inexpensive* law that prevents disputes.

Certainty and accessibility, make continental law *economically efficient*.

Certain common law countries have been seduced by the advantages of civil law when it comes to financial or commercial transactions. As a matter of fact, on 30 October 1811, Jeremy Bentham wrote an open letter to the President of the United-States, James Madison, urging him to adopt a French style code. Whilst this suggestion was not retained, the reasons why the United-States of America themselves came to establish an Uniform Commercial Code, as from 1942, are sometimes forgotten. Finalised in 1949 and submitted to the States for signature, the UCC largely contributed to the creation of a federal market. In this respect, Article 1-103 clearly underlines the economic development objective of the UCC, providing that «*(a) The Uniform Commercial Code must be liberally construed and applied to promote its underlying purposes and policies, which are: (1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) to uniform the law among the jurisdictions*».

[10] https://www.legifrance.gouv.fr/ - *Substantial parts of this legislation having been translated and made available in English.*

The codification is also present in Africa, here again in the name of economic efficiency. Article 1 of the Port-Louis Treaty establishing the Organization for the Harmonization in Africa of Business Law (Ohada), adopted on 17 October 1993, provides that: «*the objective of the present Treaty is the harmonisation of business law in the contracting States by the elaboration and adoption of simple modern common rules adapted to their economies, by setting up appropriate judicial procedures and by encouraging arbitration for the settlement of contractual disputes*». OHADA's rationale is mainly economic. Building on ten uniform Acts providing for substantive rules, civil law therefore aims at facilitating growth within the Ohada area: numerous States which are party thereto have enviable growth rates ranging from 4.5 to 7 % of GDP.

1.1.2 - Qualities of French contract law: contractual freedom and security

The French Law Master Agreement is part of civil law, which is largely disseminated and presents real advantages in terms of attractivity. These advantages are reflected in French contract law, which is highly technical and modern. After having been largely shaped by case-law of the French Cour de cassation for more than two centuries, French contract law was deeply renovated by the Ordinance of 10 February 2016 reforming contract law, the general regime and proof of obligations, which became effective on 1 October 2016 and was ratified on 20 April 2018.

As a result, the accessibility and intelligibility of contract law were reinforced, with a very large number of case-law solutions being consolidated in contemporary language and according to a didactic plan. Loyal to the values of civil law, the philosophy of this reform rests upon two fundamental pillars:

- contractual freedom, on the one hand; and

- contractual security, on the other hand.

The assertion of the prevalence of contractual freedom in article 1102 of the French Civil Code must be underlined: market participants can freely determine the content of their contract - orally or in writing, even electronically - to invent new contractual types and even to *agree* on the way evidence could be brought against each other, subject to the special and public policy rules. The report to the President of the French Republic on the Ordinance of 10 February 2016 emphasizes the «*general principle of the suppletive nature of the texts*», which therefore implies broad possibilities of conventional derogation to the law, each time the relevant provision of the law is not an express policy rule or each time derogating from the text would be logically impossible (*e.g.* in relation to defects of consent).

French contract law is guided by economic efficiency considerations which justify the refusal of any control of the value of the obligations; provided those are not illusory or derisory, it is up to the parties

alone to assess their equivalence[11]: whatever is contractually agreed, shall be deemed fair and just!

Such liberalism is reflected in the important role given to the unilateral will: a dissatisfied contracting party will be entitled to suspend performance of its obligations if it anticipates a coming default of its counterparty[12], to reduce the price paid proportionally to a partial performance[13], or even to terminate the contract[14]. And, building on the lessons learned from practice, a recast general regime of contractual obligations[15] considers the debtor-creditor link as an asset, which can then be used as underlying for a number of financial transactions: transfers of receivables have been simplified and assignments of debts and assignments of contracts (the later being valid under French law) have been enshrined in the law.

Contractual security is the second pillar of French contract law which supplements and crowns contractual freedom: it implies giving a full binding force to contracts. Article 1103 of the Civil Code soberly sets out the «*Pacta sunt servanda*» rule by providing that: «*Agreements validly entered into have for the parties thereto, the same force than law*».

Also, enforcement in kind is possible under French law on the sole condition that the cost of such enforcement in kind is not manifestly out of proportion[16]. From this point of view, French law offers the security demanded by the markets, by forcing the debtor to perform delivery obligations in kind, instead of simply paying damages. French law fearcely fights any failure to honor one's word, as having lethal effects on contractual security. As an illustration, rescission of unilateral promises (which any put and call options are based upon) shall not prevent the transfer of the promised underlying securities[17].

1.2 - Special banking and financial law

For a long time, French law has set up mandatory regimes recognizing and protecting netting and collateral safe harbors, even in insolvency. Conditions for their application are clear and set in the law. This regime is now based on Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (known as the «**Collateral Directive**»). The Collateral Directive has of course been implemented in France and this regime is now set out in Articles L. 211-36 and seq. of the Monetary and Financial Code (the «**M&F Code**»).

[11] *Article 1168 of the Civil Code.*
[12] *Article 1220 of the Civil Code.*
[13] *Article 1223 of the Civil Code.*
[14] *Article 1226 of the Civil Code.*
[15] *Title IV of the Civil Code.*
[16] *Article 1221 of the Civil Code.*
[17] *Article 1124 of the Civil Code.*

French law hence clearly recognizes that netting agreements relating to financial obligations, such as the French Law Master Agreement, may be early terminated, and that amounts due and replacement values, can be set-off against each other to calculate a single termination or close-out amount[18].

And French law even goes up to expressely recognizing, for cleared derivatives, the validlity and enforceability of multilateral netting, *i.e.* in circumstances where there is a lack of mutuality.

This regime applies to a much broader range of transactions than just derivatives. At a minimum, it also covers any transaction on financial instruments, but also a series of others transactions, such as spot FX or transactions on bullions or allowances that are customarily traded under a market master agreement, such as the ISDA Master Agreements[19].

This safe harbor is supplemented by a collateral regime protecting rights and assets given as collateral[20]. This collateral regime is also derogatory to any bankruptcy law. It protects collateral received (whether through title transfers, pledge or other security interest arrangements) from its time of creation and perfection - even if such time happen to fall in a so-called «suspect period», *i.e.* shortly before the opening of an insolvency proceeding - to its enforcement, which could not be paralyzed or prevented by the opening of an insolvency proceeding against the transferor or pledgor, whether this proceeding is opened in France or anywhere else[21].

The regime extends its protection to collateral received from third parties (i.e. collateral provider not being one of the counterparties to the agreement). And the French regime provides for a far broader range of assets and rights in respect of which collateral could be transferred or given far beyond the sole assets contemplated by the Collateral Directive.

The netting and collateral safe harbors are supplemented by legal provisions ensuring the enforceability *vis-à-vis* third parties[22].

French law provides for the general rules governing unforeseeability of obligations to be set aside for derivatives contracts[23]. More recently, it has allowed netting agreements to derogate from the

[18] *Art. L. 211-36-1 of the M&F Code.*

[19] *Article L. 211-36, I, 1°, of the M&F Code (Law n° 2019-486 of 22 May 2019 relating to the growth and transformation of companies): transactions on greenhouse gas emission quotas, cash foreign exchange transactions or transactions for the sale, purchase or delivery of gold, silver, platinum, palladium or other precious metals or goods represented by a wharehousing receipt referred to in Article L. 522-37-1 of the Commercial Code.*

[20] *Art. L. 211-38 of the M&F Code.*

[21] *Art. L. 211-40 of the M&F Code.*

[22] *Art. L. 211-36-1 of the M&F Code.*

[23] *Art. L. 211-40-1 of the M&F Code. (Law n° 2018-287 of 20 April 2018 ratifying the Government Ordinance n° 2016-131 of 10 February 2016 reforming the contract law, the general regime and proof of obligations).*

restrictive general law regime applicable to compounding interests[24].

Acknowledging the constant concern of the French legislator to maintain and protect the stability and security of these markets, netting agreements and derivatives were also set aside from any emergency governmental measures taken by Ordinance during the Covid-19 epidemic and aiming at temporarily suspending contractual termination clauses, penalties or delays.

French courts, on their end, also contribute to create and maintain a stable legal environment, by scrupulously ensuring that legal characterization and contractual provisions are respected.

Unlike what some people seem to think, litigations relating to derivatives are by far not rare, and often occurring in highly publicized contexts. During the last twenty five years, cases have been many. They have provided French courts with the opportunity to rule on a series of issues, ranging from the breach of the EU financial services monopoly, *ultra vires*, speculative transactions, the scope of the safe harbors, their derogatory nature to bankruptcy law, calculation of termination amounts, relationships between hedging transactions and related credit facility, intercreditors agreements and rank of hedge providers versus lenders, legal characterization of certain derivatives or «structured loans», replacement of indices, duty to inform, disclosure or accounting treatment, market abuse, etc.

With respect to the safe harbor specifically, the Paris Commercial Court[25], ruling in summary proceedings, recently provided an illustration of the great respect French courts have for contracts and the legal characterization chosen by the parties. In this case, the Court ruled that the receiver cannot require the recharacterization of a derivative product into a credit agreement, on the sole ground that their economic results were in the present case, similar. This decision is remarkable in many ways, but its most clear statement that the proximity - and even the identity - of economic results is not a sufficient reason to recharacterize a contract in something different than what parties agreed when entering into it, is a major issue for the markets where, as we know, coexist multiple available instruments - often subject to disctinct criminally sanctioned monopolies - to achieve one identical economic result (see *e.g.* the issues surrounding the distinction between credit derivatives and credit insurance policies). The *Cour de Cassation* rightly and frequently recalls that when the terms of an agreement are clear and precise, the court cannot interpret it, without distorting it. The uncertainty which would result from any other

[24] *Art. L. 211-40, al. 2, of the M&F Code. (Law n° 2019-486 of 22 may 2019 relating to the growth and transformation of companies).*

[25] *Order n° 2020-306 of 25 March 2020 relating to the extension of deadlines during the period of health emergency and the adaptation of procedures during that same period (Art. 1, II, 4°).*

approach would immediately be noticed and would have serious adverse effects on the financial Place. This is a critical issue for the development of the derivatives market in Paris and the further use of French law to govern their transactions, that the safe harbor is enforced strictly, *a fortiori* in insolvency[26].

With regard to the legal characterization of certain derivatives and the coordination of their regime with the principles governing general contract law and civil liability law, the *Cour de Cassation* has taken a series of remarkable decisions, witnessing a clear understanding of financial derivatives transactions and markets.

The Court has for instance held that derivative transactions entered into for hedging purposes cannot be regarded as speculative transactions - a nature which would have submitted the bank selling the products to more stringent disclosure informations - for the sole reason that they are exposing the client to unlimited risks[27].

The Court has also ruled that, the early termination of a credit facility should not be a termination event for a hedging transaction, if the parties have failed to provide for such a termination or have not otherwise expressly provided for an *indivisibility* as between the hedge and the facility[28].

The Court was also led to rule on the legal nature of «structured» swaps. In this context, it ruled after a detailed analysis of the products that the terms of the transactions did not contain any hidden or implied option as the client pretended, but were firm obligations indexed on the changes in value of an underlying asset[29].

[26] *Trib. com. de Paris, ord. de référé, 4 July 2019, RG n° 2019031042.*

[27] *Cass. com., 17 March 2015, Bull., IV, n° 50; Cass. Com., 5 September 2018, n° 17-11264.*

[28] *Cass. com., 28 March 2018, n° 16-23798; Cass. com., 24 May 2018, n° 17-14697.*

[29] *Cass. Com., 5 September 2018, préc.*

II- Qualifications frequently expressed against the use of French Law in financial transactions

It has come to the working group's attention that certain qualifications or reservations were sometimes expressed to market participants willing to use the French Law Master Agreement, to dissuade them from using French law or French courts, in banking and financial matters in particular.

This is an area of great concern for the HCJP. And the purpose of the following developments is to analyze in detail each of such objections brought to our attention and to determine whether they are justified or not. Many appear outdated - often because they have not taken into account - or have not measured the full extend of - the reforms that French law has undergone in recent years.

At the end of its work, the working group feels that the modernity of French law solutions is still somewhat ignored and that a considerable pedagogical work still awaits the Place on this. The HCJP has an important role to play in this regard for organizing, with the help of its founding regulatory members and the economic representations of French embassies abroad, training/outreach seminars on French law in the European main financial centers.

2.1 - Implementing the French Law Master Agreement

2.1.1 - Acclimatization of the French Law Master Agreement with French civil law concepts

The detailed analysis made of the above mentioned objections is presented in the following developments, in no specific order, as they appear in legal opinions reviewed by the working group.

2.1.1.1 - In «cruising mode»

a) Risks of potestativity or indetermination of the purpose in cases where one of the parties to the agreement is appointed as calculation agent

The risk of potestativity or indetermination of an obligation, is sometimes presented as a disincentive to use French Law, for example when one of the parties to the agreement is appointed as calculation agent, or in another capacity, where it is given broad powers of appreciation - sometimes discretionary rights - for making calculations, assesments or adjustments.

The calculation agent, which missions are determined by the ISDA Master Agreements (or the Transactions' Confirmations), is often responsible for making a number of calculations, determinations or adjustments which may have a very significant impact on parties' obligations under a Transaction or the Master Agreement. The role of the calculation agent is an important one designed to ensure the possibility for the contract to survive certain market events, or for obligations to be created or to expire, or for the economics of the contracts to be preserved (*e.g.* in case of dilution or relution of the underlying asset).

In practice - but this is not a requirement of the ISDA Master Agreements - the sell side counterparty acts as calculation agent.

Can such calculations, determinations or adjustments made by the calculation agent be legally challenged under French law, on the basis that, as the calculation agent is given discretionary rights, such provisions should be considered as flawed by «potestativity»?

(i) What is «potestativity» under French law?

Under French law, the concept of potestativity refers to a provision which whould subject the very creation of an obligation to its debtor's sole will. Because such a condition contradicts the core idea of any commitment - as the debtor may simply decide not to be bound if he doesn't want to, the obligation entered into under a *purely* potestative condition, is under French law sanctioned by nullity. It is a pure appearance of commitment. Article 1304-2 of the Civil Code provides: «a*ny obligation contracted under a condition the meeting of which depends solely on the debtor's will, is null. Such nullity can however not be invoked when the obligation was performed knowingly*».

Case law relating to Article 1304-2 of the Civil Code is interesting to analyse.

It assesses the «potestative» character of an obligation, based on the degree of freedom or discretion which the debtor has:

- the condition is said to be *purely* potestative when, its meeting is solely dependent on the sole debtor[30] who is at liberty to decide whether the obligation is created or not; the binding nature of the obligation is then unfairly said to be subject to a «condition», as it is subject to a mere unilateral manifestation of will; on the contrary,

- the condition is said to be *simply* potestative, when its meeting depends upon both the will of the debtor and the will of a third party or the occurrence of one or several external objective events.

Such distinction is important since only *purely* potestative conditions are null under French law[31], and still, the Court will need to make a «proportionality control» before declaring the provision null, *i.e.* it needs to ensure that such nullity has no disproportionate effect given what the provision was intented to achieve. *Simply* potestative conditions are valid under French law.

It is interesting to note that many of the reservations expressed, make no reference to such distinction. It is event further interesting to say, that the risk of potestativity can easyly to be dealt with.

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[30] *A condition that is in the hands of the creditor alone cannot incur a criticism of potestativity.*
[31] *Jean-Jacques TAISNE, Lexis Nexis - Synthèse - Obligations conditionnelles.*

(ii) The neutralization of the risk of potestativity

The nullity provided by Article 1304-2 of the Civil Code should not apply to provisions appointing one party as calculation agent. This so for the following three reasons:

- First, the condition upon which calculation agents are given discretionary powers in ISDA Master Agreements or ISDA documentation, do not fall within the definition of *purely* potestative condition. It is even doubtful that such provisions amount to a «condition», *i.e.* an event which is future and uncertain, within the meaning of Article 1304 paragraph 1 of the Civil Code. As a result, a counterparty should not be able to claim that a Transaction or the Master Agreement is null, on the basis of the potestativity of a calculation agent's calculation, decision or adjustment. Such a calculation, decision or adjustment cannot itself be potestative. Only the provision giving the calculation agent such rights could be deemed so. But such a provision could only be deemed potestative if it were giving the calculation agent the right not to perform its obligations thereunder, at this sole will and at no cost.

- Second, case-law relating to Article 1304-2 of the Civil Code makes clear that postestativity does not apply in the presence of a «synallagmatic» contract, *i.e.* reciprocal agreement. Authors[32] emphasize that in presence of reciprocal obligations, requesting the nullity of an obligation on the basis of potestativity would be of little interest, since the debtor would also have to waive its own claim. Both the French Law Master Agreement and any Transaction governed thereby, are contractual undertakings creating reciprocal obligations. This excludes the application of article 1304-2 of the Civil Code.

- Lastly, article 1304-2 of the Civil Code now provides that the nullity for potestativity «*may not be claimed when the obligation was performed knowingly*». This is an important change brought by the recent reform of French contract law and a further illustration of the decline of potestativity, often emphasized by authors. It means that even a *purely* potestative condition would be valid, if the obligation it relates to has been performed knowingly and with full knowledge of its terms. Introduced by Ordinance n° 2016-131 of 10 February 2016, this clarification further reduces the risk of invalidity to such sole cases where the counterparty had ignored the potestative nature of the condition when performing the litigious obligation.

The risk of invalidity for potestativity can therefore reasonably be set aside. In order to succeed and obtain the nullity, a party would need to identify a truly conditional obligation (*i.e.* with a future and uncertain event), *purely* potestative, non-reciprocal and which would not have been performed with full knowledge.

[32] *JurisClasseur, Fasc. 10: RÉGIME GÉNÉRAL DES OBLIGATIONS §33, Jean-Jacques Taisne.*

(iii) Potential control of abusive enforcement

The above does not mean however that a court would refuse to *a posteriori* control the conditions upon which a calculation agent has exerciced its rights or prerogatives. This of course cannot be excluded.

But here, the issue has little to do with potestativity. At most, such a control would end up holding the calculation agent responsible to keep the other indemnified of losses resulting from its failure to perform its mission in accordance with standard market practices or in good faith. Under French law, good faith is a mandatory standard for performing any contractual obligation (Article 1104 of the Civil Code). A breach and a resulting liability could, for example be characterized if the agent would not conform to market practices, would make biased calculations having in mind its own interest (as otherwise a counterparty) to the detriment of its counterparty. On this, we note that under ISDA documentation, calculation agents are most often requested to perform their obligations in good faith (to that extent, submitting the Master Agreement to French law where good faith is mandatory, will be of no effect or change) and to provide to the other party all justifications of its calculations and determinations.

The possibility of such an *a posteriori* control by the courts of the conditions in which the calculation agent has performed its mission, is by far not a prerogative of French law. It can happen in most legal and judicial systems. Judicial control of unilateral prerogatives used in an unlawful or abusive manner, also exists under English law.

(b) The «Election of Domicile» provision

Costs of a «process agent» are not necessary to expose when using the French law Master Agreement which elects jurisdiction before Paris courts.

The provision of the French Law Master Agreement, whereby parties can «elect domicile» in France, is of a type envisaged and authorized by Article 111 of the Civil Code. As opposed to systems where the appointment of a local agent is mandatory, such election is optional under French procedural rules. When parties choose to use it, court papers may be served in France, at the elected domicile of the party, rather than at its actual domicile. If the election of domicile is made in the common interest of both parties or in the exclusive interest of the obligor, its counterparty is bound by the election of domicile provision and shall only deliver court papers at the elected domicile. If the election of domicile was made in the exclusive interest of one party, such party may deliver court papers at its choice, either at the elected domicile or the actual domicile of its counterparty.

Article 48 of the Code of Civil Procedure deems the election of domicile provision null (*réputé non écrit*) if it breaches, directly or indirectly, territorial jurisdiction rules unless it has been agreed between parties who have all contracted as professional merchants (*commerçants*). The election of domicile provision of the French Law Master Agreement, if selected to apply, should therefore be reserved to situations where the agreement is entered into between professional merchants and in the context of their business professional activity - a scenario which is by far the dominating one on the market.

The election of domicile provision being optional, it can be ignored or be specified as not applicable for either or both parties to the French Law Master Agreement, including when one of them is registered outside France. In such a case, if both parties are established in the Union (which in all likelihood, will be the dominating scenario in which in practise a French Law Master Agreement is signed), if election of domicile has not been made in France, service of court papers will be governed by Regulation EC No 1393/2007 of 13 November 2007, (the «**Regulation**») which provides that:

- each Member State shall designate (i) a *transmitting* entity, which is in charge of the transmission of judicial documents to the receiving agency of another Member State where the recipient is located; and (ii) a *receiving* entity, which is in charge to receive judicial documents from the transmitting agency where the applicant is located and to serve such judicial documents to the addressee. In France the transmitting entity is the *huissier de justice* (bailiff); and

- the addressee may refuse to accept service if the document is not drafted in a language accepted by the receiving Member State. The applicant may chose to translate the judicial document at its own expense.

Pursuant to Article 14 of the Regulation, the service may be effected by postal services without involving the entities referred to by the Regulation. Since the Regulation does not provide for any hierarchy as between these two roads, the choice is left to the applicant. However, the flexible solutions adopted by the Court of Justice of the European Union and the French *Cour de Cassation* which consider that both methods of service are equivalent, are not necessarily shared by other local courts. As a result, market practice in France is to serve court papers to a counterparty established in another State Member of the Union (*i*) through a *huissier de justice* (bailiff) established in France, who in turn will transmit the papers to a bailiff established in the relevant State Member; and then (*ii*) the relevant State Member bailiff will serve the papers to the final addressee.

For these reasons, if not mandatory, election of domicile may be convenient in cross border professional merchants relationships, as a way to simplify greatly the service of process. It is also a way to ensure a much facter process by avoiding extensions of delays and time limits on account of distance.

c) «Negative consent» under French law

Market participants are often facing legal or regulatory changes commanding to amend their Master Agreements and/or Confirmations with a great number of their counterparties. In order to ease the way such modifications can be made and to avoid such complex and costly repapering exercises, the question is often asked to counsels about «negative consent», *i.e.* whether silence - or more precisely, a *nihil obstat* - can be an acceptable and valid way of agreeing. This is often referred to as «negative consent».

The working group has spent much time in analyzing this issue. Our conclusions are that English and French laws come to extremely similar positions. The principle is that silence is always ambiguous, or at a minimum equivocal, and therefore should in principle not be deemed as a valid consent or agreement. There are however, under both laws, a number of most useful accomodations to this principle. Most of which are also identical - or very similar - in both systems.

The rule that silence can in principle not be acceptance, is shared by all democratic systems which recognize the freedom not to contract. Infering an agreement from silence, would jeopardize individual liberties and freedom. The new Article 1120 of the Civil Code, in its new reading further to the reform of 2016 which has consolidated in the law a long established case law, provides that: «*silence is not equivalent to acceptance, unless otherwise requested by law, practices, terms of business relationships, or specific circumstances*».

Article 1113 of the Civil Code also provides that «*the contract is formed by the meeting of an offer and an acceptance whereby the parties express their will to commit. This will can result from a statement or from an unequivocal conduct of its author*», such is specifically the case of a beginning of performance. Only the absence of ambiguity on an offer can constitute the basis of the conclusion of an agreement or amendment thereof by an amendment agreement.

Under English law, the principle is also that the offeree cannot be bound by the terms of an offer in the absence of manifestation on its part, even when the said offer specifies that it will be deemed accepted if the offeree remains silent. The offeree does not have to bear the costs, nor the obligations linked, to the rejection of an offer that it does not wish to accept.

There are exceptions to this principle, in both English and French law. It is therefore possible that exceptional circumstances give an intelligible dimension to the silence of the offeree - the silence is then «circumstantial» - which allows to infer a tacit acceptance from the offeree, and this, by way of exception to the idea that silence is in principle equivocal and therefore meaningless.

The application of these exceptions often depends on whether the offeree is subject to a «duty to speak», in which case a breach of this duty may constitute acceptance.Case law also makes a distinction

between mere silence and the acceptance of an offer or a contract inferred from the conduct of the offeree - a notion that can be compared to the beginning of performance under French law.

Finally, the theory of «equitable estoppel», according to which the offeree who makes an unequivocal statement for the benefit of the offeror and on which the offeror relies to his detriment, cannot withdraw such statement[33].

English case law proves to be relatively complex to analyze and always closely linked to the circumstances of each case. English case law has thus recognized the existence of such exceptional circumstances in the following cases:

- the offer was requested by its recipient, in particular if the latter has provided the model of the offer and that this offer provides that silence constitutes acceptance;

- a business relationship exists between the parties where the offeree must notify the rejection of the offer to the offeror (in particular, when the offeror considers the acceptance acquired to its detriment);

- the recipient of the offer is subject to a «duty to speak» for example, when the offeree specifies that the offer is deemed to be accepted unless otherwise indicated by it within a specific deadline. In such a case, only the offeror may invoke silence as acceptance, the offeree not being able to rely on its own deficiency;

- silence is equivalent to acceptance by virtue of a custom of trade;

- a valid contractual agreement exists but some terms must be agreed upon subsequently by the parties, in which case the absence of objection to these finalized terms could constitute an acceptance of the contract; or

- tacit acceptance is derived from the behavior of the recipient of the offer, whether by virtue of a positive act, its abstention or its silence (for example, a tenant remaining in the premises and de facto accepting a new lease or a customer continuing to use a service).

Beyond the generality of these rules, it is necessary to analyze the precise situations where, on the markets, this tacit acceptance is considered useful or not by the operators:

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[33] The theory of equitable estoppel applies when the offeror has, to the knowledge of the offeree, acted to its detriment by inferring from the silence of the offeree its acceptance of said offer. The difficulty raised by this theory is that it can only be applied in the presence of a «clear and unequivocal» statement made by the offeree. The mere inaction and silence of the offeree will generally be insufficient under English law to characterize estoppel. Again, the demonstration of exceptional circumstances will be necessary (such as a «duty to speak»).

(i) Amendments of the ISDA Master Agreement itself

The answer to this question is easy and does not require to analyze the rule of law. Section 9(b) of all versions of the 2002 ISDA Master Agreement prohibits the parties from making changes other than in writing: «***(b) Amendments.*** *An amendment, modification or waiver in respect of this Agreement will only be effective if in writing (including a writing evidenced by a facsimile transmission) and executed by each of the parties or confirmed by an exchange of telexes or by an exchange of electronic messages on an electronic messaging system*».

This clause will receive full effect under French law.

It is also true under English law. In its decision *Rock Advertising v. MWB Business Exchange Centres Ltd [2016] UKSC 24*, the UK Supreme Court acknowledged the validity and the application of these provisions. Therefore, in the situations where the parties provide that their agreement can only be amended in writing, it can only be done by an amendment agreement and not orally or by any other means. However, the Court considered, without giving any further details, that in exceptional circumstances, parties acting on the basis of an amendment agreement orally agreed upon can be denied the possibility to question the validity of this agreement if the conditions for the application of the theory of estoppel are satisfied.

(ii) Agreement to the terms of a draft Confirmation

After entering into a Transaction, most of the time by telephone, it is customary for the most diligent party, or the one who bears the responsibility as per the agreement of the parties, to send to the other party a written «Confirmation» of the terms of the Transaction. This Confirmation is not the agreement (*negotium*), but its - hopefully accurate - transcription (*instrumentum*). However, it is not uncommon for it to contain clause providing that only its terms are binding, to the exclusion of any previous exchange, even written, or telephone recordings. Its content and reception are therefore essential for the parties.

No provision of any version of the ISDA Master Agreement imposes a formal and written acceptance of the Confirmations. Article 9(e)(ii) of the 2002 ISDA Master Agreement provides a great flexibility in the collection of their agreement: «*The parties intend that they are legally bound by the terms of each Transaction from the moment they agree to those terms (whether orally or otherwise). A Confirmation will be entered into as soon as practicable and may be executed and delivered in counterparts (including by facsimile transmission) or be created by an exchange of telexes, by an exchange of electronic messages on an electronic messaging system or by an exchange of e-mails, which in each case will be sufficient for all purposes to evidence a binding supplement to this Agreement. The parties will specify therein or through another effective means that any such counterpart, telex, electronic message or e-mail constitutes a Confirmation*».

Also, the Confirmation of a transaction, even if it can incidentally supplement the oral agreement, is essentially a matter of pre-constitution of the evidence of a specific transaction already entered into, and not *stricto sensu* a matter of entry into the transaction. Therefore, the question relates

more to the accuracy of the Confirmation with the agreement entered into orally (*negotium*), than that of the entry into another agreement, even by way of tacit acceptance or silence accompanied by specific circumstances.

Therefore, certain cardinal rules of the French law governing evidence must be applied here.

The first one is that the evidence is entirely free between professional merchants (*commerçants*) for transactions on derivatives of a commercial nature. Article L.110-3 of the Commercial Code provides that «*With regard to merchants, commercial acts may be proven by any means unless the law otherwise specifies.*»

The second one is that agreements on evidence are valid under French law with regard to rights that the parties can freely dispose of[34], and this is subject to two qualifications:

- on the one hand, provided that this does not give rise to the establishment of an irrefutable presumption to the benefit of the drafter of the Confirmation[35]; and

- on the other hand, provided that the drafter does not pretend to thereby constitute for itself a perfect debt instrument as «*no one may constitute an instrument for itself*»[36].

Overall, it is perfectly conceivable under French law to deem the Confirmation conform to the agreement of the parties. Moreover, the draft Confirmation may appear as a proposed agreement on evidence, tacitly acceptable pursuant to customs in the matters of derivatives and/or pursuant to a beginning of performance.

The European Securities and Markets Authority ("**ESMA**") accepts to consent by silence to the terms of a Confirmation. It confirmed, in its Q&A EMIR (OTC Q°5.a), its compatibility with the requirements of the EMIR on the correct confirmation of derivatives transactions, provided that both parties had accepted such process in advance. It states in that respect that: «*processes under which documentation is deemed to be finalised and accepted by both parties after a fixed deadline has expired would be compliant provided that both counterparties have agreed in advance to confirm by this process*».

From a French law standpoint, and in accordance with these requirements of the European regulator, it is therefore recommended to the parties wishing to operate this way, to insert in the Schedule to their French Law Master Agreement a provision to this effect, providing that the receipt without protest of a Confirmation by the Parties will be worth acceptance of its terms, after a certain period of time. Such provision is valid and would receive full effect under French law.

[34] *Article 1356 of the Civil Code.*
[35] *Article 1356, al. 2 in fine of the Civil Code.*
[36] *Article 1353, rule of the loyalty of evidence, of the Civil code.*

However, in the absence of such provision, there are other exceptional circumstances in which a court in France could consider silence of the recipient of the Confirmation as acceptance, such as the execution of its terms. Even if nothing was formally provided for in the Schedule, a beginning of performance may be considered as tacit acceptance of the draft Confirmation, pursuant to the above-mentioned article 1113, paragraph 2.

(iii) Amendments «requested» by regulatory changes

The purpose here is to analyse the conditions upon which operators may achieve compliance with new regulations. Since 2008, the derivatives industry and market have experienced a Copernican revolution. EMIR, on the one hand, required operators to clear their simple and standard transactions with central counterparties, and on the other hand, required, for the fraction of their portfolios which would remain OTC, a series of «*risk mitigation techniques*» to be implemented.

Such risk mitigation techniques are many to:

- reporting,
- timely confirmation,
- daily valuation,
- mandatory collateralization,
- reconciliation and compression of portfolios,
- dispute resolution, etc.

Each of these techniques requires either a repapering of existing agreements (this is the case for collateralization which must now be carried out in accordance with the approaches prescribed by law), or at least a modification of the latter. However, EMIR places the responsibility for this regulatory compliance on institutions.

ISDA has early determined to build the appropriate contractual instruments to allow market participants to comply, in a consistent way, with such requirements. Amendments are often prepared, from these ISDA contractual instruments, by institutions and sent to their clients for signature. What if the client remains silent further to the receipt of these proposals? Can these proposed amendments provide that, without objection on his part after a certain period of time, the client will be deemed to have accepted their terms? This is an important issue, because if this solution cannot be implemented, only immediate termination of the relationship can address this compliance issue.

It is recalled that pursuant to article 1194 of the Civil Code, the binding force of agreements extends not only to the expressed obligation but also to the implicit obligations resulting from custom or from the law: «*the contracts oblige not only to what is therein expressed, but also to all the consequences given to them by equity, custom or the law*».

It seems to the working group that there are, therefore, good arguments to consider that when these amendments are required by law and are made in good faith, fairly and in the common interest of the parties, so as to strictly comply with law a flexible application of the rule should prevail. Moreover, under these conditions, it seems to us that a continuation of the performance of the contract should be considered as tacit acceptance of the terms of these offers.

(d) Evidence and electronic signature under French law

Under French law, the use of electronic signature for the purpose of entering into ISDA documentation will be possible in the vast majority of cases where the French Law Master Agreement will be used. This is because:

- electronic writing and electronic signature are recognized as equivalent to handwritten signature;

- evidence of legal acts entered into between professional merchants (*commerçants*) is free; and

- parties to an evidence agreement can agree on any admissible standard of proof as between them.

(i) Recognition of electronic writing and electronic signature

French law recognizes the validity of electronic writings and electronic signatures.

Thus, an electronic writing has the same probative value as a writing on paper, provided that the author of the electronic writing can be duly identified and that it is drawn up and stored in conditions that guarantee its integrity[37].

The electronic signature must consist in the use of a reliable identification process guaranteeing its link with the act to which it relates[38]. The reliability of the signature is presumed - until proven otherwise - when the signature is created, the identity of the signatory is ensured and the integrity of the act is guaranteed under the conditions of the decree of 28 September 2017, *i.e.* when the process uses a *qualified* electronic signature.

A *qualified* electronic signature is an advanced electronic signature that complies with Article 26 of EU Regulation 910/2014 of 23 July 2014 (the «**eIDAS Regulation**») and is created using a qualified electronic signature creation device that meets the requirements of Article 29 of the eIDAS Regulation, which is based on a qualified certificate for electronic signature that meets the requirements of Article 28 of this regulation.

[37] *Article 1366 of the Civil Code.*

[38] *Article 1367 of the Civil Code.*

At present, there is only a very limited area under French law which the use of electronic writing is not possible for, which are[39]:

- private deeds relating to family and inheritance law; and

- private deeds relating to personal or real security (*sûretés personnelles ou réelles*), of a civil or commercial nature, unless they are executed by a person for the purposes of his profession.

It is reasonable to think however that most ISDA Master Agreements are entered into for the purposes of one's profession or business. The parties to a French Law Master Agreement or to an ISDA collateral documentation, will therefore be able to make an extensive use of electronic signature to validly sign such documentation.

(ii) Freedom of evidence of legal acts between professional merchants (commerçants)

In addition to recognizing electronic writing and signature, French law facilitates the evidence of legal acts between professional merchants, since such evidence is free[40] and can therefore be brought by any means.

As a result, between professional merchants, less stringent procedures than those required for the validity of a written document or an electronic signature are frequently used.

For example, the scanned «pdf» copy of a handwritten signed document is a method of evidence usually accepted between professional merchants and the validity of which is not doubtful.

(iii) Possibility to enter into an agreement on evidences

Finally, French law also allows contracting parties to provide for the means of evidence they wish to be able to use among themselves[41].

This allows contracting parties to provide for, in the French Law Master Agreement, the terms they agree to recognize among themselves to validate the conclusion and confirm the transactions governed by the French Law Master Agreement. They will thus be able to validly authorize the use of emails or scans.

[39] *Article 1175 of the Civil Code.*

[40] *Article L.110-3 of the Commercial Code.*

[41] *Article 1368 of the Civil Code.*

(e) Benefit of the prudential treatment of exposures on a net basis (Article 296(3) of CRR)

Regulation (EU) No. 575/2013 («**CRR**») recognizes the prudential treatment of exposures arising from derivative transactions (and securities lending and repos, as well) on a net basis, when such transactions are governed by a netting agreement[42].

However, this is subject to a number of conditions relating to the characteristics of the said netting agreement, as provided for in article 296(2) of CRR.

Typically, eligible netting agreements are:

- international master agreements relating to specific products, such as the ISDA Master agreements (relating to derivatives, etc.), the ISMA Global Master Repurchase Agreement (GMRA) (relating to repo transactions), the ISLA Global Master Securities Lending Agreement (GMSLA) (relating to securities lending and borrowing);

- their European equivalent, the European Master Agreement (Euromaster) (relating to repurchase agreements, securities lending and derivatives) which is in frequent use by Central banks of the Union for their repo transactions entered into for the monetary policy ; or

- national Master Agreements, such as the FBF Master agreement relating to transactions on forward financial instruments published by the French banking federation, or the German Master agreement *Rahmenvertrag für Finanztermingeschäfte*) published by the German banking federation.

Netting is also recognized as between close-out or termination amounts of several Master Agreements - this is sometimes referred to as «*global netting*» -, provided that such Master Agreements are «linked» among themselves through the terms of a global netting agreement, or a «contractual cross product agreement» as defined under CCR. Once again, a number of conditions however need to be met in order to secure the most favorable prudential treatment, namely:

- the net balance calculated under the global netting agreement shall be the net balance of the termination balances calculated pursuant to each of the underlying Master Agreements; and

- an *independent* legal opinion must confirm the validity and enforceability of the provisions of the global netting agreement, not only pursuant to its governing law but also under all insolvency

[42] *Articles 295 et seq. CRR.*

laws relevant to the business operations of the estiblishment seeking to benefit from the favorable prudential regime.

Pursuant to Article 296(3)(a) of CRR, a global netting agreement sets up a two-steps process:

- in a first step, the close-out and netting (which is not set-off) of each underlying Master Agreements. Each such netting operations, is made taking account of all financial guarantees provided under each relevant Master Agreement; and

- in a second step, each termination or close-out amount calculated pursuant to the terms of each underlying Master Agreements, are then set-off against each other. Such net balance is the sole amount due between the parties, further to the termination of the relationships.

The Global netting agreement published by the FBF and the SIFMA Cross-Product Master Agreement are global netting agreements in most frequent use on the market.

The difficulty generally raised by such global netting agreements stems from the fact that they are trying to achieve netting accros a great variety of very different products which:

- do not form a homogenous class as they may govern transactions of very diverse nature;

- are subject to non-harmonized termination terms (close-out amounts, event of default, termination events, etc.)[43]; and

- may not be governed by the same law.

That being said, this difficulty is mitigated by the fact that a global netting agreement will carry out the set-off between the positive and negative net termination balances, only after such net termination balances are calculated, each in accordance with the provisions of its own governing Master Agreement. As a result, a global netting agreement will operate such a set-off solely in accordance with its own provisions, most often without having to refer to the underlying Master Agreements, other than to extract the raw material (*i.e.* their respective net termination balances) to be set-off. The terms used by global netting agreements are therefore generally open and inclusive, with the aim of capturing key underlying concepts as broadly as possible. For example, the SIFMA Cross-Product Master Agreement defines the term «Close Out» as follows: ««*Close Out*» *means,*

[43] *See for example the definitions of Termination Event provided for by the 2002 ISDA Master Agreement and of Event of Default under the GMRA 2000 (as modified by the 2011 Protocol).*

when used as a verb in relation with transactions or Principal Agreements, to accelerate, terminate, liquidate or cancel (including by way of automatic early termination) these transactions or the transactions under a Principal Agreement; and «Close-Out» means the act of Closing Out».

Considering the inclusion of the French Law Master Agreement among the list of Master Agreements covered by a global netting agreement, the following conclusions stand out:

- netting carried out pursuant to the provisions of the French Law Master Agreement should benefit from the safe harbor of Articles L. 211-36 and *seq.* of the M&F Code;

- in the event that the defaulting party is a Union credit institution or investment firm covered by Directive 2001/24/EC (the «**WUD**»), Article 25 thereof provides that the governing law of a netting agreement shall solely determine the conditions of enforceability of netting in any insolvency proceeding opened against an EU credit institution or investment firm, and so irrespective of where the relevant insolvency proceeding is opened; and

- the set-off of the Early Termination Amount calculated under the French Law Master Agreement against other termination amounts calculated under other Master Agreements entered into between the same parties, will be carried out in accordance with the law governing the global netting agreement, subject to the admissibility of such set-off under the relevant insolvency law (*lex fori*).

Hence, for the purpose of Article 296 (3) of CRR, the use of the French Law Master Agreement presents exacty the same guarantees and confort than the use of the English law version of the 2002 ISDA Master Agreement.

(f) Coverage of the contract by legal opinions

ISDA provided the working group with an up-to-date list of all the legal opinions it has already collected from its counsels on the French Law Master Agreement and French law ISDA documentation. These opinions cover both issues relating to netting and those relating to collateral. This list is attached as Annex 3 to this report.

2.1.1.2 - In « crisis time »

a) The flawed assets theory

Together with close-out netting and the «single agreement» principle, Section 2(a)(iii) is the third «pillar» of any ISDA Master Agreements. This obviously remains true and unchanged for the French Master Agreement.

Section 2(a)(iii) reads as follows:

«*Each obligation of each party under Section 2(a)(i) is subject to (1) the condition precedent that no Event of Default or Potential Event of Default with respect to the other party has occurred and is continuing, (2) the condition precedent that no Early Termination Date in respect of the relevant Transaction has occurred or been effectively designated and (3) each other applicable condition precedent specified in this Agreement.*»

These provisions are often referred to as the «*flawed assets*» theory. Indeed, while the Section starts by talking about «*obligations*» of each party, what it says is that no counterparty to an ISDA Master Agreement enjoys any right but «flawed» by three conditions precedent, *i.e.* such counterparty being not itself (*i*) in defaut, (*ii*) potential event of default, or (*iii*) subject to any other condition decided by the parties. And the provision does not say that its counterparty is authorized to «*suspend performance*» in such cases. It clearly says that the party shall have no right and that there shall be no corresponding obligation.

The English law *flawed asset* theory is therefore neither the Civil law concept of defense of non-performance[44], nor of preventive defense of non-performance[45], nor of condition precedent[46]. It goes much further than that in affecting rights and obligations in their very essence or existence. This has no equivalent under civil law. But its practical effects can be replicated in civil law, following an other path.

The objectives of the authors of Section 2(a)(iii) were twofold:

- First, it was designed to allow the non-defaulting party to suspend, as soon as the occurrence of an event of default or of a potential event of default, performance of its obligations. The risk that this provision is trying to deal with is the non-defaulting party having to make a payment to its counterparty in difficulty, during the time period necessary to carry out all close-out netting operations of their Master Agreement, with little prospect to recover such amounts, should *in fine* the termination amount be due to the non-defaulting party.

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[44] *Article 1219 of the Civil Code : «A party may refuse to perform its obligation, even though it is due, if the other party does not perform its obligation and if this non-performance is sufficiently serious.»*

[45] *Article 1220 of the Civil Code: «A party may suspend the performance of its obligation as soon as it is clear that its co-contracting party will not perform its obligation on the due date and that the consequences of this non-performance are serious enough for it. This suspension must be notified as soon as possible».*

[46] *Article 1304-6 of the Civil Code: «The obligation becomes pure and simple from the fulfillment of the condition precedent. However, parties may provide that the fulfillement of the condition shall be retroact and apply on the date of the contract. The thing, which is the object of the obligation, nevertheless remains at the risk of the debtor, who retains administration of it and has a right to the fruits until the condition is fulfilled. If the condition precedent is not met, the obligation is deemed to have never existed.»*

- Second, the purpose was to draw a clear distinction as between *netting*, on the one hand, and *set-off*, on the other hand. This was designed to contribute to the enforceability of the ISDA Master Agreement in jurisdictions where set-off in insolvency is prohibited by law. Indeed, if rights and obligations of each parties can be deemed non existing, it may prove difficult to consider netting as an equivalent to a set-off of reciprocal rights and debts. The ISDA Master Agreement even goes up to providing that in case of early termination, any such «*flawed rights*» cease to exist, and only survives one single obligation, for one party or the other, to pay the net termination amount. Such net termination amount being uncapable of being regarded as the net balance from a set-off, it must be considered as the contractually agreed amount of damages due by one party to the other as an indemnity against loses resulting from the early termination of their business relationships.

This provision has however been deviated from its original purpose at the occasion of the bankruptcy of Lehman Brothers in The United Kingdom and in the United States, by some counterparties of the bank. Such counterparties have been trying to make use of Section 2(a)(iii) of the Master Agreement in a rather iconoclastic way which gave rise to interesting case law – with opposite outcomes in the United States and in The United Kingdom.

Realizing that if they were to decide the early termination of their Master Agreements with Lehman Brothers further to the opening of an insolvency proceedings against it, they would immediately have to pay to the bank's administrator significant termination amounts, the counterparties sought to avoid making such payments. They believed Section 2(a)(iii) could help them in achieving this. Their reasoning was simple:

- bankruptcy is an event of default under the ISDA Master Agreement,

- Lehman Brothers is bankrupt,

- therefore Lehman Brothers, until the counterparty serves a termination notice, is in «*potential event of default*»,

- whereas, Section 2(a)(iii) provides that a party in potential default has no rights under the Master Agreement, apart from being paid of the termination amount, if due to it.

On such basis, the counterparties determined to notify to Lehman Brothers its *potential* default while at the same time not terminating the Master Agreement (such termination would have immediately forced the counterparties to calculate and pay termination amounts to the bank).

This use of Section 2(a)(iii) was hardly the one authors of the ISDA Master Agreement had scheduled when drafting it. However, even if it is the intent and spirit of Section 2(a)(iii), the letter of the clause does not condition its application to a decision to terminate the Master Agreement.

When both asked whether such an interpretation and use of Section 2(a)(iii) was valid (the Section is drafted in exact identical terms in both the English and New York law versions of the 2002 ISDA Master Areement), English and New York Courts decided over the cases in diametrically opposing ways. English courts, while acknowledging that this was undoubtedly a deviation from the *spirit* of the provision, made a strict application of the provisions of the contract and authorized the counterparties of Lehman Brothers to make use of this right for an unlimited period of time[47]. Conversely, the US judge considered that it was an abuse of rights and condemned the bank's counterparties[48].

These debate and the potentially serious concerns raised by the possible impacts of the English court decision on the prudential supervision of banks and investment firms, led ISDA to publish an amendment to the Master Agreement aiming at amending Section 2(a)(iii) by contractually limiting the time period during which parties can make use of it. This amendment is now widely in use on the market.

Decision was made early by the working group in charge of the drafting of the French Law Master Agreement to incorporate this amendment provisions in the agreement itself - in order to build the most «uptated» version of the 2002 ISDA Maste Agreement on the market. For such reason, the French Law Master agreement incorporates, directly into its text, the *verbatim* provisions of such ISDA amendment designed to correct an imperfection of the original versions of the Master Agreement and to clarify parties' intent.

Substantively however, Section 2(a)(iii) of the French Law Master Agreement is not a «*flawed asset*» provision. This principle can even harldly be found in civil law, where no valid contract could be formed from such flawed assets or flawed rights.

The provision has been slightly changed to allow the French law version of the ISDA 2020 Master Agreement to achieve an identical result in practice to what other versions, amended as per the terms of the ISDA amendment, are achieving. But it makes *performance* of obligations (as opposed to their very existence) dependent upon the three same conditions.

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[47] Lomas v JFB Firth Rixson Inc. [2012] EWCA Civ 419. The four cases appealed were Lomas v JFB Firth Rixson Inc [2010] EWHC 3372 (Ch), Lehman Brothers Special Financing Inc v Carlton Communications Ltd [2011] EWHC 718 (Ch), Pioneer Freight Futures Co Ltd v Cosco Bulk Carrier Company Ltd [2011] EWHC 1692 (Comm) and Britannia Bulk plc v Pioneer Navigation Ltd [2011] EWHC 692 (Comm).

[48] Lehman Brothers Holdings, Inc, et al (Case n° 08-13555(JMP), Bankr SDNY, 15 September 2009.

Section 2(a)(iii) of the French Law Master Agreement reads as follows: «*Upon the occurrence of an Event of Default or a Potential Event of Default in respect of a party or any other event specified as such in the Schedule, and in each case subject to the provisions of Section 2(e), the Non-defaulting Party or the other party, as the case may be, may suspend performance of its obligations until the occurrence of the Early Termination Date*».

The question could arise of whether this provision could be criticized on the basis of the provisions of Article 1170 of the Civil Code, on the grounds of lack of substance[49]. The working group is convinced that this is not the case. The provision provides for a legitimate, reasonable and time-limited protection of the non-defaulting party's interests. The protection is conditional upon the non-defaulting party's decision to terminate the Master Agreement, *i.e.* if it waives its rights to terminate, or if it does not terminate within a certain prescribed period of time, it will have to perform all its obligations, including prior suspended payments, plus late interests. The substance of its obligation is hence not affected.

All «*terms relating to the early termination* [of a netting agreement]» are covered and protected by the safe harbor of Article L. 211-36-1 of the M&F Code. Members of the working group consider that Section 2(a)(iii) of the French Law Master Agreement are terms relating to the early termination - significantly after the modification made in the French law version linking the effect of Section 2(a)(iii) to a decision to terminate. As such, rights to be exerciced pursuant thereto should benefit from the favorable financial netting regime.

(b) Notices, electronic signature and evidences

Evidences. As mentioned above, pursuant to Article L.110-3 of the Commercial Code, evidence is free as between professional merchants (*commerçants*), *i.e.* proof of the existence and content of an agreement may be brought in Court in any way. Our assumption is that most market participants using the French Law Master Agreement to document derivatives transactions, are professional merchants dealing with such derivatives in the context of their business activity.

In the residual situations where a French Law Master Agreement would be entered into between two parties which do not both act as professional merchants, the asymmetric rules applicable to «mixed» agreements (*i.e.* agreements entered into between one party acting as a professional merchant and

[49] *Free translation of Article 1170 of the Civil Code: «Any clause which deprives the essential obligation of the debtor of its substance is deemed unwritten».*

another party which does not act as such) or to «civil» agreements (*i.e.* agreements concluded between two parties neither of which are acting as professional merchants) should be applied:

- a party which is not a professional merchant will be allowed to bring evidence against a professional merchant, by any means; whereas

- the same party or a party which is a professional merchant, will only be allowed to bring evidence against a non-professional merchant by complying with the rules of the Civil Code. Such rules are briefly detailed below.

Such rules of the Civil Code, to be applied outside of business relationships, are also pretty flexible:

- Articles 1358 and 1359 of the Civil Code respectively state that 1/ evidence of facts may be brought by any means, and that 2/ unless impossible or impracticable, evidence of contractual obligations relating to an amount higher than €1,500 should be made in writting.

- Article 1365 of the Civil Code provides that written evidence «*consists of a series of letters, characters, numbers or any other signs or symbols endowed with an intelligible meaning, whatever their medium*». The scope of the definition set by this Article of written evidence is so broad that it includes a great number of media as written evidence. Written evidence no longer requires hard copies and may consist of other types of media.

- Consequently, the question is not whether providing hard copies is the only way to provide written evidence. The question is merely about the hierarchy of probative value between the different types of written medium, including hard copies and electronic media. In that respect, and as already indicated above, Article 1366 of the Civil Code provides that «*the electronic medium has the same probative value as hard copies, provided that the person from whom it originates can be duly identified and that it is established and maintained in suitable conditions as required to preserve its integrity*». The use of electronic signature (as described above) involving a certifying third party, will meet those requirements.

- Furthermore, the rule laid down by Article 1359 of the Civil Code, *i.e.* the requirement of written evidence for legal acts relating to an amount or a value exceeding €1,500, is disapplied «*in the event of a material or moral impossibility to provide written evidence, if it is customary not to draw up any written document or when the written evidence was lost due to a force majeure event*».

- In addition, Article 1361 of the Civil Code provides that written evidence may be supplemented by a commencement of written evidence supported by another type of evidence. Pursuant to article 1362 of the Civil Code, a commencement of written evidence will be constituted by any written item which, originating from the disputing person or the person whom it represents, provides prima facie evidence of the fact which is alleged.

Notices. Actual receipt of any notice served in accordance with the terms agreed upon by parties to a French Law Master Agreement is an issue of *fact* which may hence be proved by any type of evidence.

Occasions in real life where strict compliance with such contractual provisions happen to be impossible or impracticable, are however not rare. If the addressor is able to demonstrate, through any mean (*e.g.* a bailiff's statement, testimonies or even photographies) that the addressee has actually received the relevant notice, such notice should be considered as valid and effective, notably on the basis that contracts should be performed in good faith under French law.

(c) Force majeure

(i) Ordinary law of force majeure

Under French law, when a contract does not contain any provision relating to *force majeure* and that its other provisions do not exclude, totally or partially, the statutory regime of *force majeure*, such regime will be applied. When applying, *force majeure* is subject to the following conditions:

- the event must be *external* to the debtor, *i.e.* outside its control and not attributable to it;

- the event must be reasonably *unpredictable* at the time of conclusion of the contract; and

- the event must occur in an *uncontrollable* manner (the event must be inevitable and the debtor cannot prevent its occurrence), its effects should be beyond its control (the consequences of the event are insurmountable for the debtor who is unable to take any remedial measures) and it must be the very reason preventing the debtor from fulfilling its obligation. The impossibility for the debtor to perform its obligation must be absolute, *i.e.* it does not suffice that performance becomes more difficult or more costly.

A contract can adapt the statutory regime of *force majeure*. Its provisions can list events that parties agree among themselves to regard as *force majeure*, including events that would not otherwise qualify as f*orce majeure* under the statutory regime. Such provisions can also provide for the legal and financial consequences that parties agree to apply to such a contractually defined *force majeure*. Where such provisions broaden the statutory regime of *force majeure*, parties should simply bear in mind that such provisions could amount to contractual limitation of exclusion of liability and therefore need to comply with rules of the Civil Code governing the validity of such limitations or exclusions. Also regarding contracts entered into with non professional, regulation on abusive clauses may apply.

(ii) Force majeure in the French law version of the ISDA 2002 Master Agreement

The provisions of the French Law Master Agreement relating to *force majeure* (Section 5(b)(ii)) are identical to the same provisions of the English or New York law versions of the 2002 ISDA Master Agreement.

A «*Force Majeure Event*» is notably constituted once all solutions to remedy the situation have been implemented, following a «*force majeure event*» or an «*act of state*», (i) a party is «*prevented*» from performing any obligation to make a payment or delivery in respect of such transaction, from receiving a payment or delivery in respect of such transaction or from complying with any other material provision of the agreement; or (ii) it becomes «*impossible or impractical*» for this party so to perform, receive or comply. The *force majeure* event must be beyond the control of one party and the person invoking it must have attempted «*all reasonable efforts*» to overcome the prevention, impossibility or impracticability resulting from the *force majeure* event. The agreement specifies that reasonable efforts do not require the party to incur any loss, «*other than immaterial, incidental expenses*». The occurrence of the *force majeure* event allows the affected party to suspend its obligation for a waiting period (that can last 8 business days) before having the right to terminate the affected transactions.

French law would fully respect the contractual provisions of the French Law Master Agreement relating to *force majeure*. In this regard, we can note that:

- the ISDA 2002 Master Agreement was drafted in such a way that the qualification of *force majeure* for a same event is likely to vary depending on specific cases. This approach will be respected by French law. The analysis of *force majeure* by French courts is made on a case-by-case basis and no event can be considered a *force majeure* in abstract.

- The terms «*force majeure event*» and «*act of state*» are not defined by the ISDA 2002 Master Agreement. French law will respect this and will not consider these terms as having a unique definition known to the parties. Rather, such facts will be identified from their characters, as described in the ISDA 2002 Master Agreement.

- The French Law Master Agreement and the documentation of each Transaction will be considered altogether to determine whether a *force majeure* event has occurred and especially if the disruption must lead to an adjustment of the terms of the transaction, in application of the relevant technical definitions applicable to the transaction, or if it reveals an impossibility of execution, constituting a *force majeure* event. For example, for an equity derivative Transaction, which terms incorporate the 2002 ISDA Equity Derivatives Definitions, it will be necessary to determine whether the disruption constitutes an Additional Disruption Event such as a Failure to Deliver, Hedging Disruption or

Increased Cost of Hedging, as defined in such Definitions. If this is the case, the adjustments set out in the contractual provisions will be applied and this event will not constitute a *force majeure* event.

- As per the terms of the ISDA 2002 Master Agreement, a *force majeure* event can be applied in an anticipated manner, *i.e.* the parties may, for example, determine that a scheduled future payment is affected without having to wait for the date on which the payment is actually due.

- The *force majeure* event of the ISDA 2002 Master Agreement refers to «*impracticability*», which seems to be a less restrictive standard than «*impossibility*». However, the ISDA 2002 Master Agreement maintains the requirement that the performance of an obligation (obligation to pay, to make or receive a payment or delivery) had been «impracticable», which seems sufficient to characterize *force majeure*.

Lastly, French law will recognize the provisions of the ISDA 2002 Master Agreement which provide for the suspension of obligations in the occurrence of a *force majeure* event and the right of the affected party to terminate the Agreement or the affected Transactions, following a waiting period. It will also recognize the provisions of the ISDA 2002 Master Agreement establishing the *force majeure* event as a termination event, for the benefit of the party entitled to invoke it.

2.1.2 - Articulation of the French Law Master Agreement with all other ISDA documentation

We will make this analysis in respect of both ISDA «Definitions» and «Protocols».

2.1.2.1 - ISDA Definitions

In addition to the master agreements, ISDA publishes a rich and diverse literature, the most emblematic figure of which is a set of defined terms, called «Definitions» which booklets set, asset class by asset class, the customs in force and the standard terms in use on each particular market which each Definitions booklet refers to:

- FX and Currency Definitions, for interest rate and currency derivatives;
- Equity Definitions, for equity, baskets, indexes or volatility indexes derivatives;
- Credit Definitions, for credit derivatives;
- Commodity Definitions, for commodity derivatives of all kinds (bullions, energy, greenhouse gas emission quotas, agricultural commodities, etc.);
- Government Bonds Definitions, for transactions on sovereign securities;
- Property Index Definitions, for real estate derivatives;
- Inflation Definitions, for derivatives on inflation indices;
- etc.

These booklets are regularly updated. They represent a considerable amount of work, and have no real equivalent in the world.

This remarkabe and unique character has very early led market participants on the French domestic market to make a broad use of such Definitions when documenting their Transactions, even when using the domestic AFB/FBF Master Agreement. The usual way to achieve this is to include a «*bridge*» provision incorporating by reference the relevant booklet of Definitions in the AFB/FBF master agreement or in the Confirmation of the relevant Transaction.

ISDA Definitions are booklets of standard terms, a sort of dictionary, and template Transactions Confirmations. They are not contracts. As such, they do not include any governing law provision. The law applicable to the Definitions is the governing law of the agreement incorporating the Definitions by reference. Having said so, all such Definitions have - at least, until now - been drafted by Anglo-Saxon (and most of the time English) counsels, with the sole purpose of being used with an English or New York law ISDA Master Agreement. In recognition of this, the bridge provisions used in AFB/FBF often provide that the Definitions, although incorporated by reference in a French law agreement, will be interpretated in accordance with English law.

Such a dual link, or «split» (*dépeçage*) of the contract, insofar as it is carried out for a clearly detachable part of the whole, is perfectly conceivable and valid under French law.

However, it seems to the working group that the publication of the French Law Master Agreement now requires to go further and to ask ourselves whether such a split (*dépeçage*) is necessary when parties use the new French Law Master Agreement. This question comes down to whether there is any downside to subject these Definitions to French law and to use them with the new French Law Master Agreement in the exact same way parties would do when using any other versions of the ISDA 2002 Master Agreement, *i.e.* without indicating any specific law, distinct from the governing law of the Master Agreement, for the purpose of interpretrating the Definitions.

This question obviously requires a careful analysis of the provisions of the Definitions to ensure that they do not contain provision contrary to French law.

This is a huge piece of work which the working group was willing to undertake to the fullest extent. This work will most certainly have to be supplemented. But we have concentrated on the most complex and widely used Definitions. The following developments detail our analysis. It was made with two main considerations in mind which, based on our collective experience, appeared as the two most frequent questions asked about the Definitions, namely:

- the risk of potestativity, and

- the risk of indetermination or indeterminability.

Under these two angles, our analysis conclude that all Definitions reviewed are valid and enforceable under French law.

(a) Specificities of the Credit Derivatives Definitions

Compared to most other derivatives Transactions which pay-off profiles are triggered by the variation of economic parameters (*e.g.* levels of interest rate, exchange rate, index rate or stock price) or of a fact (climate related data), credit derivatives stand as a separate category of derivatives. Their payment profile is governed by legal concepts. The payer owes the protection purchased by the buyer if, and only if, one of the following three events occurs, and is made public, in relation to the third party which their Transaction relates to:

- a Bankruptcy,

- a Restructuring,

- a Failure to Pay, Repudiation/Moratorium.

These derivatives, which are relatively recent (it is generally considered that the first of the kind was concluded *circa* 1995), received ISDA's attention very early. ISDA published two versions of Definitions relating to credit derivatives, in 2003 and in 2014. These ISDA 2003 and ISDA 2014 Credit Derivatives Definitions have, like any other Definitions, been drafted by Anglo-Saxon counsels for confirming credit derivative Transactions governed by English or New York law ISDA Master Agreements.

The overwhelming majority of credit derivative Transactions across the world, including those relating to French companies, are currently governed by English law. Submitting the Credit Definitions to French law when they are incorporated in the French Law Master Agreement, therefore raises a legitimate question, in so far credit derivatives are based on legal concepts. Should we fear that credit derivative Transactions governed by the French Law Master Agreement would not be considered by the market as «fungible», or at least comparable, to the same credit derivatives Transactions governed by an English or New York law Master Agreement? Is there a risk of illiquidity for market participants who would chose French law and would as a result not be able to easily return their positions on the market? Should they take the view that credit derivatives Transactions governed by the French Law Master Agreement cannot back-to-back or hedge same Transactions governed by the English or NY Law Master Agreements, and *vice versa* (risk of «mismatch»)? Should they incorate a «bridge» provision ?

The working group does not think so, for a series of reasons.

- The key legal concepts on which credit derivatives Transactions are based and priced upon, are defined in an extremely precise manner in the ISDA Credit Derivatives Definitions, in such a way that these legal concepts are in fact «contractualized». These concepts are:

- Credit Events (Bankruptcy, Restructuring et Failure to Pay),

- Successor, et

- Reference Obligation and Substitute Reference Obligation.

Obligations under a credit derivative Transaction do not so much depend upon whether the event has *legally* occurred, but upon whether *contractually* what is provided for in the Definitions has happened or not. And such Definitions are very detailed. Each term is defined in sometimes pages long definitions, together with a great profusion of details and precisions. It is worth noting, that for a particular Transaction, such terms may be amended and supplemented by the parties who can extend or limit a definition. Such extensions or restrictions then determine the cost of the credit protection bought by the buyer. Only the terms contractually agreed, in such a precise way, command the Transaction's pay off - not abstract legal concept or statutory definitions.

- While these key legal concepts were drafted by Anglo-Saxon legal counsels, the credit derivatives market is a global market. Moreover, the underlying entities subject to credit protections governed by the Definitions («Reference Entity») can be located anywhere in the world - not just in the United Kingdom. It is very usual to enter into credit derivatives transactions on underlyings having their registered offices in the United States, Europe, Asia or the Middle East. Authors of the Credit Derivatives Definitions have ensured that these concepts were drafted in a sufficiently broad way to allow the writing of credit protections in respect of as many entities as possible in the world, whichever their own governing law can be. What matters is the agreement of the parties, and whether in each relevant applicable jurisdiction what they have agreed, occured or not. For instance the definition of Bankruptcy in the Definitions covers a very large number of situations, including a number of procedures unknown in English law.

- More importantly, for credit derivatives related to the most heavily traded underlying entities in the world - *i.e.* the Transactions for which liquidity and fungibility issues are the most critical - ISDA has radically changed the structure of its documentation in 2009. Henceforth, it is no longer up to the parties themselves to determine whether a Credit Event has occurred or not in respect of the Reference Entity, but to an independent third party. These independent third parties are expert committees coordinated by ISDA known as *Determination Committees* («DC»). They are composed, at regional level, of 15 market representatives and often include legal counsels and lawyers. They consider all facts occured in respect of a particular Reference Entity they are asked to opine about, and determine whether a Credit Event in relation to such Reference Entity has occured or not. Decisions of the DC, which generally require a qualified majority vote of its members, are taken without taking into account the law applicable to a specific transaction. Decisions of a DC about a Reference Entity will consider if pursuant to the law of Reference Entity's *personal status,* the Definitions are met or not. Their decisions are binding on market participants using ISDA documentation. We mean that if

the competent DC denies the occurrence of the relevant event, none of the credit protections written in ISDA on the relevant Reference Entity can be triggered. And, simetrically, if DC determines that this event has occurred, no seller of protection will be able to avoid performing its obligation on the basis that the legal English concept means something else than what the Definitions provide for.

The ISDA procedure is quite detailed. For example, in the most rare occasions where a DC would fail to agree, the Definitions provide for an «external review» to be carried out. The same question that the one asked to the non conclusive DC, will be asked to a panel of three independent arbitrators. The rules of conduct set by ISDA expressely provide that the panel is due to take a decision without regard to the law applicable to a specific transaction. They provide that: «*External Reviewers will interpret the Reviewable Question in accordance with the Relevant Governing Law. Any Decision made by the External Reviewers will be made without regard to the governing law of any Relevant Transaction*». This is a key provision for our question. This Relevant Governing Law is defined by ISDA as:

- the Law of the State of New York, if the transaction is carried out on the American markets; and

-English law, if the transaction is carried out on the Asian, European or Middle Eastern markets.

In other words, the DC will examine the questions submitted to it solely from the point of view of English Law or of the Law of the State of New York, this notwithstanding the fact that French Law is the governing law of the Master Agreement.

We have no reason to believe that the choice expressed by the parties to the French Law Master Agreement to unwind their transactions in accordance with such determinations made by the ISDA DC would not be valid and could not produce its full effects under French law.

The parties using the French Law Master Agreement can therefore simply insert the ISDA Credit Definitions in their Schedule or in the Confirmations of their transactions, in the exact same way they would do if it were an English or New York law ISDA Master Agreement. And they are assured, at least for these most important transactions, that this choice of French law will not have any disruptive effect nor will it fragment the liquidity of their portfolios.

(b) Validity of ISDA Definitions under French law

It was not possible, in the timeframe given to our working group to conduct this work, to review and discuss each and every ISDA Definitions. They are many and it is a huge piece of market litterature. We have instead determined to focus our energy on such Definitions that are the most complex and more frequently used. And based on our collective experience, we believe reasonable to consider that it would be very unlikely to find in any Definitions not reviewed an issue of principle which is not discussed and resolved below.

The Definitions which have been reviewed by the working group and which are discussed below are the following:

- the 2006 ISDA Definitions, in their initial version, without their updates;

- the 2002 ISDA Equity Derivatives Definitions;

- the 1998 ISDA FX and Currency Option Definitions; and

- the 2005 ISDA Commodity Definitions, without their appendices.

This detailed analysis of the Definitions revealed that, among all the provisions that those booklets include, the only one which attention should be paid to when it comes to enforceability under French law, is the significant flexibility left to one party to the agreement (ISDA refers to the calculation agent, but in practice, one of the parties is frequently appointed to perform these functions) to make certain calculations, statements, determinations or adjustments of the financial parameters of the agreement upon the occurrence of certain events.

The two questions we therefore asked ourselves were 1/ whether the fact that these functions are left to one of the parties and 2/ whether the fact that the agent has discretionary powers in the assessment and in the performance of its mission, could lead to consider that the obligations arising from Transactions incorporating the Definitions are *indeterminable* or subject to potestativity?

(i) Can ISDA Definitions be challenged on the ground of «potestativity»?

The risk that the validity of the French Law Master Agreement or the ISDA Definitions incorporated therein be challenged on the grounds of potestativity can be set aside, for the reasons explained in paragraph 2.1(A)(1)(b) above. We will not come back here on this issue already discussed in detail above. We would kindly refer our reader to the above sections.

(ii) Do ISDA Definitions create obligations that cannot be «determined» when entered into?

According to Article 1163 of the Civil Code, as amended by the 2016 reform of French contract law, the object of any contract must be a determined *or determinable* obligation, *i.e.* an obligation which can be deduced from the contract, either by reference to market practice or to what parties have done in the past, and so without requiring a new agreement between them. When a calculation or a determination is to be made by a party under the reviewed ISDA Definitions, can the obligations affected by the determination be considered to have always been determinable?

For being *determinable* an obligation does obviously not need to be exactly knowed and quantified at the time it is entered into. It suffices for its *quantum* to be able to be determined in an objective way.

The ISDA Definitions that we have reviewed, all provide for *determinable* obligations. The Calculation Agent has admittedly broad powers, but it has an obligation to base its calculations or adjustments on objective elements which are not subject to the parties' influence. In a limited number of provisions, it enjoys greater flexibilities, but not to a point where it makes the relevant obligation non *determinable*.

Here below are a series of provisions extracted from the Definitions, where such greater flexibility is identified and discussed.

2006 ISDA Definitions

Most of the provisions of the 2006 ISDA Definitions refer to objective elements and do not raise any issue.

Thus, for the determination of a rate, if the initial method of determination set in the Definitions cannot be applied, there are three types of fallbacks.

1/ Quotation by reference banks

Example: Section 7.1(f)(iv) «EUR-EURIBOR-Reference Banks»: «*The Calculation Agent will request the principal Euro-zone office of each of the Reference Banks to provide a quotation of its rate. If at least two quotations are provided, the rate for that Reset Date will be the arithmetic mean of the quotations. If fewer than two quotations are provided as requested, the rate for that Reset Date will be the arithmetic mean of the rates quoted by major banks in the Euro-zone, selected by the Calculation Agent, at approximately 11:00 a.m., Brussels time, on that Reset Date for loans in euros to leading European banks for a period of the Designated Maturity commencing on that Reset Date and in a Representative Amount.*»

2/ Fallback to another method

Example: Section 7.1(f)(ii) «EUR-EURIBOR-Act/365»: «*If such rate does not appear on the Reuters Screen EURIBOR365 Page, the rate for that Reset Date will be determined as if the parties had specified «EUR-EURIBOR-Reference Banks» as the applicable Floating Rate Option.*»

3/ Determination by the calculation agent

Example: Section 7.1(w)(iv) «GBP-ISDA-Swap Rate»: «*If such rate does not appear on the Reuters Screen ISDAFIX4 Page, the rate for that Reset Date will be determined by the Calculation Agent.*»

Clauses 1) and 2) do not raise any issue. Clause 3) gives the calculation agent some flexibility, although such flexibility may be limited by clarifications such as «*having regard to comparable indices then available*» (example: art. 7.1(a)(v) «AUD-BBR-BBSW-Bloomberg») or «*using a representative rate*» (example: Section 7.1(k)(ii) «ILS-TELEBOR-Reference Banks»).

A party may also have flexibility in making a determination in a limited number of situations (for instance, Section 13.9 specifies that the Settlement Amount shall be determined «*by the Seller in good faith and in a commerciallly reasonable maner*»).

None of such clauses should be considered as purely potestative and they should not make it possible to consider that the obligations are not determinable.

1998 FX and Currency Option Definitions

Most of the provisions of the 1998 FX and Currency Option Definitions refer to objective elements that do not raise any issue. Some clauses, however, give the calculation agent flexibility.

Examples: Section 1.16(e) «Spot Rate»: «*as determined in good faith and in a commercially reasonable manner by the Calculation Agent*»; Section 5.1(g) «Calculation Agent Determination of Disruption Event»: «*the Calculation Agent, after consultation with the parties or the other party, will determine in good faith whether a Disruption Event applicable to a Transaction has occurred*»; Section 5.2(c)(ii) «Calculation Agent Determination of Settlement Rate»: «*the Calculation Agent will determine the Settlement Rate (or a method for determining the Settlement Rate), taking into consideration all available information that in good faith it deems relevant).*»

The reference in some definitions to the market practice (for example in Section 1.23 «Rounding», where rounding must be made «*in accordance with the relevant market practice*») makes the obligation determinable under the terms of article 1163 of the Civil Code, which allows the parties to refer to customs[50]: «*the performance is determinable when it can be deduced (...) by reference to customs (usages)*». The derivatives market is, moreover, a market which has many well established market practices and recommendations, in particular those published by ISDA.

2002 ISDA Equity Derivatives Definitions

In some provisions of the 2002 ISDA Equity Derivatives Definitions, the calculation agent has significant flexibility.

For example:

- in Sections 1.44 (Knock-in Event) and 1.45 (Knock-out Event), the calculation agent may be required to settle a dispute arising between the parties in relation to the occurrence of an Activating Event;

[50] *Article 1163 of the Civil Code.*

- in Sections 6.3(a), 6.6(a)(A), 10.6 and 11.1(a), in the event of a Market Disruption Event, it is up to the calculation agent to determine whether or not the event is «significant»;

- in case certain events occur (suspension of the listing of a share, merger of the issuer, suspension of trading, etc.), the calculation agent must adjust some terms of the contract.

While some of these provisions limit the intervention of the calculation agent, who can therefore have «*to preserve for each party the economic balance*» (*e.g.* in Sections 6.8(d), 11.3, 12.2(f), 12.3(e) and 12. 6(c)(iii)), other provisions allow the calculation agent to make a determination «*at its discretion*» (*e.g.* in Sections 9.4, 12.5(b)(ii)) and 12.7(b)(i)(A)(3)) or «*as the calculation agent deems appropriate*» (*e.g.* in Sections 11.1(b)(A), 11.2(b) and 11.2(c)).

In some cases, the power to decide may be given to the parties, for instance to determine a Cancelation Amount (*e.g.* in Section 12.8, which provides that the party «*will act in good faith and use commercially reasonable procedures in order to produce a commercially reasonable result*», or that it «*may take into account any relevant information, including, but not limited to, (...)*») or for certain Additional Disruption Cases (*e.g.* in Sections 12. 9(a)(vi) and 12.9(b)(vi) for the Increase in the Cost of Hedging, in Section 12.9(a)(vii) for the Loss Related to the Securities Borrowing and in Sections 12.9(a)(viii) and 12.9(b)(v) for the Increase in the Cost of Borrowing).

However, non of such clauses should be considered as purely potestative and they should not be considered as causing the obligations to be non determinable.

2005 ISDA Commodity Definitions

Most of the provisions of the 2005 ISDA Commodity Definitions refer to objective elements and do not raise any issue.

Section 4.5, however, grants the calculation agent very broad powers, ranging for example from pricing, to the determinations of the amounts to be paid in the event of a cash settlement or at maturity. The calculation agent is also in charge of determining whether a Market Disruption Event has occurred or not, selecting reference banks in order to obtain quotations, etc.

In the examples mentioned above, it should be noted that the main obligation of the agreement (a particular derivative Transaction) is fully determined. The calculation agent will only have flexibility in special circumstances, in particular if an external event requires the adjustment of some terms of the contract in order to preserve the economic balance initially defined by the parties. In this case, adjustments are most often achieved by reference to objective elements, external to the parties, so that the discretion of the calculating agent is limited. And even where such latitude exists, all ISDA Definitions provide that the calculation agent has an obligation to act in good faith and in a commercially reasonable manner (*e.g.* Section 4.14 of the 2006 ISDA Definitions, Section 4.14 of the 2006 ISDA Definitions: «*Whenever the Calculation Agent is required to select banks or dealers for purposes of making any calculation or determination or select any exchange rate, the Calculation Agent will make the selection in good faith after consultation with the other party (or the parties if the Calculation Agent is a third party), if practicable, for purposes of obtaining a representative rate*

that will reasonably reflect conditions prevailing at the time in the relevant market or designating a freely convertible currency, as the case may be. Whenever the Calculation Agent is required to act, make a determination or to exercise judgment in any other way, it will do so in good faith and in a commercially reasonable manner»). Acting in a commercially reasonable manner is the standard for performing obligations under French law. It means at the very least, acting in accordance with market practises. The discretionary power of the calculation agent is therefore a power to choose, among such market practices and customs, the most relevant one to reflect the parties' intent and the contractual balance.

When one of the parties is the calculation agent, the other party may therefore challenge a determination that was not made in good faith and in a commercially reasonable manner.

ISDA is currently working on new 2020 ISDA Definitions, which aim at consolidating the 2006 ISDA Definitions and their successive amendments, to include some recent changes relating to indexes, and to introduce some changes, notably to make calculations and determinations from the calculation agent even more objective. Indeed, it is common for the parties to include in the Schedule to their master agreement or in the Confirmations of their Transactions more details about the way calculations or determinations should be made, or to include a dispute mechanism in the event a party disagrees with a calculation or determination made by the calculation agent or the other party.

But even without such additions, the validity of the ISDA definitions should not be challenged under French law on the grounds of «indetermination». The good execution of the contract can be controlled and the calculation agent or the party making a calculation or determination must always be able to justify its calculation or determination. In this respect, having the ISDA Definitions being governed by French law should not lead to a different result for the parties than what would have been the case had the definitions been governed by English law.

The parties to an English law ISDA 2002 Master Agreement who wish, by signing the Amendment Agreement (March 2020) published by ISDA, to transform this agreement into a French Law Master Agreement can therefore do so without fearing the validity of the use of the ISDA Definitions in French law being challenged, nor for their current transactions entered into under the English law ISDA master agreement (the *legacy*), nor for their future transactions.

2.1.2.2 - ISDA Protocols

ISDA has in recent years multiplied the number of «Protocols» as a most convenient way for market participants to amend or keep updated their documentation. This technique is making use of the cloud. It is a pretty simple mechanics. Once an ISDA working group has agreed on a stable and balanced draft proposal to either manage the effect of a market event (such as the disappearance of IBOR indices), to comply with a regulatory change (Resolution, EMIR / Dodd Franck Act) or to implement a new market practice (new updated set of Definitions), this proposal is put online by ISDA and each ISDA member has the option to officially mark their agreement by «adhering» publicly on the ISDA Website to the terms of such proposal. If two ISDA members having entered into an ISDA Master Agreement and Transactions turn out to have in parallel adhered to the said proposal, the terms of such proposal shall immediately be deemed to consitute an amendment to

their existing contract and Transactions. Such paralel unilateral adhesions will constitute a valid amendment agreement under French law.

There is a great variety of Protocols and their scope extends beyond ISDA members and the sole ISDA Master Agreements.

Most of these protocols were published before the publication of the French Law version of the ISDA 2002 Master Agreement and therefore do not expressly take it into account. The question therefore arises of whether the Protocols are enforceable under French law and can be used with a French Law Master Agreement.

Protocols operate on the basis of adherence of the counterparty by submitting a letter along with the payment of a fee to ISDA. If the other party also adheres to the Protocol, the agreement covered by the Protocol is automatically amended. This is an amendment of the agreement between absent persons. The first of the counterparties to adhere makes an offer to amend the agreement, which is accepted by the other counterparty (even if it does not necessarily know that it is the offeree and not the offeror, or that it has not verified the adherence of its counterparty before its own adherence or it has adhered before ISDA validates the adherence of the first counterparty).

Such agreement amendment mechanism is based on the offer and acceptance mechanism and is fully valid under French law.

2.2 - The interpretation of the French Law Master Agreement by French courts

2.2.1 - Interpretation of the French Law Master Agreement

In the presence of complex transactions and confronted to the necessity, as the case may be, to give a clear meaning to certain provisions, are the rules governing the interpretation of contracts in French law likely to affect the binding force of the French Law Master Agreement and its economy (interpretation based on external elements; interpretation based on the reasonable person criteria; interpretation in favor of the debtor of the obligation in the event of persistence of doubt on the meaning of the clause…)?

The purpose of the rules governing the interpretation of contracts set out in Articles 1188 *et seq.* of the Civil Code is to provide French courts with tools enabling them, when necessary, to give a clear meaning to the intention the parties wanted to express in their agreement.

However, the prevailing principle under French law is the binding force of agreements[51]. Both the role and the power of French courts when interpretating any agreements are heavily regulated.

First, the agreement can only be interpreted if its provisions are not clear and precise, so as to avoid distorting the nature of the transaction[52]. This is a public policy rule, which is imperative for the parties and the courts and to which it cannot therefore be contractually derogated.

It is only in the absence of clear and precise provisions of the agreement that French courts can interpret the terms of a contract and seek the common intention of the parties[53]. In this process, French courts have to interpret the agreement in light of its terms, but also with regard to equity, customs and the law, in accordance with Article 1194 of the Civil Code.

The reference made to customs in Article 1194 of the Civil Code, in the section of the Civil Code related to the binding force of contracts, is of paramount importance in the area of derivatives, as it uses professional practices as an objective source of interpretation of the terms of the agreement. This is confirmed by Article 1163 of the Civil Code which provides that parties' obligations to an agreement must be considered as determinable when they can be deduced from the contract or by reference to customs, without a new agreement of the parties being necessary.

[51] *Articles 1103 and 1193 et seq. of the Civil Code.*

[52] *Article 1192 of the Civil Code.*

[53] *Article 1188 of the Civil Code.*

When asked what could constitute a custom in the area of derivatives, Mr. Paul-Louis Netter, the Chairman of the Paris Commercial Court, indicated on several occasions that for any issue relating to the interpretation of the terms of the French Law Master Agreement and, more generally, for any question of interpretation in connection with the derivatives markets, the International Chamber of the Paris Commercial Court will undertake a thorough review of the English case-law relating to such provision, before making a decision on the substance: «*We fully appreciate that legal certainty is a key issue for market participants. I want to make this point clear: in any situation where there is an issue regarding the interpretation of a particular section of the ISDA master agreement (or any provision of another international market netting agreement), the Paris Commercial Court will first look for and examine previous court decisions on that section or provision. We will seek to ensure consistency and predictability to the greatest extent permitted by French law and by the specificities of the case. In other words, the Paris Commercial Court does not see itself as a new 'Christopher Columbus' in the derivatives markets. Rather, we intend to offer a solid and stable alternative forum for global participants, with a sense of continuity and legal certainty*»[54].

In doing so, the International Chamber, which have jurisdiction over disputes relating to derivatives, intend, to the extent justified by the context of the case referred to them and the compatibility of these solutions with French law, to ensure maximum predictability and continuity to market participants, in comparison with English case law which led to current professional pratices.

A French court interpreting an agreement relating to derivatives would therefore have to interpret it on the basis of concrete and objective elements, which are the terms of the agreement and professional customs, at the risk of distorting its meaning or purpose.

2.2.2 - Information obligations imposed on investment service providers

Two specific risks have been mentioned as qualifications to the conclusion of a French Law Master Agreement.

On the one hand, was put forward the risk of more stringent obligation when it comes to duty to inform, warnings or advice to the counterparty acting as an investment service provider, outside the framework of ethical obligations provided for by the MiFID Directive, considering, notably, the obligation to enter into contracts in good faith,

[54] *IQ ISDA, august 2020, p. 30.*

the status of the counterparty (informed counterparty) or the nature of the transactions (complex transactions).

To this argument, it can be answered that the question of the applicable law to a contract is a separate question from the one regarding the applicable law to the parties to this contract. Indeed, the first one depends on the consent of the parties to said contract while the second depends on the status applicable to these parties. Also, the second one will not arise in the same terms depending on whether the parties are French, Spanish or German, for example. This explains why taking into consideration the obligations imposed on one or the other of the parties to an ISDA 2002 Master Agreement, pursuant to their status, is irrelevant in regards to the choice of law applicable to the master agreement.

On the other hand, was put forward the risk that, in the presence of complex products, a case law based on MiFID would develop, leading to submit the marketing of these products to the regime of investment recommendations.

To this argument, it may be answered that the question is not specific to French courts and French law. It is closely dependent on the behavior of professionals which can be analyzed by any judge, retrospectively, as having constituted personalized investment recommendations. Moreover, European case law adopted an *in specie* approach, in view of the circumstances governing the service offering.

French case law is not imposing to financial intermediaries a duty to advise because of the sophistication of the operations or the nature of the products marketed. It is in harmony with European case law which recently reiterated that the national judge cannot adopt an interpretation inconsistent with the objectives of European texts.

2.2.3 - The judiciary organization

2.2.3.1 - Judicial timeframes, deemed excessively lengthy

Any dispute relating to a French Law Master Agreement may be judged within a very reasonable timeframe.

The French law version of the ISDA 2002 Master Agreement provides that disputes arising therefrom shall be subject to the jurisdiction (exclusive or non-exclusive, at the parties' discretion) of the Paris Commercial Court and the Paris Court of Appeal. Both of these Courts have international chambers (3rd chamber of the Paris Commercial Court; Pole 5 Chamber 16 of the Court of Appeal). Two protocols relating to the procedure before these chambers were adopted on February 7, 2018, according to which these chambers are intended to hear «*disputes relating to transactions involving*

financial instruments, market master agreements, contracts, financial instruments and products»; therefore, in practice, these chambers will hear disputes arising from the French Law Master Agreement.

When the parties agree to the application of the protocol to their proceedings[55], a binding procedural timetable will be adopted, the purpose of which is to pre-determine the main stages of the proceedings, including the date at which the judgment will ultimately be handed down. The adoption of such timetable not only ensures some predictability for the parties but also a simpler and faster handling of the case, without successive referrals. It should be added that the Judges of the two international chambers have insisted on their willingness to decide on cases in shorter timeframes than during traditional case handling (the first judicial decisions under the protocols were rendered approximately one year after the proceedings were initiated).

Finally, it should be recalled that pursuant to Article 514 of the Code of Civil Procedure (as amended by Decree No. 2019-1333 of 11 December 2019), «*first instance decisions are provisionally enforceable by right unless otherwise provided for by the law or the rendered decision*». This amendment should lead, in practice, to a significant reduction in the number of appeals lodged and therefore in the overall time dedicated to handling financial disputes (some cases will stop at the first instance stage; others will still go to the appeal stage but will be rendered more quickly considering the smaller number of proceedings before the Court).

It will therefore be possible for International Chambers to handle French Law Master Agreement disputes within perfectly reasonable timeframes.

To ensure that this is the case, the HCJP strongly encourages parties opting for the French Law Master Agreement to specify that they (*i*) submit their agreement to the exclusive jurisdiction of the Commercial Court and the Paris Court of Appeal and (*ii*) agree to the applicability of the procedural protocols.

In addition to a faster handling of disputes, the choice of International Chambers offers many advantages.

These Chambers are composed of judges fluent in one or more foreign languages (including at least English) and who are particularly experienced in dealing with economic and financial disputes. If need be, they may also request other specialized judges from any other chamber of the Commercial Court or the Court of Appeal to seat alongside them.

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[55] *It being specified that a potential lack of acceptance of the protocol will not affect the allocation of ISDA disputes to these chambers. See « Les compétences de la CCIP-TC », Philippe Bernard et « Les compétences de la CCIP- CA », François Ancel, Revue Lamy Droit des Affaires « L'attractivité de la Place de Paris – les chambres internationales – fonctionnement et trajectoire » colloque du 14 juin 2019 à la Cour d'appel de Paris, n°152, October 2019, p. 15 and 17.»*

As is the case before English and American courts and arbitral tribunals, the procedural protocols provide for a personal appearance of the parties, the hearing of witnesses and experts and the possibility for the parties to obtain the forced production of documents held by another party in a more systematic way. This type of procedure will therefore be familiar to many international stakeholders.

The protocols provide for an increased use of the English language[56] (possibility to submit documents to the proceedings without translation into French, possibility for foreign witnesses, experts and counsel of the parties to express themselves in English, if they wish so) and for an important place for oral proceedings: «*As an illustration, I would highlight the fact that documents and agreements, together with tape recordings, can be brought before the Paris Commercial Court - as well as the Paris Court of Appeal - as valid evidence in English, with no need for a French translation. Interactions with the court, pleadings, submissions, conclusions, opinions and all hearings can be in English. A greater focus has also been given to hearings: parties will be able to ask experts to be heard by the court and cross-examined by the other party, all in English. Looking ahead, we strongly believe procedural rules globally will further converge and harmonise*»[57].

These protocols are well tried as they have been applied in a number of cases already.

The resort to French courts to settle disputes related to an ISDA agreement will also help to avoid applying for an *exequatur* of a foreign judicial decision in France (which, for judgments from non-EU countries, is generally a lengthy process - several months of proceedings are often necessary - and therefore costly).

2.2.3.2 - The alleged unpredictability of the decisions rendered by trial judges and the stability of the Cour de Cassation's case law

Although the French legal system does not contain the rule of «*precedent*» (as applicable in common law legal systems), French case law is not more unpredictable than that of other legal systems: reversals of its own case law by the *Cour de Cassation* are the exception and trial judges generally render decisions in line with the *Cour de cassation's* case law (particularly in financial matters).

The question of case law predictability will be even less problematic in the context of ISDA contracts related disputes since the judicial decisions will be rendered by the international chambers of the Paris Commercial Court and the Paris Court of Appeal only (see above). This concentration of judges in charge of ruling such disputes will obviously reduce any risk of significant divergences in case law.

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[56] *See « La langue et la représentation devant les chambres internationales », Fabienne Schaller, Revue Lamy Droit des Affaires « L'attractivité de la Place de Paris – les chambres internationales – fonctionnement et trajectoire » colloque du 14 juin 2019 à la Cour d'appel de Paris, n° 152, October 2019, p. 36.*

[57] *IQ ISDA, august 2020, p. 31*

Moreover, the judges composing these chambers have announced that they have no intention of departing at all costs from case law already developed by foreign judges in the context of ISDA disputes (see in particular the developments in section 2.2(A) above). Although not biding French judges, it is obvious that the abundant case law on this subject will be an element taken into account by the international chambers in the disputes that will be submitted to them (even more since the French law version of the ISDA agreement is very close to other existing versions).

Lastly, if ISDA deems it necessary, it will be allowed to assert its position in a given dispute, for example through a voluntary intervention.

WORKING GROUP COMPOSITION

WORKING GROUP COMPOSITION
«REPORT ISDA MASTER AGREEMENT (FRENCH LAW)»

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ANNEX 1

List of questions relating to the use of the French Law Master Agreement and summary of answers of the working group

LIST OF QUESTIONS RELATING TO THE USE OF THE FRENCH LAW MASTER AGREEMENT AND SUMMARY OF ANSWERS OF THE WORKING GROUP

1. Can the provisions of the French Law Master Agreement that grant one of the counterparties the role of calculating, adjusting or setting certain financial parameters of a transaction be qualified as potestative and therefore incur invalidity?

The working group considers that the ISDA provisions it has reviewed which give the power, under often very precise and regulated conditions to one of the counterparties to calculate, adjust or set certain financial parameters of their transaction upon the occurrence of exceptional events cannot be characterized as potestative conditions sanctioned by invalidity.

For more details, see developments *infra* section 2.1(A)(1)(a) and 2.1(B)(1).

2. Is it mandatory to provide an address in France for the «Election of Domicile» clause, even when the counterparties are not in France?

Payment of process agent's fees is not necessary for the French Law Master Agreement.

It is not mandatory to provide an address in France for the «Election of Domicile» provision because the application of this clause is optional. If both parties are located within the European Union, in the absence of such a clause, they can, in any case, benefit from Regulation EC No 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extra-judicial documents in civil or commercial matters, which allows for a simplified service process.

In the context of the use of said regulation, the market practice for a party established in France consists in proceeding with the notification of the concerned legal act (i) by a bailiff in France who will forward the act to its local counterpart in the jurisdiction where the receiving party is established and then (ii) by this local counterpart who will notify the act to the receiving party in the jurisdiction of destination.

For more details, see developments in section 2.1(A)(1)(b)

3. Is the electronic signature of the French Law Master Agreement valid under French law? Is the sending of signed copies in dematerialized format (pdf type) valid under French law?

The electronic signature is valid under French law.

Between persons acting as professional merchants (*commerçants*), sending signed copies in dematerialized format (pdf) constitutes a valid method of evidence under French law as any other method of evidence. If the contract is entered into with a person who is not acting as merchant (*i.e.* a non-professional merchant or *non-commerçant*), sending signed copies in dematerialized format (pdf) will have less probative value than that of signed original copies or of an electronic signature.

For more details, see developments *infra* section 2.1(A)(1)(d) and 2.2(A)(2)(b).

4. Does the silence of a counterparty constitute acceptance of (a) an amendment to the French Law Master Agreement, (b) the Confirmation of a Transaction entered into by telephone or (c) amendments imposed by a change in regulations affecting a counterparty to the French Law Master Agreement?

Under French law, the principle is, as is the case of many other Western legal systems and notably English law, that silence is ambiguous by nature and therefore does not constitute acceptance. Nevertheless, this principle is subject to exceptions – very similar in all the legal systems observed by the working group – if they are provided for by law, customs, business relations or particular circumstances.

Amendments to the French Law Master Agreement must be made in writing, pursuant to Section 9(b) of the French Law Master Agreement. However, if the parties wish to avoid the application of this Section or amend it, it is perfectly possible under French law for the parties to provide in the French Law Master Agreement for a provision considering that the counterparty has accepted an amendment if it remained silent for a reasonable period of time.

Parties may also provide for a provision which deems consent to the confirmation of a transaction entered into by telephone, to have been given if the counterparty remains silent following the receipt of the confirmation. If the parties begin performing their obligations under the transaction, it is possible to consider that such beginning of performance reflects a tacit acceptance of the draft confirmation.

Finally, the silence retained following the sending of an amendment to the French Law Master Agreement or confirmations to reflect or implement legal or regulatory requirements to enable one of the parties to comply with its legal or regulatory obligations may be considered as an acceptance under French law. This solution may be based either on a beginning of performance by the counterparty, or on the binding force of the contract, which also includes implicit obligations resulting from customs and the law.

For more details, see developments *infra* section 2.1(A)(1)(c).

5. Does French law give full effect to the flawed assets theory of Section 2(a)(iii) which allows a contracting party to suspend performance of its obligations when the other party is (potentially) in default?

Yes. Although the flawed assets mechanism does not exist as such under French law, Section 2(a)(iii) of the French Law Master Agreement (amending the standard provision of the 2002 ISDA Master Agreement standard) replicates its spirit as well as its practical effects.

For more details, see developments *infra* section 2.1(A)(2)(a).

6. Which conditions shall notices sent pursuant to the contract satisfy in order to be effective under French law?

The delivery of notices in accordance with the terms agreed upon between two parties to the French Law Master Agreement constitutes a legal fact which may be proved by any means.

In the event that compliance with the strict terms of notification provided for by the parties in the contract could not be respected by either one of the parties, to the extent that such party is able to provide evidence (for example by way of findings by a bailiff, testimonies or photographs attesting to the presentation of the bearer of the notice at the place indicated by the other party for the delivery of notices to it) that it has implemented all possible ways to carry out the notification in accordance with the said contractual terms, then the steps thus taken should be considered sufficient for the purposes of a valid notification under the ISDA French Law Master Agreement, in particular on the basis of the principle of performance in good faith referred to in Article 1104 of the French Civil Code.

For more details, see developments *infra* section 2.1(A)(2)(b).

7. How does the Force Majeure provision of the agreement apply in French law?

French law recognizes the provisions of the French Law Master Agreement which provide for the suspension of obligations in the event of the occurrence of *force majeure* as well as the right of the affected party to terminate the contract at the end of a waiting period.

For more details, see developments *infra* section 2.1(A)(2)(c).

8. Do ISDA Definitions work with a French Law Master Agreement without any amendment? In particular, can provisions granting powers to the Calculation Agent to determine some economic parameters be considered as potestative or render obligations indeterminable?

ISDA Definitions can be seamlessly integrated into the French Law Master Agreement, without having to adapt these definitions to the French Law Master Agreement.

The working group considers that the provisions of the ISDA Definitions granting one of the parties the prerogatives of calculation agent and determination of some economic parameters cannot be called into question on the grounds of potestativity. These provisions cannot be challenged on the grounds of indetermination. Even to the extent that some form of discretion is left to the calculation agent, ISDA Definitions include an obligation to act in good faith and in a commercially reasonable manner.

For more details, see developments *infra* section 2.1(B)(1).

9. Do ISDA Protocols work with the French Law Master Agreement?

The amendment mechanism proposed by the Protocols operates under French law and is compatible with the «offer» and «acceptance» mechanisms.

Adherence by the parties to the Protocol constitutes evidence of their consent to the amendments suggested within the framework of the protocol.

For more details, see developments *infra* section 2.1(B)(2).

10. Can transactions documented by the French Law Master Agreement benefit from prudential treatment on a net basis (article 296 of CRR)?

Yes. The close-out netting mechanism provided for in the French Law Master Agreement fulfils the conditions of Articles 296(2)(a) and 296(3)(a) of CRR relating to the establishment of a single net balance, which allows the transactions governed by the French Law Master Agreement to benefit from the prudential treatment on a net basis, to the extent that this mechanism is also validated by a legal opinion which must meet the conditions of Article 296(2)(b) of CRR.

For more details, see developments *infra* section 2.1(A)(1)(e).

11. How many jurisdictions are covered by legal opinions covering the French Law Master Agreement and the French law ISDA documentation?

As of the date of publication of this report, out of the 69 jurisdictions in which ISDA obtains legal opinions from local legal counsels, 52 cover the French Law Master Agreement in legal opinions issued for the benefit of ISDA members. All EU jurisdictions will be covered in 2020 (including England and Cyprus).

French law collateral documentation is also covered by the legal opinions issued for the benefit of ISDA members.

For more details, see developments *infra* section 2.1(A)(1)(f).

12. Can exchanges between counterparties be taken into account to interpret the contract or determine the intention of the parties?

The principle is that the court can only interpret the contract when its terms are not clear and precise. In such a case, and only in that case, the court shall seek the common intention of the parties. To do so, the court may refer to the exchanges between the parties to determine their common intention. Exchanges between a party and its lawyer will be protected by secrecy.

For more details, see developments *infra* section 2.2(A).

13. Does the court systematically use the «reasonable person» standard of interpretation?

The court is bound not only by the cardinal principle of the binding force of the contract of French contract law but also by the strict interpretation rules of the Civil Code.

The court may only interpret the contract when the clauses are not clear and precise and can only do so by seeking the common intention of the parties. The judge must also interpret the contract in light of equity, customs and the law.

For more details, see developments *infra* section 2.2(A).

14. What is the average timeframe for the International Chambers (at first instance and on appeal) to render their decisions?

The average case processing time is 12 months for a judgement.

For more details, see developments *infra* section 2.2(B)(1).

15. Is the French court bound by previous decisions rendered on the same subject?

The French legal system does not contain the rule of «precedent».

However, even though they are not strictly bound by the decisions of the *Cour de Cassation*, courts render judicial decisions in line with those of the *Cour de Cassation*. Reversals are the exception. In the area of derivatives, the case law is solid and stable.

Case law should be even more predictable in the context of litigation relating to ISDA agreements since the decisions will only be handed down by the sole international chambers of the Paris Commercial Court and the Paris Court of Appeal.

For more details, see developments *infra* section 2.2(B)(2).

16. Does the court take into account the case law on the English law or New York State law ISDA?

The judges composing these chambers have publicly announced that they had no intention of distancing themselves at all costs from the case law already handed down by foreign judges in the context of ISDA litigation.

Without binding them, it is obvious that the abundant case law already rendered on the subject will be an element taken into account by the international chambers in the disputes that will be submitted to them (as the French Law Master Agreement is very close to the other existing versions in English law / New York law).

For more details, see developments *infra* section 2.2(B)(2).

ANNEX 2

The consequences of BREXIT on the exequatur in France of an arbitral award and a judgment issued in the United Kingdom

THE CONSEQUENCES OF BREXIT ON THE *EXEQUATUR* IN FRANCE OF AN ARBITRAL AWARD AND A JUDGMENT ISSUED IN THE UNITED KINGDOM

1- The *exequatur* in France of an award rendered in the United Kingdom

The United Kingdom's exit from the European Union will have no impact on the recognition and enforcement in France of an arbitral award rendered in the United Kingdom, which are and will remain governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 and the specific provisions set out in Book Four, Title Two, Chapters III and IV of the Code of Civil Procedure («CCP»).

A multilateral treaty resulting from the work of the United Nations' Economic and Social Council, the New York Convention now has 161 signatory States. It was signed by France on 25 November 1958 and ratified on 26 June 1959. The United Kingdom acceded to it on 24 September 1975, subject to reciprocity issued on 5 May 1980.

The Convention establishes a common core of simplified conditions for recognition and enforcement within a Contracting State, which shall apply to all arbitral awards made outside the country where recognition or enforcement is sought (or only to awards made by an arbitral tribunal sitting in another Member State in the case of a reciprocity reservation as is the case in the United Kingdom). These conditions, which need not be discussed here, exclude in particular any review of the merits and any requirement of prior *exequatur* at the seat of the arbitration.

The conditions laid down in the New York Convention only constitute a maximum control ceiling which may be lowered in particular in the event of a more favorable local regime for the recognition or enforcement of awards. The preference clause, provided for in Article VII.1 of the Convention, states that its provisions shall not «*deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon*».

In France, the provisions of the CCP governing the recognition and enforcement of arbitral awards made abroad or in international arbitration are more favorable, and therefore take precedence over the provisions of the New York Convention.

In accordance with Article 1514 of the CCP, any foreign award is recognized or enforced in France if its «*existence is established by the party invoking it and if such recognition or enforcement is not manifestly contrary to international public policy*». In practice, the applicant files a request for the *exequatur* of a foreign award at the registry of the Judicial Court of Paris (*Tribunal judiciaire de Paris*), by providing the original or an authentic copy of the award and the arbitration agreement,

as well as a sworn translation of these two documents. The procedure relating to the request for *exequatur* is not adversarial[58]. A decision can be obtained within a few days.

The appeal procedure is contradictory. It is specifically governed by Articles 1525, 1526 and 1527 of the CCP and its strictly procedural aspects are subject to the ordinary law rules of the contentious appeal procedure[59], it being specified, however, that appeals in arbitral matters are by principle non-suspensive, as long as a stay or adjustment of the enforcement can be requested if said enforcement is likely to seriously prejudice the rights of one of the parties[60]. Appeals relating to international arbitration are now directed to the International Chamber of the Paris Court of Appeal (CICAP), *i.e.* the 16th Chamber of Pole 5 (in charge of economic cases) of the Paris Court of Appeal.

As for the conditions for examining an appeal against the *exequatur* of an arbitral award, they are identical to those governing an annulment action against an award rendered in France in international arbitration, by express reference to Article 1520 of the Code of Civil Procedure. Thus, the Court of Appeal may only refuse recognition or enforcement of the arbitral award if: «*1°) the Arbitral Tribunal wrongly declared itself competent or incompetent; or 2°) the Arbitral Tribunal was irregularly constituted; or 3°) the Arbitral Tribunal ruled without complying with the mission entrusted to it; or 4°) the principle of contradiction was not respected; or 5°) the recognition or enforcement of the award is contrary to international public policy*».

2- The recognition in France of a judgment rendered in the United Kingdom in civil and commercial matters after BREXIT

The date of BREXIT, initially set for 29 March 2019, has been postponed several times until 31 January 2020.

The Member States of the European Union and the United Kingdom (the «**Twenty-Eight**») adopted an exit agreement on 17 October 2019, which was validated by the British Members of Parliament on January 9, 2020 and ratified by the European Parliament on 29 Janurary 2020 (the «**Exit Agreement**»). The Exit Agreement provides for a transitional period until 31 December 2020[61],

[58] *Art. 1515 and 1516 of the Code of Civil Procedure.*
[59] *Articles 900 to 930-1 of the CCP.*
[60] *Art. 1526 of the CCP.*
[61] *Exit Agreement, article 126.*

during which the Twenty-Eight will negotiate the terms of their future trade relations (the «**Transition Period**»). During the Transition Period, European Union law will continue to apply[62]. The Transition Period has not been extended[63].

With regard to the recognition and enforcement in France of judgments rendered in the United Kingdom, two time periods must be distinguished.

The first time period runs from the pre-BREXIT period until the end of the Transitional Period, *i.e.* until 31 December 2020. The second time period starts the day after the end of the Transition Period, *i.e.* on 1 January 2021.

2.1 - The enforcement in France of judgments rendered in the United Kingdom in civil and commercial matters during the Transition Period

In accordance with Article 67 of the Exit Agreement, the Member States of the European Union will continue to apply Regulation (EC) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the «**Brussels I Bis Regulation**») in regard to the recognition and enforcement of judgments rendered in the United Kingdom in proceedings filed before the end of the Transition Period[64].

In accordance with Article 39 of the Brussels I Bis Regulation, judgments rendered in the United Kingdom in civil and commercial matters in proceedings filed before the end of the Transition Period will be directly enforceable in France, without the need for a declaration of enforceability of these judgements. The party against whom enforcement is sought may file a request for refusal of enforcement before the Judicial Court (*Tribunal Judiciaire*) if enforcement of the judgment is manifestly contrary to French public policy, in the event of a breach of the principle of adversarial proceedings or where an irreconcilable judicial decision has already been rendered in France or in another Member State (Article 46 of the Brussels I Bis Regulation).

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[62] *EU Commission Memorandum entitled BREXIT Negotiations: What is in the Withdrawal Agreement, 14 November 2018, «The continued application of EU law during this period will give time to national administrations and businesses to prepare for the new relationship. It will also provide the EU and the UK with time to negotiate the future relationship».*

[63] *Extract from Le Monde, BREXIT : l'UE et le Royaume-Uni s'accordent sur leurs «relations futures» (the EU and UK agree on their «future relations»), 22 November 2018. This possibility is not mentioned in the Political Declaration Draft setting out the framework for future relations between the European Union and the United Kingdom drawn up on 22 November 2018.*

[64] *Exit Agreement, Article 67.*
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840655/Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf

2.2 - The enforcement in France of judgments rendered in the United Kingdom in civil and commercial matters after the Transition Period

The regime applicable to the enforcement of a judgment rendered in the United Kingdom in civil and commercial matters in regard to proceedings filed after the Transition Period should in principle be defined under the terms of the agreement concluded between the Twenty-Eight.

Prior to the conclusion of this agreement, there are four possibilities.

Firstly, the United Kingdom announced in its White Paper of 12 July 2018 that it was seeking to join the Lugano Convention on the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 31 December 2007 (the «**Lugano Convention**»[65]).

The Lugano Convention specifies the conditions applicable to the enforcement of judgments rendered in the States of the European Free Trade Association («**EFTA**»). The requesting party must request the Chief Registrar of the Judicial Court to issue a declaration of enforceability of the judgment (Article 38). The party against whom enforcement is sought may lodge an appeal against the decision relating to the request for a declaration of enforceability on the grounds that it is manifestly contrary to French public policy, that the adversarial procedure has not been observed or that an irreconcilable judgment has previously been rendered in France or in another EFTA State.

Secondly, some authors suggest that the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the «**Brussels Convention**») could apply again in relations between Member States and the United Kingdom[66]. If this were the case, in order to enforce in France a judgment rendered in the United Kingdom, the requesting party would have to file a request to the Judicial Court (*Tribunal Judiciaire*) for an authorization to enforce it[67]. The procedure and grounds for opposing the decision on the request for enforcement authorization are the same as those applicable under the Lugano Convention.

Thirdly, the bilateral Convention concluded between the United Kingdom and France on the reciprocal enforcement of judgments in civil and commercial matters, accompanied by a Protocol,

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[65] *White Paper, 12 July 2018, paras 128 (g) (« seeking to join the Lugano Convention, and exploring a new bilateral agreement with the EU on civil judicial cooperation, covering a coherent package of rules on jurisdiction, choice of jurisdiction, applicable law and recognition and enforcement of judgments in civil, commercial, insolvency and family matters ») and 147. Unanimity of the Contracting Parties is required for the authorization of a new member (Lugano Convention, Article 72).*

[66] *H Muir-Watt et altri, Haut Comité Juridique de la Place Financière de Paris, Report on BREXIT's implications, 30 January 2017, p 19-20.*

[67] *Brussels Convention, Articles 31 to 34.*

signed in Paris on 18 January 1934, expressly referred to in Articles 55 of the Brussels Convention of 27 September 1968 (as amended by Article 24 of the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland of 9 October 1978) and 69 of Regulation (EC) No. 44/2001, known as «Brussels I», which list the pre-existing international conventions that these instruments replace. This Franco-British Convention of 18 January 1934 lays down the conditions under which the judgments of the «higher courts» are recognized as res judicata (Article 2(1)) and under which the judgments of the «higher courts» are enforced exclusively in civil or commercial matters, including convictions in criminal matters on compensation for civil interests (Article 2(2)). The *exequatur* request for a judgment rendered in the United Kingdom must be submitted to a «*court of first instance*» accompanied by a certified copy of the judgment, containing «*full particulars of the procedure followed*» and reproducing the reasons for the decision (Article 7). In order to obtain *exequatur*, the judgment must be enforceable in the United Kingdom and order payment of a specified sum of money (Article 5). Three pleas may be raised to oppose enforcement in France of judgments rendered in the United Kingdom, namely (*i*) the lack of jurisdiction of the Court of Origin; (*ii*) the adversarial procedure has not been observed; and (*iii*) the disruption of French public policy (Article 3 to which Article 5 refers).

Nevertheless, some eminent authors criticize these attempts to resurrect old treaties or conventions, which they consider to be rendered null and void by the adoption of subsequent instruments[68].

Fourthly, and assuming that the above three hypotheses are not applicable, judgments rendered in the United Kingdom would be enforced in France according to the ordinary rules of law applicable to foreign judgments. These rules assume that a party submits a request for *exequatur* before the Judicial Court. The *exequatur* procedure is adversarial and generally lasts between 12 and 18 months at first instance (plus the duration of the appeal procedure, *i.e.* about 12 additional months). The defendant may raise three objections to the enforcement of the judgment, relating to the fact that (*i*) the judgment is inconsistent with French procedural public policy, (*ii*) the United Kingdom courts do not have a sufficient connection with the dispute or (*iii*) the judgment was obtained by fraud[69].

[68] *H Muir-Watt et alii, Haut Comité Juridique de la Place Financière de Paris, Report on BREXIT's implications, 30 January 2017, p 20. In particular, the Brussels I bis Regulation specifies that it « replaces the provisions of the 1968 Brussels Convention» (Article 68) and that it «shall, as between Member States, supersede conventions that cover the same matters as those to which this Regulation applies». (Article 69).*

[69] *Cour de Cassation, Civil Chamber 1, 20 February 2007, Cornelissen, pourvoi n° 05-14.082.*

ANNEX 3

List of jurisdictions whose legal opinions cover documentation under French law

LIST OF JURISDICTIONS WHOSE LEGAL OPINIONS COVER DOCUMENTATION UNDER FRENCH LAW

Status of inclusion of Irish law and French law docs in netting and collateral opinions – as of 25/06/20

Jurisdiction	Netting	Collateral
Anguilla	YES	YES
Argentina	YES	N/A
Armenia	YES	N/A
Australia	YES	YES
Austria	YES	YES
Bahamas	Pending	Pending
Barbados	To be covered in 2020 update	To be covered in 2020 update
Belgium	YES	YES
Bermuda	To be covered in 2020 update	YES
Brazil	YES	YES
British Virgin Islands	YES	YES
Canada	YES	
Cayman Islands	Pending	Pending
Channel Islands - Guernsey	YES	YES
Channel Islands - Jersey	YES	YES
Chile	To be covered in 2020 update	To be covered in 2020 update
Colombia	To be covered in 2020 update	To be covered in 2020 update
Curacao, Aruba, St Maarten	To be covered in 2020 update	To be covered in 2020 update
Cyprus	YES	YES
Czech Republic	YES	YES
Denmark	YES	YES
England & Wales	To be covered in 2020 update	To be covered in 2020 update
Finland	YES	YES
France	YES	YES
Germany	YES	Pending
Greece	YES	YES
Hong Kong	To be covered in 2020 update	To be covered in 2020 update
Hungary	YES	YES
Iceland	YES	YES
India	Pending	Pending
Indonesia	Pending	Pending
Ireland	YES	YES
Israel	YES	To be covered in 2020 update
Italy	YES	To be covered in 2020 update

Jurisdiction	Netting	Collateral
Japan	YES	YES
Liechtenstein	YES	N/A
Luxembourg	YES	YES
Lithuania	YES	N/A
Malaysia	Pending	Pending
Malta	YES	To be covered in 2020 update
Mauritius	YES	N/A
Mexico	YES	YES
Netherlands	YES	YES
New Zealand	YES	YES
Norway	YES	YES
Peru	YES	To be covered in 2020 update
Philippines	YES	Pending
Poland	YES	YES
Portugal	YES	YES
Qatar (QFC)	YES	N/A
Romania	YES	YES
Russia	YES	N/A
Scotland	YES	YES
Serbia	YES	N/A
Singapore	YES	YES
Slovakia	YES	N/A
Slovenia	YES	To be covered in 2020 update
South Africa	YES	YES
South Korea	YES	YES
Spain	YES	YES
Sweden	YES	YES
Switzerland	YES	To be covered in 2020 update
Taiwan	YES	YES
Thailand	Pending	Pending
Turkey	YES	YES
UAE - Abu Dhabi Global Market (ADGM)	To be covered in 2020 update	To be covered in 2020 update
UAE (DIFC Free Zone)	YES	N/A
UAE (Federal)	YES	N/A
USA	Pending	Pending