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Emmanuel Jeuland

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4 THE INTERNATIONAL CHAMBERS OF PARIS: A GAUL VILLAGE

*Emmanuel Jeuland**

4.1 INTRODUCTION

The French judiciary is in a rather poor situation. The lack of financial means and the techno-managerial approach have saddened judges, who are condemned to hand down a certain number of cases a year and, at the same time, be very mobile as they move to other courts every three years. However, somewhere in the Northwest of Europe, in the centre of France, a small village of justice has managed to keep its old Frankish procedure. On the ‘Cité’ Island, the International Chamber of the Commercial Court and the International Chamber of the Court of Appeal compose the new International Commercial Courts of Paris¹ (ICCP in English, CCIP in French) on both sides of the ‘boulevard du Palais’. This Court is quasi-autonomous, self-regulated with a hybrid and specific procedure opened to all legal winds and travels around the world. We know now that the Gaul village of Asterix created by René Goscinny had nothing to do with French chauvinism, but everything with the last ‘shtetl’ (Ashkenazi village) of Europe, where his family came from.

The International Chamber is hence to be found at the first-instance level of the Paris Commercial Court (thereinafter referred to as the CCIP-TC, which used to exist until 1993 but was recreated in 2011 and 2017) and the International Chamber at the second instance level of the Paris Court of Appeal (thereinafter referred to as the CCIP-CA since March 2018). Both accept documents and hold hearings in English, and adapt the French justice system to international cases. Nevertheless, these Chambers comply, at least formally, with French procedure rules. So, it is a change in the administration of courts, not in civil procedure. It means that private international law may now take the form of special International Chambers and not only of conflicts of law and conflicts of jurisdiction in domestic courts. These new Chambers have been established only recently, and it is difficult to predict their success. One of the weaknesses of the French system is the reputation of its Commercial Courts abroad and, conversely, the lack of international reputation – as there is in arbitration – of the ‘Place de Paris’ (Paris, home of interna-

* Professor at the University of Paris 1 Panthéon-Sorbonne.

¹ Entretien avec Jean Messinesi (Président du tribunal de commerce de Paris): ‘La Nuit du Droit permettra une meilleure connaissance du tribunal de commerce, de ses juges et de leurs missions’, 40 *La Semaine Juridique Edition Générale*, at 1008 (1 October 2018).

tional litigation).² Technically, the procedures of the Commercial Court and the Paris Court of Appeal are quite different since the one is mainly oral while the other is mainly written. It has to be said that the state of the French judiciary is almost cataclysmic: courthouses are not well maintained, *e.g.* (which is not the case of the beautiful building of the Paris Commercial Court, located on quai de Corse). A certain pressure is undoubtedly going to prevent such International Chambers from spending too much money and maybe providing a competitive and international-like service. It may well be that the Paris International Chambers will not be able to compete against London or some other places in Europe which succeed in attracting big cases between big companies, and will eventually deal with not so big international litigations connected to the French sphere of traditional influence in Africa and the Middle East.

The International Chambers of Paris may not be understood without a historical perspective, to be done not in a detailed way but in the genealogical sense of it. The situation of the judiciary in France is very much the result of a very long process intertwining the various layers of the judicial, executive and legislative powers. There might be a much simpler way of seeing the emergence of the International Chambers in Paris: there is an international market of business courts and the Paris Chambers are a new product proposed on this market.³ This business-like approach calls for an economic answer: the Chambers will succeed if the product is bought by the parties in dispute, if the parties actually choose the jurisdiction of such Chambers. It will certainly depend on the characteristic of the chosen procedure based on the needs of the business litigators. There is competition amongst European international courts (*e.g.* Rotterdam and Hamburg) and in the end there will be one winner and losers. In this line, I will now expose the procedural rules of the Paris International Chambers to show how modern and efficient they are. However, I'm convinced that I may miss a point. These International Chambers take place in history and their success or failure may indeed come from a historical background. It does not mean that the economic point of view and the efficiency of the procedure are meaningless. It is just that this is not sufficient to understand these courts. My hypothesis is that these Chambers are the expression of a very old and discreet autonomous judiciary, which has been dominated for centuries but is not subdued by the administrative power.

I would like to put the Paris Chambers into their context and show how much they are rooted in the past. The French state is a procedural creation. Kings used two tools to unify France: the appeal system and the French language. The appeal system was built to get rid of duels. Some kings managed to forbid duels and at the same time they created the system of appeal. The idea was that all litigations, after many layers of appeal, could eventually be brought in front of the king. At that time, a dispute could last one genera-

2 H. Bouthinon-Dumas and B. Deffains, *La place juridique de Paris* (2019), at 29.

3 E. Themeli, *The Great Race of Courts: Civil Justice System Competition in the European Union* (PhD Rotterdam 2018), Chapter 5.

tion at least, so that the king was the last resort for the parties. The other tool was the language. The famous Ordinance of Villers-Cotterêts, still in force, in 1539 imposed the French language as a court language instead of Latin and regional languages.

As a result, the French state is a body that has been unified and centralized through rules of procedure. However, it does not mean that the judiciary holds the power in France, quite the contrary. During the Ancient Regime, a long struggle opposed the king and his administration to the judiciary led by more than twenty regional parliaments. Interestingly enough, the buildings of these courts were reused after the Revolution to shelter the new courts of appeal. These parliaments used to apply different customs (in Normandy, Beauvais, Brittany, *etc.*) or Romanic-based law (in the south of France). The unification of customs led to ordinances such as the Saint-Louis Ordinance of 1667, which prefigured the 1806 Code of Civil Procedure and, in substantive law, the Civil Code. It has been said that the French state is an administrative state rather than a judicial state (Kriegel⁴). It should be added that there were two models of procedure in France: the Frank model (the adversarial system) and the Roman law model (especially the extraordinary procedure rediscovered by ecclesiastic tribunals). The latter has been used to unify and make criminal procedure efficient. The former has remained the basis of civil procedure, even though a dose of inquisitorial procedure has been injected in it. Interestingly enough, a special kind of court born during the Middle Ages has managed to go through all these political events: the Commercial Courts composed of merchant lay judges.

Parliaments of the Ancient Regime had judicial power and some legislative power. They had the authority to prevent royal ordinances from entering into force and consider a landmark judgment as a general rule. The king's solution to ignore their powers was to create extraordinary courts or chambers dedicated to certain political cases (the Fouquet's case is the most famous one), creating a last resort remedy (called 'cassation') in front of him, or picking some cases in parliament to adjudicate them at the royal level ('évocation', see Krynen⁵). The concept of 'natural judge' was developed by parliaments to keep on adjudicating certain sensitive cases that the king wanted to remove from the normal track. The Revolution was very much a result of this struggle. The government replacing the kings won the battle against the parliaments. By way of comparison, the judiciary won the battle in England against kings and queens who have totally lost their power. It is no coincidence that the courts of London have succeeded in maintaining their prestige inside and outside the United Kingdom.

During the French Revolution, the parliaments became the courts of appeal and lost their power of creating general rules and controlling statutes. They could only adjudicate specific cases in applying statutes voted by the General Assembly and the Senate. They were unified under and controlled by the Court of Cassation. That said, it might seem

4 B. Barret-Kriegel, *Les chemins de l'Etat*, Calmann-Lévy (1986).

5 J. Krynen, *L'Etat de justice*, 2 T (2009 and 2012).

that the legislative power won the battle over the judiciary. As a matter of fact, the legislative power rarely has the lead against the executive and administrative powers. Even the Civil Code was largely imposed by the executive power of Napoleon. French legislative bodies have often been dominated by the government since the Revolution and especially since the Fifth Republic. The judiciary has been discreet since the Revolution but has never given up its power. A member of the judicial inspection body ('inspection judiciaire') told me once that he had the feeling that the judiciary was still embodying the 'Girondin' camp in France (the provincial and federalist force against Paris) against the 'Jacobin' camp represented by the Parisian centralized administration. As a matter of fact the opposition between Girondins and Jacobins is not the product of the Revolution but was more recently invented by the poet Lamartine. Anyway, it says something of the actual French tensions between the province and Paris. As a result, the judiciary still tries to remain independent in spite of a very low budget and a maintained link between the ministry of justice (an administrative body) and public prosecutors (called as a whole the 'parquet'). The International Chambers of Paris should be understood in this context. They may be an actual expression of the immemorial battle of the judiciary.

I will use five types of arguments in favour of my general hypotheses according to which the International Chambers are a true expression of the judiciary: the legal source of the International Chambers, which is not a statute; the rules of assignment as opposed to the jurisdiction rules; the predictable and hearing-oriented proceedings; the evidentiary rules, which are more adversarial than inquisitorial and the rules on language, which do not favour the French language any more.

4.2 LEGAL SOURCES OF THE INTERNATIONAL CHAMBERS

The International Chamber of the Commercial Court and the International Chamber of the Court of Appeal have not been created by a statute or a decree and so do not originate from the legislative or executive powers. The original idea for the Court of Appeal was expressed by a famous judge, the previous First President of the Court of Cassation and member of the Constitutional Council, Mr Canivet.⁶ The idea seems to have been collective within the Commercial Court and dates back to 1995. The tool used is the so-called 'Protocol' signed by the Bar, the Commercial Court for its International Chamber, and

⁶ G. Canivet (dir.), *Préconisations sur la mise en place à Paris de chambres spécialisées pour le traitement du contentieux international des affaires* (3 May 2017).

the first president of the Court of Appeal for its International Chamber, as well as the Ministry of Justice on 7 February 2018.⁷ The presence of the Ministry of Justice does not mean that the Protocol constitutes an executive source of law. As a matter of fact, the Ministry of Justice was present but did not sign it (only the representative of the Bar, the President of the Court and, for the Paris Court of Appeal, the General Public Prosecutor did). It looks like a contract, although there is no contractual sanction and no legal action attached.

The CCIP-CA started in March 2018. The way this court was created is interesting. The legal nature of this kind of Protocol is not totally clear. It has already been used in many courts, for example, to implement digitalization so that lawyers use the digital system rather than paper as usual. In this case, ordinary rules were not changed, but local rules were modified through the Protocol. It cannot be qualified as a real contract since the Court of Appeal cannot bring an action against the Bar if a lawyer does not comply with it. Nevertheless, this kind of Protocol is usually complied with since there is a social constraint amongst lawyers to do so.

Parties have to agree to assign their case to the International Chamber. Consequently, should they afterwards decide to contest the assignment, the Court may sanction them for breach of loyalty. Nevertheless, there is no general principle of loyalty in civil procedure and the standard of good faith applies only to contracts, which is not the case here. The Protocol is somewhat misleading since it refers to the ‘jurisdiction’ of the International Chamber, whereas it is not a matter of jurisdiction – only Courts have jurisdiction, not Chambers – but a matter of assignment of a case. In such circumstances, it can be said that the Protocol is attached to the general schedule order of the Court (Commercial Court or Court of Appeal). It does not give rise to a legal remedy since this schedule order made by the President of the Court to assign cases to the Chambers is an administrative order without possibility of appeal (Art. 537 of the French Code of Civil Procedure, hereafter ‘CPC’). This is why there is a current debate over whether a remedy against the schedule order should be made available. One of the discussions is to grant a remedy to the judge assigned to a Chamber who does not want to have this specialty. It would be better to give the judge and the parties the possibility to discuss the schedule order (usually once a year to assign judges in specialised chambers and so indirectly cases to these chambers, in reality the schedule order is modified several times a year to take into account judges’ mobility). This debate has been triggered by a recent judgment from the ‘tribunal des conflits’ (the Court of Jurisdictional Conflict) in charge of solving conflicts of jurisdictions between the administrative and the judicial order. The Court of

⁷ Protocole relatif à la procédure devant la Chambre Internationale de la Cour d’appel de Paris, CCIP-CA, available at: www.avocatparis.org/system/files/editos/protocoles_signes_creation_jurisdiction_commerciale_internationale_1.pdf and www.lja.fr/wp-content/uploads/2018/02/ProtocolesCIC and www.shearman.com/-/media/Files/Perspectives/2018/04/Protocol_relating_to_the_procedure_before_the_International_Chamber_of_the_Paris_Court_of_Appeal.pdf?la=en&hash=8539B15BCD02C6140DF2FDE5212C1B364FBCC1F4.

Conflicts decided that no remedy brought by a judge against the schedule order of a judicial court in front of an Administrative Court was available since it concerned the judicial order, but that there should be a remedy offered within the judicial order.⁸ So, it may well be that a remedy will be created against the schedule order, which could be used against the Protocol. That remains to be seen.

As a whole, the legal source of the International Chambers is entirely judicial, even though the Ministry of Justice asked a judge, Mr Canivet, to reflect on the subject (anyway the International Chamber of the Commercial Court existed before) and accepted (with the Supreme Judiciary Council, the CSM) to make a special selection of dedicated judges. The head of the CCIP-CA has recently been appointed, namely Mr Ancel.⁹ The former President of the Commercial Court, Mr Jean Messinesi¹⁰ (he was replaced on the 22 January 2019 by Jean-Louis Netter) would have liked to gather both Chambers in the same building, *i.e.* in the Palace of Justice (freed by the recent move of the civil High Court to a new building in the north of Paris, called the Batignolles). These Chambers form a unique body which are quite autonomous from the French state (executive and legislative powers), like a Gaul village. In this line, the Protocol looks like a self-regulation made by the Court itself. It is maybe the reason why the Protocol refers to the ‘jurisdiction’ of the International Chambers and not their assignment.

4.3 ‘JURISDICTION’ OF THE INTERNATIONAL CHAMBERS

The International Chambers look like autonomous courts created by the judiciary itself, having their own jurisdiction (see Protocol Paris Commercial court CCIP-TC: Article 1. – La compétence de la chambre internationale and Protocol CCIP-CA: Article 1. – compétence de la chambre internationale de la cour d’appel de Paris). It is probably misleading since the Chamber has no jurisdiction in itself and so there cannot be a jurisdictional debate concerning the Chamber itself but the Court as a whole. However, the use of the term ‘jurisdiction’ may be more than rhetorical and may lead one day to the acceptance of a jurisdictional motion to contest the ‘jurisdiction’ of the Chamber.

8 Tribunal des conflits, 12 February 2018, case C4115 (*retrait de la mission pour un juge de présider des audiences foraines dans une ville*): ‘Considérant que la décision prise par le président d’une juridiction judiciaire de modifier une ordonnance de roulement constitue une mesure relevant du fonctionnement du service public de la justice et dont l’examen conduit à porter une appréciation sur la marche même des services judiciaires; que la juridiction judiciaire peut seule procéder à cet examen; qu’il s’ensuit qu’un recours contre une telle décision, fondé sur le fait qu’elle constituerait une sanction déguisée, relève de sa compétence; que la juridiction judiciaire est donc compétente pour connaître de l’action introduite par M. B)’

9 F. Ancel, conference given at the Panthéon Centre, University of Paris Panthéon Assas (21 February 2019), JCP G, 2019.

10 See www.cercle-montesquieu.fr/global/gene/link.php?doc_id=768&fg=1.

The ‘jurisdiction’ of the CCIP-TC is slightly different from the ‘jurisdiction’ of the CCIP-CA. The former has jurisdiction (the case is assigned) where a commercial and economic case has an international dimension (Art. 1.1), in particular where foreign or European law is likely to apply. A (non-exhaustive) list of fields provides examples (commercial contract, breach of commercial relations, unfair competition, transportation disputes, redress action after competition infringement, financial products litigation). A jurisdiction clause may refer to the Commercial Court of Paris and so to its International Chamber. This shows well that the International Chamber has no autonomous jurisdiction, but that it looks like it. The latter (CCIP-CA) has jurisdiction over disputes concerning the interests of international trade (compare with the ‘international dimension’ of the CCIP-TC, which sounds more vague). However, the list of fields is exactly the same as that for the CCIP-TC: commercial contract, breach of commercial relations, unfair competition, transportation disputes, redress action after competition infringement and financial products litigation. This list is completed by a very general statement saying that it hears all appeals concerning a commercial and economic dispute having an international dimension (which is precisely the criterion for the CCIP-TC) and appeals against the judgment awarded in the field of international arbitration. This last point is very important as it shows that the CCIP-CA is not only the Court of Appeal of the CCIP-TC but the Court of Appeal of all judgments having an international dimension, including judgments related to international arbitration (e.g. an order of the civil High Court to appoint an arbitrator when parties disagree and some judgments awarded by the ‘juge d’appui’, the support judge of an international arbitration). Moreover, the Court of Appeal is in charge as well of the proceeding for setting aside an international arbitral award. This point is contested by some French specialists who are of the opinion that doing so creates confusion between arbitration proceedings (and their court aspects) and commercial and international procedures. Rules and logic are different. The International Chambers may also attract litigations in conjunction with French specialities such as luxury and civil engineering.¹¹

As for the CCIP-TC, the jurisdiction of the CCIP-CA may be the result of a jurisdiction clause referring to a court situated within the resort of the Paris Court of Appeal. Lastly, the CCIP-CA is the Chamber where the appeal against the judgments of the CCIP-TC will be lodged. As a whole, the jurisdiction of the CCIP-CA is much wider than the jurisdiction of the CCIP-TC. Parties may agree to go to the civil High Court and not to the Commercial Court. Moreover, the support judge (‘juge d’appui’) in the International Chamber is usually a judge of the civil High Court.

It is important to stress this point since the international reputation of French Commercial Courts is not very high, in particular since foreign parties may have been faced

¹¹ Chambres commerciales internationales – Quels défis pour les chambres commerciales internationales de Paris? – Entretien Avec Guy Canivet, Aurélien Hamelle et Carole Malinvaud, *Cahiers de droit de l’entreprise* n° 1, entretien 1 (January 2019).

with some small Commercial Courts composed of lay judges knowing nothing of international matter. However, the CCIP-TC is composed of previous international lawyers with long-standing experience (often just retired), so that these lay judges may have experienced proceedings in other international courts such as the London one. It may well be that the reputation of this CCIP-TC could have nothing to do with the old reputation of the small and remote Commercial Courts composed of local merchants. Anyway, the CCIP-CA is composed of chosen professional judges and should keep the good reputation of the Chamber traditionally in charge of appeal in the field of international arbitration.

The Commercial Court procedure is almost for free. According to the former head of the Paris Commercial Court, Jean Messinesi:¹² « The average cost of a litigation in 2015 is €105, including judges, and €40 for a summary judgment. » The head of the Paris Commercial Court also pointed out that 80 per cent of the judgments are pronounced in the ten weeks following the hearings. The appeal rate (13 per cent) is quite low and the rate of appeal in cassation is even lower. A majority of judges are newly retired lawyers (volunteers) and are rather competent. There are also non-official agents ('mandataires de justice'), who deal with the commercial procedure in certain Commercial Courts (Paris, Lyon, *etc.*) on behalf of lawyers ('avocats'). The Paris Commercial Court tends to improve its image by conducting procedures that comply with ISO 9000.¹³ An international division was recreated in 2011. This third division used to exist until 1997 for parties that were neither French nor European, but it was not widely known. As a matter of fact, in 2011 it was not really a true creation, but a marketing operation.¹⁴

A very technical rule has to be explained to show how autonomous the CCIP-CA is, nearly as an autonomous court. There are two tracks in the normal appeal procedure: a fast track without a case management judge (Art. 905 CPC leaves one month for the appellate party's written pleading, one month for the respondent) and a normal track with a case management judge (Art. 908 and 910, three months for the appellate party's written pleading, three months for the respondent). It seems that a specific case management judge may not be appointed even outside the fast track of Article 905, so that the President of the Chamber could play the role of the case management judge in all cases (Art. 1.4). This case management judge (who could be the President of the Chamber or a delegate) may have examining power but could act more as an English case manager competent as far as schedule is concerned.

12 See www.cercle-montesquieu.fr/global/gene/link.php?doc_id=768&fg=1.

13 See E. Jeuland and C. Boillot, 'La qualité dans la performance judiciaire, une notion objective et relationnelle?', *IRJS* (2015), at 115-135.

14 See interview of the former head of the Paris Commercial Court, Mr Christian de Baecque, in English, available at: <http://conflictoflaws.net/2011/paris-commercial-court-creates-international-division>.

4.4 THE PREDICTABLE, DIGITALIZED AND HEARING-ORIENTED PROCEEDINGS OF THE INTERNATIONAL CHAMBERS

Usually, in French procedure, the case manager judge of the civil High Court or the Court Of Appeal decides the schedule case having taken into account the parties' needs. However, the date of the judgment itself is rarely provided, and there is only one hearing dedicated to the lawyer's oral pleadings. This schedule is not necessarily provided in the Commercial Court, where proceedings are oral (which means that only the hearing on the merits counts, and there may well be no written pleadings). There is usually no special hearing for the witnesses and rarely a hearing to listen to the parties. Witnesses are not favoured by the French evidentiary system and it is rare for judges to listen to them orally. There may be some written statements made and signed by witnesses. Where an expert has been appointed, the court relies on their written report and rarely listens to the expert in question. Making a mix of oral procedure (Commercial Court), written procedure (written pleadings have to be exchanged in the Court of Appeal) and *common law-like* procedure favouring witnesses' evidence, the Protocol has provided for a complete, precise and compulsory schedule.¹⁵

However, since the normal procedure has to be complied with, this schedule allocates only dates that are not provided by the CPC. In particular, the appeal procedure imposes three months for the appellant's written pleading (Art. 908 CPC) and three months (Art. 910) for the respondent's one (and then three months for any intervening party). This is why the CCIP-CA Protocol refers to this time frame before dealing with the special calendar of the other dates (Art. 4 CCIP-CA Protocol). I wonder if these rather constraining time frames of the appeal procedure might not constitute an obstacle to the success of the CCIP-CA (moreover, two months in order to serve abroad has to be added even though this special time frame to serve abroad is not always necessary). This time frame seems to be reasonable for modern disputes (in an accelerating period of time). However, they may seem quite short in the event of a very big case. The CCIP-CA might allow another period of three months for supplementary pleadings. The procedure is then entirely digitalized in front of the Court of Appeal. Written pleadings and other documents have to be sent through a private (which means close to the public) network reserved to the lawyers and the Court (the lawyer's private network is connected to the Court's private network). It is not yet possible to have access to the digitalized file of the case at any time, but it should be made possible in the near future. The Commercial Court has also quite recently put in place so-called electronic communication (which is not exactly the service of judicial documents but the way the service is done, *i.e.* no longer through postal mail) of documents and pleadings. The digital system has some draw-

¹⁵ Chambres commerciales internationales – Quels défis pour les chambres commerciales internationales de Paris? – Entretien Avec Guy Canivet, Aurélien Hamelle et Carole Malinvaud, *Cahiers de droit de l'entreprise* n° 1, entretien 1 (January 2019).

backs, which should be solved in the near future (the Statute of 18 February 2019 does not allow big documents (more than 5 gigabits), which is not adapted for big business litigations.

The case manager judge, who may be the President of the CCIP-CA, acts almost as a common law judge as far as the calendar of the case is concerned. With the parties, a precise and complete schedule is drawn up so that the length of the proceedings becomes predictable (Art. 3 CCIP-TC Protocol and Art. 4 CCIP-CA Protocol). It is well known that parties accept the perspective of several months of litigation as long as they know in advance how long the proceedings are going to last. Even the date of the judgment is announced in advance. Some commentators consider that the CICPA and CCIP-TC provide a service to the parties just like in arbitration. This market-like approach is not totally true since French justice is almost free (EUR 78 for the Commercial Court and EUR 225 for the Court of Appeal). The schedule provides the date of the different hearings of the witnesses, parties and lawyers and a closing date of the examining period (before the hearings on the merits). There is even a date provided to deposit the written statement of the witnesses that the parties would like to listen to at a special hearing. A last conference before the closing date of the examining period is organized to prepare the final hearing (Art. 4.4.1 CCIP-CA Protocol) and assess the needs of simultaneous translation.

Rule 4.5 CCIP-CA Protocol (not the CCIP-TC Protocol) provides for another possibility which was created some years ago in French procedure: a collaborative case management amongst lawyers without judges. The rules on case management “do not exclude the possibility for parties to conclude a collaborative case management contract (‘procédure participative’) in accordance with Articles 1544 et seq. of the French Code of Civil Procedure. Parties may, in this context, have recourse to an expert who can conduct his/her assessment and exchange with the parties in English.” This possibility is not very much used in normal procedure; I wonder hence whether this is going to be really used by the parties in front of the Commercial Chamber of the Court of Appeal. In another way, this collaborative procedure of case management led by lawyers is quite similar to what existed in France before the implementation of the case manager judge in the 1930s and then in the 1970s (in the 1976 CPC). It is fascinating to see how much the new procedure of the International Chambers goes back to the old French adversarial procedure.

This mandatory schedule creates tailor-made proceedings, so that the International Chambers may be autonomous and adapted to each case. Such International Chamber proceedings are a nice mix of oral, written and digital procedure rooted in the historical background of France. The case manager judge acts as a common law judge to organize the proceedings, but he has as well examining power, which is a more continental-like procedure.

4.5 EVIDENTIARY RULES OF THE INTERNATIONAL CHAMBERS

The French case management judge (inspired by Austrian procedure) is not only in charge of the case schedule but also of the evidentiary part. This judge has consequently wider power than his counterpart in common-law countries. In particular, the French judge may act as an examining judge even though he does not usually use much of such examining powers for time reason. The creation of the CCIP-CA might be a good opportunity for French case management judges to act as examining judges in ordering expertise and other technician orders. The emphasis is however placed on testimonies and not on the examining measures reserved to judges such as expertise or other technician measures (technical advices and statements).

Evidentiary rules are adapted to international and commercial disputes and look like adversarial rules, a memory of the Frankish root of the French civil procedure (not to say Gaul, even though we don't have much information on it!). What is clearly favoured is witness evidence. The CCIP-CA and ITC Protocol preambles state that a large place is left to testimonial evidence. Many rules of the Protocols also concern witnesses and hearings.

Professor G. Cuniberti pointed out that, "French Commercial Courts (and French Civil Courts generally speaking) virtually never hear witnesses, so the issue of the language in which they may address the court does not arise".¹⁶ The attractiveness of foreign courts (e.g. London courts) is certainly in relation to the possibility of hearing witnesses and disclosing documents.

It is said that Article 145 of the French CPC allows a kind of pretrial disclosure.¹⁷ However, as for the procedure on the merits (Art. 145 CPC provides for a summary judgment before bringing the action on the merits to protect pieces of evidence and check whether there is a chance of success), the documents have to be precisely determined to get an order from the judge. This rule deters fishing expeditions of American-like discovery, but this is not convenient in the event of big commercial cases. It is the reason why the Protocol brings some flexibility in this matter. Rule 5.1.1 of the CCIP-CA Protocol actually provides that: "Requests for mandatory production of documents held by a party or by a third party are examined by the judge in charge of the procedure (conseiller de la mise en état), pursuant to the rules set forth in Articles 11 and 138 to 142 of the French Code of Civil Procedure."¹⁸ This rule seems to be in line with the normal procedure so that only determined documents may be considered by the judge. However, Rule 5.1.2 CCIP-CA Protocol (Art. 4.1.3 CCIP-TC Protocol) provides that, "Parties may seek the production of precisely identified categories of documents." This rule opens the door to a French disclosure of documents since it refers to identified categories of documents

¹⁶ See <http://conflictoflaws.net/2011/paris-commercial-court-creates-international-division>.

¹⁷ E. Jeuland, *Introduction to French Business litigation* (2016), at 137.

¹⁸ Non-official translation of Shearman and Sterling, above n. 7.

and not to identified documents. For example, instead of requesting a business contract number Y of a precise date, a party may request an order from the judge imposing the other party or a third party to disclose a series of contracts concluded between the parties during such or such period of time. It is quite similar to the procedure of disclosure implemented in France for the private enforcement of competition infringement.¹⁹ It is also close to the compromise (between civil law countries and common law countries) reached in the ELI-UNIDROIT Project of European rules of civil procedure (to be published in 2020) referring to the access of relevant and non-privileged evidence. The advantage of the common-law flexible rules of disclosure or discovery is to offer better access to relevant pieces of evidence that the claimant does/may not precisely know. The disadvantage is the cost incurred, which can be huge and disproportionate. This is why the American discovery system is only plainly available for the biggest cases (see Art. 26 and seq. Federal rules). So, the compromise entails a reasonable cost of disclosing documents. By the way, this new flexible rule may, one day, lead to the wider acceptance in France of the effect of an American discovery order in spite of the blocking statute of 1980.²⁰ It is also important to stress that French in-house lawyers do not benefit from privileges, so that they cannot refuse, like American lawyers, to comply with a discovery order. Many French in-house lawyers would like to benefit from such a privilege, but it is not likely to happen since these lawyers are not independent from their companies.

The rules concerning witnesses also set another kind of compromise. Usually, in France, written evidence is favoured in civil matters, whereas written documents are not necessary in commercial matters. Some facts, however, cannot be proved by written documents. The French tradition is to be cautious with witnesses. According to a famous French adage, written evidence outweighs oral evidence (*lettres passent témoins*). It is a point made possible because of the French notary who is able to secure written evidence (having a much wider role than in common law countries, a role fulfilled by solicitor in England and an attorney in the United States). In business litigation, French notaries do not play an important role and witness evidence (in practice, partners or employees of the parties' companies) may be necessary. The practice of written testimony has the advantage of being costless but the drawback of not being secure even though it has to be written and signed by the hand of the witness. The Protocols provide that the written

19 Directive 2014/104/EU 26 Nov. 2014 transposed in France by Ordinance 2017-303, 9 March 2017, D. 2017, 565; JCP G 2017, 298; AJDA 2017, 548, M.-C. DE MONTECLER; RLC/60 2017, no 3165, M. Cousin and M. Dumarçay, 'La transposition de la directive "dommages" en droit français: vers une nouvelle architecture des contentieux du droit des pratiques anticoncurrentielles?', RLC/62, 3204 (2017).

20 Art. 1 of the statute of 26 July 1968, modified by the statute of 16 July 1980 (provides as follows: "French nationals, French residents and other entities present in France are prohibited from communicating economic, commercial, industrial, financial or technical information to foreign public officials if such communication is harmful to France. It applies 'anywhere', including extraterritorially and to all communications, whether in writing, orally, or by any other means. The communications that are prohibited are those capable or likely of harming or prejudicing the sovereignty, security or essential economic interests of France or public order").

statement may be drafted by way of computer, which creates some new flexibility (Art. 4.3.2 CCIP-TC Protocol and 5.3.2 CCIP-CA Protocol).

In addition, witnesses may be interrogated in front of the Court, which is possible in normal procedure but quite rare. The Protocols add the possibility, which in France only exists in criminal procedure, to cross-examine witnesses and parties. In principle, the President of the Chamber has to ask questions to the parties and witnesses. The parties' lawyers may not cross-examine the witnesses and adverse parties. They may suggest a question to the President of the Chamber to be asked, if the President agrees, to the other parties and witnesses. It does not sound very convenient and efficient. This derives from the old Roman-Canonical procedure, whereby the idea was to protect witnesses and parties from the other parties' pressure.

Rule 5.4.4 provides that: "The judge carries out the examination of witnesses, by asking those questions he considers useful on all facts for which evidence is admitted by law. Witnesses may thereafter be invited by the judge to respond to the questions that the parties wish to ask." It means that cross-examination is possible under the supervision of the Court. This should lead to an unknown practice in France, which is the preparation of witnesses. This is still an issue since the preparation of witnesses by the parties' lawyers may be considered as a criminal offence called 'subornation de témoin' 'witness tampering', which is an attempt to influence and to corrupt a witness.²¹ It is possible to cross-examine a party under the supervision of the Court under Article 5.2.1: "Each party may thereafter be invited by the judge to respond to the questions that the other parties wish to ask." The reason why there are two rules on cross-examination comes from the fact that there are two different series of rules in the CPC. It should be added that under French law parties do not have a complete obligation to reveal all relevant facts to the Court, such as in common law with the sanction provided by the principle of contempt of court. Quite the contrary, French rules usually try to prevent parties from self-incrimination. This difference of rules and culture may remain a huge gap between common law procedure and French International Chambers procedure. The acknowledgement of a loyalty principle in procedure, such as the one that exists in arbitration procedure, could help fill such a gap if there were sufficient sanction. However, French lawyers are against this acknowledgement, which could result in very costly actions brought against them by the parties engaging their professional liability.

As a whole, the special procedure set by the Paris International Chambers is original and autonomous. Some specific improvements will probably be necessary in the future (e.g. witness preparation, *amicus curiae* such as an expert in foreign law, etc.). The notion of *amicus curiae* is unknown to the French tradition, but has been accepted before the Court of Cassation.²² Actually, judges have the power to order on-site inspections « descente sur les lieux » (Art. 179 CPC): to allow the practice of *amicus curiae* may be a way of

²¹ Chambres commerciales internationales, above n. 15.

²² Art. 1015-2 CPC.

better knowing the reality of a dispute. Other domestic rules have already been interpreted differently in an international context (e.g. Art. 100 CPC on *lis pendens* or 48 CPC on jurisdiction clauses). So, the Court of Cassation could allow some specific developments there. Declaratory actions may also be made possible, whereas they are not, in principle, possible in normal procedure since, in this situation, the claimant has no actual interest and standing. For example, the special action related to the international jurisdiction of the French International Chambers could be brought where an American judge has already accepted his jurisdiction but considers that the French Court is more convenient (under the *forum non conveniens* doctrine). The Paris Court of Appeal has already accepted this point in the Flash Airline case²³ against the domestic rule opening the jurisdiction motion only to the respondent (Art. 75 CPC).²⁴

4.6 LANGUAGE RULES AND COST IN FRONT OF THE INTERNATIONAL CHAMBERS

The International Chambers accept to receive documents in English (before the CCIP-TC Protocol, German and Spanish were also accepted) without them being translated and even to conduct hearings in these languages. Parties have to agree on that point since the proceedings should normally be conducted in French. As a matter of law, the Ordinance of Villers-Cotterêts of 10 August, 1539, which is the oldest statute still enforceable in France, has unified the French language (against Latin and regional languages). Article 23 of the CPC provides that a judge is not bound to call an interpreter if he understands the foreign language spoken. Nevertheless, a party may challenge the hearings made in English as contrary to the Ordinance and the French Constitution, even though he/she agreed to use this language in the litigation.

In practice, hearings in English are not frequent in front of the Paris Commercial Court, but they are possible and such opportunity will certainly develop. The goal is to attract or maintain international cases in Paris. To my knowledge (I interviewed the former head of such a Commercial Court in 2013) there are many documents in English (not only in the International Chamber of the Commercial Court), which are transmitted untranslated to the Paris Commercial Court, but there are still very few hearings in English. There is no tradition and no incentive to choose Paris as a Commercial Court in a foreign litigation. When the litigation is linked to the French territory, this is generally because one party has an interest in having French as the procedural language. The fact that judges are laymen – even though there are professional lawyers – does not attract foreign litigations. That the procedure is free of charge has no impact in business matters. Quite the con-

23 C. Chalas, 'The Flash Airlines Case: Transatlantic Ping-Pong or Judicial Cooperation?', 2 *International Dispute Resolution*, 207 (2010).

24 Cass. 2^e civ., 7 Dec. 2000, Bull. n°163.

trary, the cost of English litigations, which is rather high, does not prevent cases from being introduced over there. Professor Sandrine Clavel²⁵ raised another point: “Let’s assume now that a French lower Court clearly ignores the real meaning of a document. If the document is in French, parties can rely on a ‘contrôle de dénaturation’ by the ‘Cour de Cassation’, which means that the Court of Cassation may quash the judgment which ill-interpreted the document. In other words, with this ‘contrôle de dénaturation’, the Court of Cassation checks that the meaning of a provision is not missed. But so far, the ‘Cour de Cassation’ has not exercised this ‘contrôle de dénaturation’ on documents drafted in a foreign language. So, when accepting that these documents be submitted to the Court, parties take a risk, as they waive their right to claim for a ‘contrôle de dénaturation’. It is not frequent but this point shows, once again, that choosing the International Chamber of the Paris Commercial Court involves a strategic approach.

Rule 7 CCIP-CA Protocol provides that: “The judgment issued by the International Chamber of the Paris Court of Appeal will be drafted in French and accompanied by a sworn translation in English” Rule 7 CCIP-TC Protocol enlarges the rule to the orders made by the case manager judge and specifies that the cost of the translation has to be borne by the parties (however, the translation of the final judgment has not to be borne by the parties).²⁶ So, it seems that the orders of the case manager judge of the Court of Appeal will not be translated, which is certainly a shame.

Speaking of fees, the debate may be prolonged. French justice is costless, almost free, but the costs of the lawyers, appointed experts, translators (and so on) are borne by the parties. The loser has to pay the winner some legal costs, but a small part of the lawyer’s fees, the ones which are regulated (Art. 695 CPC 1° Fees, taxes, government royalties or emoluments levied by the clerk’s offices of courts or by the tax administration with the exception of fees, taxes and penalties which may be due on documents and titles produced in support of the claims of the parties; 2° Cost of translation of documents where the latter is rendered necessary by the law or international engagement ; 3° Allowance for witnesses; 4° Expert fees; 5° Fixed amount disbursements; 6° Emolument of public officers and public officers; 7° Cost of advocates to the extent that it is regulated including the closing speech dues; 8° Expenses paid due to the notification of a process abroad; 9° Cost of interpreting and translation rendered necessary by the inquiry orders to be carried out abroad at the request of courts pursuant to Council Regulation (EC) n°1206/2001 of 28 May 2001 on cooperation between courts of the member states in the taking of evidence in civil and commercial matters). However, Article 700 CPC allows the judge the

25 See <http://conflictoflaws.net/2011/paris-commercial-court-creates-international-division> (4 February 2011).

26 I would like to thank Mr Ancel, the president of CCIP-CA, for this information in particular and for other remarks as well.

possibility of imposing on a party the duty to reimburse the other party a part of the non-legal costs (outside Art. 695). This article provides: “In all proceedings, the judge will order the party obliged to pay for legal costs or, in default, the losing party, to pay to the other party the amount which he will fix on the basis of the sums outlaid but not included in the legal costs. The judge will take into consideration the rules of equity and the financial condition of the party ordered to pay. He may, even *sua sponte*, for reasons based on the same considerations, decide that there is no need for such order.” Usually, French judges do not use Article 700 to cover all fees incurred since they favour access to justice. However, this explanation is not accurate for the International Chambers, which hence may use Article 700 to condemn the losing party to reimburse all the fees paid by the winning party. That will be a matter of practice and situations.

As a whole, the Paris International Chambers are almost set free from the Villers-Cotterêts Ordinance and so the royal, executive and legislative powers. Again, these Courts are almost autonomous from the French state, even in term of language and cost. Once again, they look like the Gaul village of Asterix.²⁷

4.7 CONCLUSION

The Commercial and International Court of Paris, composed of two International Chambers at the first instance- and appeal levels, looks like an ideal Gaul village in the middle of the poor French judiciary. It is like a metaphoric island of happiness situated precisely in the heart of the Cité Island. It may trigger jealousy or remain a model to a more ideal procedural system in France. It may well be a laboratory, not only for domestic purposes but also at a wider level, to facilitate the convergence between civil law and common law procedures.²⁸ It may bring some money and ideas into the judicial system. It may attract luxury and construction litigations (French specialties) between big or even small companies from Africa or the Middle East. Strangely enough, its procedure looks like the old adversarial procedure of Frank origins, improved by its contact with the inquisitorial procedure.

Continental courts may take advantage of ‘Brexit’ to hear cases involving European law (which English courts will not allegedly apply any more, especially since Brussels 1 Regulation will not allow the circulation of English judgments in Europe without *exequatur*). The Paris International and Commercial Court are not likely to be a leader in this com-

27 By the way, the names Asterix and Obelix are taken from the typographical symbols (the ‘Obele’ is a kind of cross used for obituary) of a printing company (as the one founded by Goscinny’s grand-father in Paris around 1920).

28 F. Ancel, conference given at the Panthéon centre, University of Paris Panthéon Assas (21 February 2019).

petition, for the time being at least. The procedure has been renovated to comply with international standards, which are not only of common law origins (development of class action, case management, estoppel, *etc.*). It is just recently that the Paris Commercial Court has accepted to allow the removal of documents for trade confidentiality reasons. Conversely, it would be dangerous to accept in France some of the drawbacks of common-law countries, such as the complexity or the cost of certain legal procedures (discovery, expert witness). Historically, the French language may be considered as a court language, whereas English (old French-Norman used to be the language of the Middle Ages' common-law courts) is more a business and technical language. So, it seems strange now to use English as a *lingua franca* in international litigations. On the other hand, it might be said that the French part of English (almost half of English words) makes the latter a court language. The success of these Chambers will be linked to the success of Paris to be home of international arbitration (with the International Chamber of Commerce, ICC) and the competence of the law firms settled in Paris. However, the fragmented organization of French law firms,²⁹ the lack of privilege of in-house counsels and the lack of ability to prepare witnesses may constitute some obstacles to such success. Even though these Chambers might not meet a great success, they will still be a happy Gaul village in the middle of one of the poorest judiciaries in Europe (the 37th budget of the Council of Europe, even though judges are quite well paid).

29 A. Hamelle & C. Jamin, 'Chambres internationales de Paris: encore un effort!', *JCP* 1223 (2018).

