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La création d'une chambre internationale au sein du tribunal de commerce de Paris visait à concurrencer le tribunal de commerce de Londres. Pourtant, les promoteurs des nouvelles juridictions internationales françaises ne semblent pas s'être efforcés d'évaluer le nombre et la nature des affaires que les tribunaux français pouvaient espérer attirer. Cet article étudie et compare les affaires internationales des deux tribunaux. La première partie porte sur la concurrence judiciaire internationale ; les nombreux types d'affaires traitées par chacune des deux juridictions révèlent l'existence de marchés différents, qui ne sont pas tous concurrentiels et internationaux. La deuxième partie propose une étude empirique des affaires traitées en se concentrant uniquement sur les marchés potentiellement concurrentiels et évalue leur attractivité internationale en distinguant selon l'origine des parties.

Mots-clefs International commercial courts London Commercial Court Paris international commercial chambers Judicial competition Attractiveness Captive market Competitive market

The establishment of an international chamber in the Paris Commercial Court aimed at competing with and divesting judicial business from the London Commercial Court. Yet, the promoters of the new French international courts haven't made any effort to assess the number and nature of cases that French courts could hope to attract. This Article conducts this inquiry by studying and comparing the international caseloads of both courts. Its first part reflects on the conditions for international judicial competition and argues that the many types of cases that each of the two courts handles reveal the existence of different markets, which are not all competitive and international. The second part offers an empirical study of the caseloads focusing on potentially competitive markets only. It then argues that the international attractiveness of commercial courts is revealed by the origin of the parties and assesses the attractiveness of each of two courts by distinguishing the cases on this basis.

I. Introduction

1. The rise of international commercial courts is one of the most significant developments in international dispute resolution in recent years. As is well documented, these courts were established in a variety of jurisdictions in Asia, the Middle East and Europe. A wealth

of scholarship has studied the various contexts of these experiments, and the features distinguishing each of these courts[1].

2. In Europe, the foundational event which led to the establishment of international courts in several continental jurisdictions was Brexit. As the possibility that the United Kingdom (UK) would stop participating in the various instruments of judicial cooperation adopted by the European Union (EU) appeared to be increasingly credible, the governments of a number of EU Member States saw an opportunity to divest the judicial business of the London Commercial Court to their own courts. More specifically, it was believed that, as the EU judgments regulations[2] would cease to apply as between the UK and EU Member States[3], the attractiveness of English courts would suffer as the recognition and enforcement of English judgments in the EU would not anymore be (almost) guaranteed. In France, it was the only rationale put forward by the Minister of Justice in the official letter that she sent to a leading French judge, President Guy Canivet, to commission him to reflect and make proposals on the establishment of international commercial chambers in Paris courts (*Chambres commerciales internationales de Paris* — 'CCIP')[4].

3. The goal, therefore, was clear. It was to attract judicial business from London. If anyone still doubted it, the French project made it abundantly clear not only that commercial litigation is now perceived as a business, but also that this business is perceived as international. The assumption of the French promoters of the CCIP was that the caseload of the London Commercial Court is a market on which the newly established CCIP can compete and which is thus international (or at least regional). But remarkably, it does not seem that the promoters of the new international courts had any precise idea of the judicial business of London. As the French were ready to invest significant resources in the project, no serious assessment was made of the number and nature of cases that French courts could hope to attract. Assuming that the new French courts could indeed appear as more attractive than English courts, are the parties to all English cases really likely to be convinced to bring their cases to France ? Is it actually legally possible for them to do so? Is there a single market for business adjudication, which is competitive, and on which English and French courts can freely compete ? Or are there several markets, some of which might not be very competitive, or might even be captive, while others might be competitive and global ? The Report commissioned by the French Minister of Justice addressed the issue in a short footnote referring to "the statistics of the Commercial court of London" and making some general statements on the percentage of foreign parties litigating in the said court ("80 %"), of cases involving only foreign parties ("close to 50 %") and the overall number of cases ("1000 per year")[5].

4. The primary goal of this Article is to conduct this inquiry by studying and comparing the caseloads of both the London Commercial Court and the CCIP. Before doing so, however, it is necessary to reflect on

1 In an extensive literature, see X Kramer & J Sorabji (eds), *International Business Courts. A European and Global Perspective*, Eleven International Publishing, 2019 ; S Brekoulakis and G Dimitropoulos (eds), *International Commercial Courts — The Future of Transnational Adjudication*, Cambridge University Press, 2022 ; M Yip & G Rühl (eds), *New International Commercial Courts — A Comparative Perspective*, Intersentia, 2024.

2 In particular Regulation (EU) 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 (recast) (hereafter the Brussels I Recast Regulation).

3 And the Lugano Convention (Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters signed on 10 October 2007 in Lugano) between the UK and Switzerland, Norway and Island.

4 Lettre de saisine adressée par le Garde des Sceaux-Ministre de la Justice au Haut Comité Juridique de la Place Financière de Paris (HCJP) on 7 March 2017, appended to the Rapport du HCJP of 3 May 2017 *Préconisations sur la mise en place à Paris de chambres spécialisées pour le traitement du contentieux international des affaires*.

5 Rapport du HCJP of 3 May 2017, n 4, p 5, fn 11.

the conditions for international judicial competition and wonder whether it might not be necessary to distinguish between the many types of cases that each of the two courts handles, and whether they reveal the existence of different markets, which might not all be competitive and international.

II. Captive and Competitive Markets in International Business Litigation

5. Both the English Commercial Court and the CCIP handle a variety of disputes. Some of these cases, however, could not possibly be brought, or are unlikely to ever be brought, before the courts of another country. They should be viewed as markets which are either captive, or at best little competitive, which means that there is little point competing for them (A). What the competing jurisdictions should care for are other cases for which effective competition can exist (B).

A. Captive and Little Competitive Markets

6. A captive market is a market where consumers are obliged to buy their product from a single supplier for lack of choice. In the context of judicial business, this result can be reached when the rules of all the competing courts only allow one of them to decide a dispute. This is the case where all the competing courts share the same jurisdictional rules, and where these rules grant exclusive jurisdiction to one of them. The clearest and most significant example for the purposes of this study is arbitration. The jurisdiction of courts over arbitration disputes is essentially linked to the seat of the arbitration. With respect to challenges to the validity of arbitral awards, an almost universal rule grants exclusive jurisdiction to the courts of the seat of the arbitration. Although French courts have famously endorsed the doctrine of delocalized arbitration[6], their jurisdiction to entertain applications to set aside arbitral awards made in France was never questioned[7]. The situation is slightly different as regards the jurisdiction of courts to support arbitration proceedings, since some arbitration laws, including French law, provide for other grounds of jurisdiction than the seat of the arbitration[8], but it is rare, in practice, that the parties apply to courts other than the courts of the seat of the arbitration[9]. The most significant exception is enforcement of arbitral awards, which is linked to the place of enforcement. However, such cases are also subject to a rule of exclusive jurisdiction and they have a limited purpose. Only the courts of the place of enforcement have jurisdiction to declare an arbitral award enforceable, and their decisions are solely concerned with the enforcement of the award in the territory of the relevant State.

7. It follows that the judicial market for arbitration disputes is essentially captive. Without excluding exceptional cases, in particular those in which the seat of the arbitration would be disputed, it will be argued that the parties to an arbitration will, in almost all cases,

6 See generally Emmanuel Gaillard, *Legal Theory of International Arbitration*, Martinus Nijhoff, 2010.

7 And is expressly provided by Art 1518 of the French Code of civil procedure ('CCP').

8 See French CCP, Art 1505.

9 A recent exception is the jurisdiction of English courts to grant antisuit injunctions in support of foreign arbitration where the arbitration agreement is governed by English law (see most recently *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] UKSC 30). Yet, given that French courts do not grant such remedies, there is again no genuine competition on this front between French and English courts.

turn to the courts of the seat or, as regards exequatur and enforcement, to the courts of the State in which enforcement of the award is planned. The resulting markets are therefore divided nationally and essentially captive. The question of whether different States could compete for such disputes does not arise. In particular, the establishment of the CCIP could not possibly divest arbitration disputes from English courts. Such cases are ancillary to the arbitration proceedings themselves, and to the choice of the seat of the arbitration. It is at this stage (i.e. the choice of the seat) that competition can and does exist.

8. Both the English Commercial Court and the international chamber of the Paris Court of Appeal[10] handle a significant number of arbitration disputes. As was just underscored, these disputes essentially relate to arbitrations having their seat respectively in England and France. For the purposes of this study, these disputes are uninteresting. As far as possible, I will therefore try to exclude them from my analysis in order to compare disputes which are capable of being brought before both London and Paris courts.

9. A second type of captive market is domestic litigation. The concept of domestic litigation is complex and difficult to define. It has, in addition, given rise to diverging interpretations in England and in the rest of Europe[11]. From a legal point of view, it reflects the fact that the most relevant aspects of a given dispute are linked to a single State. In commercial matters, this usually refers to the domicile and/or residence of the parties and the place of conclusion and performance of the relevant contracts. The first consequence of a dispute lacking meaningful connections with several States is that, in the absence of a jurisdiction clause, such a dispute will most likely fall within the jurisdiction of a single court, as all reasonable connecting factors on which the courts of various States could rely in order to retain jurisdiction will point to a single State[12]. The second consequence is that an agreement granting jurisdiction to the courts of another State might be ineffective[13].

10. In addition to the legal consequences of lack of connections between the dispute and a foreign legal system, it is important to consider the psychological consequences resulting from the involvement, in a commercial dispute, of parties all domiciled in a single State, or all citizens of the same State. In such a situation, irrespective of any other connections between the dispute and a foreign State, it seems unlikely that those parties could be easily persuaded to go to a court other than that of their common domicile and/or nationality. The weight of habits, the fear of the unknown, seem to naturally attract the parties to their 'home' justice. In addition, the parties usually have their assets in the place of their residence, and suing in a foreign court would often create a problem of enforcement of the foreign judgment which could be avoided by bringing the suit directly at the place of their common residence. It follows that, for parties domi-

10 But not the international chamber of the Paris Commercial Court: *infra* III A, 2.

11 English courts have accepted that disputes arising out of interest rate swap contracts between parties with the same foreign nationality and residence could be characterized as international in the meaning of Art 3(3) of the Rome I Regulation: see, e.g., *Dexia Crediop Spa v. Comune di Prato* [2017] EWCA Civ. 428. This analysis is widely criticized in continental Europe: see, e.g., Jan von Hein, "Grenzen der Rechtswahl bei derivativen Geschäften zwischen inländischen Vertragsparteien (Art. 3 Abs. 3 Rom I-VO)", in Stefan Grundmann, Hanno Merkt und Peter O Mülbert (eds.), *Festschrift für Klaus J. Hopt zum 80. Geburtstag am 24. August 2020*, De Gruyter, 2020, p. 1405; Gilles Cuniberti, "Choice of Law in Domestic Contracts: Towards a Right to Access Financial Markets?", in Horatia Muir Watt, Lucie Bíziková, Agatha Brandão de Oliveira & Diego Fernandez Arroyo (eds), *Global Private International Law — Adjudication without Frontiers*, Edward Elgar, 2019, p. 464.

12 For an example of French courts declining jurisdiction over such a dispute, see *infra* footnote n° 15. It should be noted, however, that outside the scope of the Brussels I Recast and the Lugano Convention, exorbitant rules of jurisdiction are available and may grant jurisdiction on grounds unrelated to the parties or the dispute (e.g. nationality of the parties, physical presence of the defendant or his property within the jurisdiction).

13 This is the view shared in many continental jurisdictions. In France, the Court of cassation limits the scope of liberal rules providing for the enforcement of jurisdiction clauses to international cases: see *Cie de signaux et d'entreprises électriques v. SORELEC*, appeal no 84-16.338 (Fr *Cour de cassation*, 17 Decembre 1985). Art 1(1) of the Hague Convention of 30 June 2005 on Choice of Court Agreements also limits its scope to international cases. However, and in contrast, the CJEU has ruled that a clause providing for the jurisdiction of a foreign court in an otherwise domestic contract was enforceable under Art 25 of the Brussels I Recast: Case C566/22, *Inkreal sro v Dúha reality sro*, ECLI:EU:C:2024:123.

ciled or resident in the same State to choose to litigate in a foreign court, that court and the foreign process would have to offer much greater benefits than the courts and process of their home State. This could certainly be the case for parties from authoritarian countries where the quality of the judicial process might appear to be highly questionable, in particular in terms of independence and impartiality. In recent years, some of the disputes brought to the English Commercial Court were exclusively between Russian parties[14], or between Kazakh parties. Likewise, Gabonese parties sued other Gabonese parties in French courts[15]. It is not difficult to imagine that these parties could have perceived the independence and impartiality of English or French courts as a great benefit justifying litigating in a foreign court. But is it really realistic to expect English parties to find such great advantages in French courts that they would decide to bring their dispute in Paris rather than in London ? It is unclear to the present author what these could be, although he did find one judgment of the Paris commercial court deciding a dispute between two English companies in a case concerned with the acquisition of a Belgium company[16].

B. Competitive markets

11. Judicial competition can exist if the parties deciding to bring proceedings have a choice between several courts and there is no significant obstacle to the exercise of their freedom of choice between those courts. That choice could be made at two different stages. First, it could be made prior to the dispute, usually in the context of contractual negotiations. This would then be a choice of all the parties to the relevant contract, which would result in the conclusion of a choice of court agreement. In this scenario, an important factor would be the respective bargaining powers of the parties, which could allow one of them to impose its preference. Conversely, where none of the parties could impose its preference, each party might be reluctant to give a home court advantage to any other party, and the need to find a compromise could lead to the choice of a court perceived as neutral.

12. Lawyers in general and litigators in particular know that clauses related to dispute resolution are critically important. As a consequence, they might assume that international contracts will typically include jurisdiction clauses. At various stages of the establishment of the CCIP, it was assumed and expressly stated that those courts would be designated by choice of court agreements. The truth of the matter, however, is that while business people are typically sophisticated and rational actors, they are not lawyers, and will not necessarily be assisted by lawyers when negotiating their contracts. One of the lessons of this study is that, in most cases eventually giving rise to litigation, no jurisdiction clause was concluded beforehand by the parties[17]. The choice to bring proceedings in one particular court is thus made at the stage of the initiation of the proceedings, by

14 See eg *PJSC National Bank Trust & Anor v Mints & Ors* [2021] EWHC 692 (Comm).

15 See eg Court of Appeal of Paris, 18 February 2020, Case RG 19/19022: the court, however, declined jurisdiction, as the case lacked the necessary connections France to establish the jurisdiction of French courts.

16 CCIP-TC, 8 Dec 2022, case no 2021020066.While the judgment mentions that the contract provided for the application of French law, it does not mention that it also provided for the jurisdiction of the Paris commercial court. The jurisdiction of the court was not challenged.

17 *Infra*, III, D.

the claimant(s) alone. It is therefore the preferences of a single party, or group of parties, that will determine which court will be seised, and that choice will be imposed on the defendants. This means that the customer on the market of business litigation is, more often than not, the claimant(s). It is therefore critical to distinguish between the various categories of claimants to determine their potential preferences as customers on the judicial market.

13. The most important distinction is between local and foreign claimants. The first case scenario is that of a local claimant who decides to sue foreign parties before the court of his domicile. Such a choice may, in theory, be made after an analysis of the respective advantages of the courts of several States. The hypothesis of this Article, however, is that, in practice, claimants very often prefer to initiate proceedings in their home country in order to benefit from the advantage of being in known territory and, above all, to avoid being in unknown territory[18]. As a result, the decision of local claimants to sue foreign parties locally is difficult to assess and arguably only rarely reflects a particular attractiveness of the local court.

14. It will therefore be argued that the parties likely to be genuinely sensitive, or more sensitive, to an alternative court offering are foreign parties deciding to bring proceedings before a court other than that of their home State. The same applies where groups of claimants including local and foreign parties decide to group their action before a single court : the decision to initiate proceedings in a particular court should have been made by claimants of different origin. Conversely, whether the defendants are local or foreign should not be an essential factor, except where enforcement of the resulting judgment abroad could give rise to difficulties.

III. Empirical study

A. Samples

1) London Commercial Court

15. For the purposes of this study, this author reviewed (with the great assistance of Ms Mathilde Codazzi) the judgments of the London Commercial Court for years 2020-2021 and 2021-2022. It was decided to use the same period (April to March) as that used by English analysts in order to be able to benefit from and compare the results obtained. The judgments studied are those published in the public database BAILII[19]. Although it is not exhaustive, as English judges decide whether to publish their judgments in accordance with a practical guidance on publication of judgments, it seems comprehensive. The total number of judgments found in the database for each of the years studied (respectively 288 and 255) is comparable with the number of judgments reported by English analysts such as Portland Communication ('Portland')[20].

18 In addition, prior consultation by such claimants with their usual (local) lawyers creates an obvious agency problem: lawyers have clear incentives to advise their client to sue locally in order to keep the case.

19 www.bailii.org.

20 2020-2021: 292 judgments; 2021-2022: 234 judgments. As Portland does not explain its own methodology, in particular, with respect to judgments issued in the same cases, it is difficult to explain these differences, but one hypothesis is that they simply reflect how judgments rendered in the same case in different years are accounted for (see eg *infra* footnote n° 22).

16. The goal of the study is to assess the attractiveness of courts. Obviously, the customers are the parties, and the attractiveness of a given court will be revealed by the number of parties who chose to bring proceedings in the relevant court. It is therefore necessary to focus on cases, and to count only judgments rendered in different cases, with different parties. It is not uncommon, however, that several judgements are delivered by the Commercial Court in a given case[21]. We only count such cases as one case, irrespective of the number of judgments rendered in the relevant case[22]. If the Commercial Court rendered several judgments in each of the two years studied, we only count the case in one of these years[23].

2) International Chamber of the Paris Commercial Court

17. Unlike other countries, France has not established new international courts. It has, instead, established international 'chambers' (i.e. divisions) in the Paris Commercial Court, and in the Paris Court of Appeal. At the present time, the decisions of French commercial courts are not freely available. However, this author was granted access to and could review all the judgments rendered by the international chamber of the Paris Commercial Court (*Chambre commerciale internationale de Paris — Tribunal de commerce*, hereafter 'CCIP-TC') for calendar year 2022[24]. There were 565 of them. Judgments rendered in the same case were few : only about 6 per cent of the total.

18. It is readily recognised that, from a methodological standpoint, focusing on a single year is not ideal. The relevant year could be exceptional and thus unrepresentative, for reasons that the author could not detect. It would clearly be preferable to present data for several years, and this author hopes to be able to do so in the future, but this is not possible at the present time.

B. Captive or Little Competitive Markets

19. A significant part of the caseload of the London Commercial Court relates to arbitration. Such cases include challenges of arbitral awards and applications seeking remedies to support the arbitral process (including the protection of arbitral jurisdiction by means of anti-suit injunction). The annual reports of the court indicate that approximately 25 per cent of the claims before the London commercial courts are concerned with arbitration[25]. As explained, I consider that these cases are a captive market for the courts and lawyers of the State of the seat of the arbitration, and that it is not useful to examine them in the context of this study. Unlike the English Commercial Court, the Paris commercial court has very limited jurisdiction over and thus handles very few cases related to arbitration. The review of arbitral awards is conducted by the international chamber of the Paris Court of appeal, and the supporting court is, in principle, another Paris first instance court (*tribunal judiciaire*, formerly *tribunal de grande instance*)[26].

21 For instance, the Court may issue decisions granting interim relief or deciding on costs.

22 In year 2021-2022, for instance, the Commercial courts issued 38 judgments in cases where it had already issued a judgment in the same year.

23 Year 2021-2022, to ensure a better comparability with the caseload of the Paris commercial court for year 2022: see below footnote 35.

24 I am grateful and thank the then presidents of the Paris commercial court (Paul-Louis Netter) and of the international chamber of the court (Christian Wiest) for their assistance.

25 See Judiciary of England and Wales, *The Commercial Court Report 2020-2021* (Crown 2022), p. 11.

26 See French CCP, Arts 1505 (international arbitration) and 1459 (domestic arbitration). Art 1459 expressly provides that the parties may agree on the jurisdiction of the *president* of a commercial court, which would thus not be the CCIP-TC. Anyhow, none of the cases handled by the CCIP-TC in year 2022 was related to arbitration.

20. It was argued above that cases involving only local parties, which are typically domestic cases, are, in principle, a non competitive, or little competitive, market, and that the prospects for courts of other states to attract these cases are low. A significant share of the caseload of the English Commercial Court only involves parties based in the UK. In years 2020-2021 and 2021-2022, these cases represented respectively 26 and 24 per cent of the disputes brought before the Court[27]. These figures are consistent with the studies of Portland, which have found that between 2017 and 2022, slightly less than 30 per cent of the judgments given by the Commercial Court do not involve any foreign party[28]. There should logically have been virtually no domestic cases in the caseload of the CCIP-TC, which was established to handle international cases. However, the international chamber participates in the effort of the Paris commercial court to handle certain repetitive cases which clog the entire court[29]. As a result, the international chamber issued 267 judgments in cases involving only parties based in France in 2022, which are excluded from the scope of this study.

21. In years 2020-2021 and 2021-2022, we find that the London Commercial Court rendered respectively 120 and 138 judgments in different international cases which were not related to arbitration (Chart 1). In year 2022, the CCIP-TC rendered 281 judgments in different international cases, none of which was related to arbitration (Chart 2). These judgments are the focus of this study.

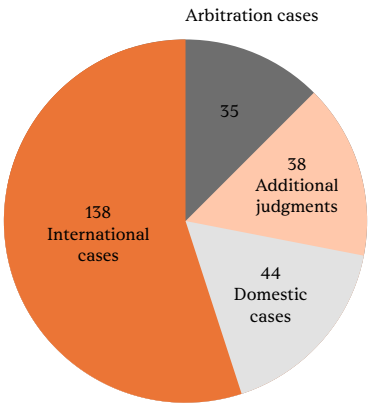

Chart 1.
London Commercial Court: Caseload
Year 2021–2022

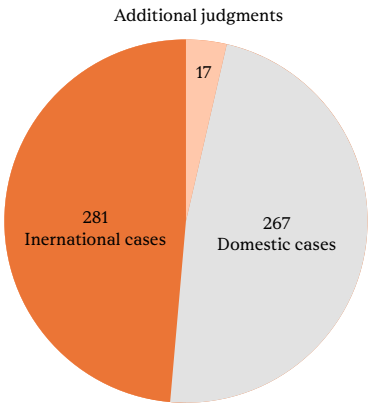

Chart 2.
CCIP-TC: Caseload
Year 2022

C. Peculiarities of French Civil Procedure

22. The sheer number of international cases brought to the Paris CCIP-TC might appear as impressive compared with the much lower number of international cases handled by the London Commercial Court. This difference, however, is primarily explained by two peculiarities of French civil procedure rather than by the attractiveness of Paris courts.

27 2020-2021: 26 per cent (44 cases out of 164); 2021-2022: 24 per cent (44 cases out of 182).
28 2017-2018: 47 out of 158 judgments (29.7 per cent); 2018-2019: 60 out of 217 judgments (27.6 per cent); 2019-2020: 56 out of 198 judgments (28.2 per cent); 2020-2021: 89 out of 292 judgments (30.4 per cent); 2021-2022: 64 out of 234 judgments (27.3 per cent).
29 In 2022, these domestic cases were mainly concerned with the aftermath of COVID for Paris businesses.

23. The first peculiarity is that French courts actually decide disputes when defendants default. Article 472 of the French Code of Civil Procedure requires, in such a case scenario, that French courts only grant claims after assessing their admissibility and merits. As a consequence, French default proceedings result in judgments issued by judges. This is obviously very different from English civil procedure, where default judgments are judgments without trial[30] which are typically obtained by an administrative procedure rather than by a judicial decision. In 2022, the 281 judgments issued by the CCIP-TC in international cases included 52 default judgments.

24. The second peculiarity of French civil procedure is that courts issue judgments to declare cases terminated when claimants discontinue their claims. This is because defendants are entitled to maintain the case in certain circumstances[31]. They rarely attempt to do so, but the result is that French courts issue many judgments which merely declare that the claimant discontinues its claims, that the defendant does not object, and that the case is thus terminated. While these judgments are silent on the reasons for such withdrawals, it seems clear that most of them are the consequence of the parties agreeing to settle the case. Again, it seems that an English court would not issue a judgment in such a case scenario. In principle, claimants have a right to discontinue claims without seeking court permission[32], and the claims are brought to an end by mere service of notice of discontinuance on the defendant[33], without involving the court (other than filing the notice with it). There are certain exceptions where the claimant must obtain permission of the court[34], but if permission is granted, the claim would still be discontinued by service of notice of discontinuance, and it does not seem that the decision of the court would be published, or reported on BAILII. In 2022, the 281 judgments issued by the CCIP-TC in international cases included 69 judgments declaring that the case was terminated as a result of the withdrawal of its claims by the claimant.

25. French international cases which resulted in default judgments, or which were terminated as a result of the claimant discontinuing its claims, are equally interesting to assess the origin of the parties (typically claimants) who decided to bring proceedings in the Paris CCIP-TC. It would be misleading, however, to compare the sheer number of international cases handled by French and English courts by taking into account default judgments and discontinued cases for one of them only, i.e. the French court. It is more accurate to compare the cases brought to Paris and London which did not result in either a default judgment, or a withdrawal of the case. For year 2021-2022, the London Commercial Court handled 138 such cases. For year 2022, the CCIP-TC handled 160 such cases[35]. For the sake of completeness, it should be noted that other courts, or divisions of the same court, handle international cases, both in Paris and London, and that these other international cases could be included in a broader study.

30 CPR 12.1.
31 French CCP, Art 395.
32 CPR 38.2(1).
33 CPR 38.5.
34 CPR 38.2(2).
35 To improve comparability, I have included in the caseload of the London Commercial Court for year 2021-2022 cases in which judgments were delivered in both years 2020-2021 and 2021-2022: *supra* footnote 23. This is because, by definition, I could not identify cases in which the CCIP-TC had issued judgments in previous years, since I only had access to the judgments delivered in one year (2022).

D. Jurisdiction Clauses

26. As already alluded to, one of the most surprising lessons of this study is the low proportion of judgments reporting that the parties had included a jurisdiction clause in the relevant contract. Only 26 per cent of the judgments delivered by the CCIP-TC mentioned that a jurisdiction clause had been stipulated[36]. The proportion was slightly higher (between 26 and 29 per cent) for the judgments delivered by the London Commercial Court in the two years studied[37].

27. It must be underscored, however, that, in many of these judgments, the existence of a jurisdiction clause might not have been dispositive of any issue that the court had to address to decide the dispute, and that it might not, therefore, have been necessary for the court to mention it. The defendant could have chosen not to challenge the jurisdiction of the court, either because it knew that, irrespective of the existence of a jurisdiction clause, the court had jurisdiction anyway, or because the forum did not appear as an inconvenient place to resolve the dispute. It is also conceivable that, although a jurisdiction clause had been stipulated, the claims did not clearly fall within its scope, and the parties decided not to waste resources relying on it.

28. Nevertheless, it is interesting to note that the origin of the parties who had stipulated these jurisdiction clauses was very different in the French and the English cases. About two thirds of the judgments of the London Commercial Court mentioning that a jurisdiction clause had been stipulated in the relevant contract were concerned with cases involving foreign parties only[38]. From a legal perspective, this might reveal that it was often necessary to identify the existence of the clause to establish the jurisdiction of the English court in such cases. From a commercial perspective, it also reveals that foreign parties, when confronted to the issue of the competent forum at the stage of the negotiation of their contract, had agreed to bring their case to London for reasons other than benefiting from a home court advantage. This is an obvious sign of the attractiveness of the London Commercial Court. In contrast, only 16 per cent of the judgments of the CCIP-TC mentioning that a jurisdiction clause had been stipulated in the relevant contract were concerned with cases involving foreign parties only[39]. This means that most of the jurisdiction clauses which had granted jurisdiction to the French court had been concluded in a negotiation process which involved at least one French party. The participation of a French party in the negotiation does not exclude that the French court appeared as an attractive forum to all parties, but it is also possible that the French party had a higher bargaining power that it used to impose its home court on the other parties.

E. Origin of the parties

29. As explained, a central argument of this Article is that the State of origin of the parties is critical to assess the attractiveness of courts.

36 43 out of 160 international cases excluding default and discontinued cases. About 25 per cent of default judgments (13 out of 52) identified the existence of a jurisdiction clause.

37 2020-2021: 29 per cent (35 out of 120 cases); 2021-2022: 26 per cent (36 out of 138 cases).

38 2020-2021: 62 per cent (22 out of 35 cases); 2021-2022: 66 per cent (24 out of 36 cases).

39 6 out of 43 international cases excluding default and discontinued cases; 3 out of 13 international cases resulting in a default judgment. Judgments declaring cases discontinued are silent on this issue and are thus excluded.

It must be underscored, however, that determining the State of origin of the parties raises a number of issues. The first is that, while French judgments systematically indicate the nationality and domicile of the parties on the first page of the judgment, English judgments do not, with the result that it was sometimes difficult to establish the origin of the parties to English proceedings. It is therefore necessary to acknowledge the existence of a margin of error in this regard, which it is hoped will not significantly change the proportions of the various categories of cases identified in this study. The second is that many parties are legal persons, and that decisions relating to litigation will be made by natural persons controlling the relevant legal person. Certain companies incorporated abroad will be controlled by individuals residing locally. Unfortunately, data relating to the individuals controlling corporations parties to English or French proceedings will typically be unavailable. Yet, it will be argued that the place of incorporation of legal persons is generally a good proxy for the residence of the individuals controlling them.

1) Proceedings initiated by local parties against foreigners

30. It has been argued that the unilateral choice by a local claimant to sue a foreigner likely reveals the known preference of litigants to sue in their home court and is unlikely to reveal the attractiveness of the chosen court. The situation is different, however, if the parties had previously agreed on the jurisdiction of the local court : the attractiveness of the chosen court is then revealed by the choice of court agreement, and the origin of the claimant, who merely enforces that agreement, becomes irrelevant.

31. The proportion of international cases brought to the CCIP-TC by French claimants against foreign defendants is high. In 2022, it amounted to half of the international cases handled by the court[40]. In 18 per cent of these cases, however, the parties had agreed on the jurisdiction of the French court, and the French claimant had thus initiated the proceedings on the basis of a jurisdiction clause[41]. The intuition of this author was that a national court would be a *forum* preferred by local claimants, and that a high proportion of cases should logically be initiated by local claimants against foreigners. The data on the caseload of the CCIP-TC confirm this intuition. Indeed, the preference of French parties to sue foreign parties in Paris can be so strong that they can initiate proceedings in disregard of clauses granting jurisdiction to foreign courts : in 20 per cent of the cases where the parties had agreed on a jurisdiction clause, the clause provided for the exclusive jurisdiction of a court other than the French court, but a French claimant had still initiated proceedings in Paris[42].

32. In contrast, the proportion and number of English claimants suing foreigners in the London Commercial Court is much lower: only about 10 per cent in the two years under consideration[43]. This author must recognize that he finds this figure surprisingly low. If one accepts

40 50 per cent (81 out of 160) of international cases excluding default and discontinued cases; 46 per cent (131 cases out of 281) of all international cases.

41 18 per cent (15 out of 81) of international cases excluding default and discontinued cases; 33 per cent (6 out of 18) of international cases resulting in a default judgment.

42 5 cases out of 20 cases international cases excluding default and discontinued cases; 0 case out of 6 international cases resulting in a default judgment. See also Court of Appeal of Paris, 7 January 2020, case no 19/12209; 7 July 2020, case no 19/19542.

43 2020-2021: 9 per cent (11 out of 120 cases); 2021-2022: 13 per cent (19 cases out of 138).

that there is no reason to believe that English businesses are less litigious than French businesses, a similar number of English claimants should have sued commercial partners, and it is surprising that so few chose London for that purpose. One explanation could be that many cases brought by English claimants against foreigners result in default judgments or settle, and are thus unaccounted for in the cases reported on BAILII[44]. One could indeed imagine that foreign defendants might choose to avoid litigating in London and hope to resist enforcement in their home jurisdiction of any resulting English judgment. Interestingly, however, the data on the caseload of the CCIP-TC do not show any significant difference depending on whether default judgments and discontinued cases are taken into account[45]. Another explanation could be that English claimants preferred alternative dispute resolution. Finally, a last explanation could be that many chose to litigate abroad. These last two hypotheses are difficult to test, but the French data show that in 2022, 7 English claimants initiated proceedings against foreigners[46] before the CCIP-TC, which is not an insignificant number when compared to the 19 English claimants who sued foreigners in the London Commercial Court in year 2021-2022. In contrast, during year 2021-2022, only 1 French claimant sued in the London Commercial Court, and it did so with co-claimants originating from multiple jurisdictions, including the UK.

2) Proceedings initiated by foreign parties against other foreign parties

33. The market which seems to be most obviously competitive is that of commercial disputes brought before the London Commercial Court by parties none of whom are based in the UK. If foreign parties have chosen to litigate in an English court, they probably could be convinced to bring proceedings before the commercial court of another Western European jurisdiction. Our study reveals that the share of the caseload of the London Commercial Court involving exclusively non-UK based parties is significant. It accounted for respectively 48 and 39 per cent of non-arbitration cases brought before the London court during the two years under consideration[47]. In contrast, the CCIP-TC attracted only few cases involving only parties based outside of France : in year 2022, they accounted for about 7 per cent of all international cases handled by the court[48].

34. The number of cases involving only foreigners is an obvious indicator of the international attractiveness of a commercial court. In this respect, London is clearly ahead. A related issue is the number of jurisdiction clauses stipulated by foreigners in their contract. As already explained, London is also clearly ahead in that regard.

3) Proceedings initiated by foreign parties against local parties

35. It will also be argued that proceedings initiated by foreign claimants against local parties are useful to assess the international attractive-

44 *Supra*, C.

45 To the contrary, the proportion of international cases where French claimants sue foreign defendants raises from 46 per cent (131 cases out of 281 cases) to 50 per cent if one excludes default and discontinued cases (81 out of 160 cases).

46 And one English claimant sued an English defendant: *supra* footnote 16.

47 2020-2021: 48 per cent (58 out of 120 cases); 2021-2022: 39 per cent (54 cases out of 138).

48 19 cases out of 281 international cases (6.7 per cent). If one excludes default and discontinued cases, 13 of 160 cases (8 per cent).

ness of commercial courts. They show, first, that, for one reason or another, foreign parties considered that the local court had advantages justifying suing in that court rather than in another country, be it their home country or a third State. They also reveal that these foreign claimants did not fear that the local court might be partial and favour local defendants over foreign plaintiffs, and that the home court advantage that the local defendants would still enjoy did not appear as significant enough to cancel the advantages justifying suing in the local court. Again, it is necessary to distinguish between cases where the parties had agreed on the jurisdiction of the court at a prior stage of their relationship and cases where they had not, as the choice of the claimant is obviously constrained in the first case scenario.

36. A significant part of the caseload of the CCIP-TC is indeed composed of cases in which foreign parties sued French defendants in Paris. In 2022, these cases accounted for almost 40 per cent of the international caseload of the Court[49]. In more than 25 per cent of them, the parties had stipulated a clause granting jurisdiction to the French court[50]. There were also quite a few cases in which foreign parties sued English defendants in London in the two years under consideration, but they accounted only for 8 to 18 per cent of the international caseload of the London Commercial Court[51].

37. An important dimension of cases where foreign claimants only sue local defendants is that the place of the future enforcement of the judgment might appear more clearly than in other cases. The local court could be attractive for certain aspects of local civil procedure, but a major consideration might also be the future enforcement of the judgement. Although it is of course necessary to reserve the case of a company incorporated in a State, but having virtually no activity or, above all, no assets there, debtors generally have the bulk of their assets in the State in which they are domiciled. It is therefore possible that, in many of the proceedings initiated against one or more local defendants, the claimants were already planning future enforcement of the (local) judgment locally. By suing in the local courts instead of a foreign court, they facilitated the future enforcement of the judgment by avoiding additional proceedings for the purpose of enforcing a foreign judgment. This consideration could be strong when deciding whether to sue in a jurisdiction with a conservative law of foreign judgments. One such jurisdiction is clearly England, in particular insofar as it defines the jurisdiction of the foreign court restrictively[52]. The French law of foreign judgments, in contrast, is quite liberal[53]. It follows that, in England more than elsewhere, the future enforcement of the judgment should to be taken into account at the stage of the initiation of the proceedings, and should logically lead lawyers of creditors of English debtors to advise their clients, all things being equal, to bring the matter before an English court. The question was certainly less acute in disputes in which it would have been possible to bring an action

49 110 cases out of 281 international cases (39 per cent). If one excludes default and discontinued cases, 57 of 160 cases (35 per cent).

50 26 per cent (15 out of 57) of international cases excluding default and discontinued cases. 13 per cent (4 out of 30) of cases resulting in a default judgment. It must be underscored that the jurisdiction of a French court over a French domiciliary is obvious (Art 4, Brussels I Recast Regulation), and clearly reduces the incentive of the court to mention the existence of any jurisdiction clause.

51 2020-2021: 8 per cent (10 out of 120 cases); 2021-2022: 18 per cent (25 cases out of 138).

52 The common law recognises the jurisdiction of the foreign court only if the defendant had consented to it or was present in the foreign country. Unlike many other countries, the place of performance of the contract is irrelevant, and probably the residence of the parties as well : see Adrian Briggs, *The Conflict of Laws*, Oxford, 5th ed, 2024, p. 126. The UK, however, is party to a number of bilateral treaties which may provide for a more liberal regime.

53 Gilles Cuniberti, 'The Liberalization of the French Law of Foreign Judgments', (2007) 56 *ICLQ* 931. A major difference between the English and the French common law of judgments is that it is only necessary to find that a meaningful connection existed between the case and the foreign court to meet the requirement that the foreign court have jurisdiction.

before a court of a Member State as long as that judgment could have benefited from the European law of foreign judgments. In that regard, Brexit could play an important role and influence the choice of the competent court for parties suing English debtors after 1 January 2021[54].

38. Another case scenario is that of foreign claimants deciding to sue not only a local defendant, but also foreign co-defendants. Such cases represented about 15 per cent of international cases brought to the London Commercial Court in the two years under consideration[55], and about 4 per cent of international cases brought to the CCIP-TC in 2022[56]. This case scenario must be distinguished from the previous one. By definition, the claimants hope to obtain a judgment ordering defendants residing in different countries to pay the relevant claims. Obtaining an English judgment will undoubtedly facilitate its enforcement against the defendants based in the UK, but not against defendants residing in other countries. It is therefore conceivable that, except in certain peculiar cases[57], the future enforcement of the judgment would not be the main consideration which would dictate the choice of the court. In a dispute involving parties most often from three different jurisdictions, no particular court should appear as obvious.

4) Proceedings initiated by mixed claimants

39. A variation of the previous scenario is that of disputes involving both local claimants and defendants, but also local and foreign defendants (mixed claimants and mixed defendants). In such disputes, since the defendants are not exclusively local, the enforcement of the future judgment against local parties should not be a decisive factor in the choice of the court. The fact that the claimants have a different origin should lead to choices made on objective factors and limit the influence of psychological factors such as the desire to litigate at home. This type of cases accounted for 10-15 per cent of the international cases brought to the London Commercial Court in the two years under consideration[58], but only for 1 per cent of the international cases brought to the CCIP-TC in 2022[59].

40. A final category of disputes involves local and foreign co-claimants and exclusively foreign defendants. In such disputes, once again, the fact that the claimants have a different origin should lead them to make a choice based on objective factors and limit the influence of psychological factors such as the desire to litigate at home. Since the enforcement of the future judgment should (also) take place abroad, it should be possible for claimants to be persuaded to bring their dispute before a court other than the English court. In the two years studied, this category accounted for between 2 and 6 per cent of the international caseload of the London Commercial Court international caseload[60], but only for 2 per cent of the international cases brought to the CCIP-TC in 2022[61].

54 Although English judgments often do not specify the date on which the proceedings were initiated, it seems that the judgments delivered during the period under consideration fell within the temporal (but not necessarily geographical) scope of the Brussels Regulation Recast.

55 2020-2021: 20 out of 120 cases (16 per cent of all international cases); 2021-2022: 18 out of 138 cases (13 per cent of all international cases).

56 11 cases out of 281 international cases. If one excludes default and discontinued cases, 4 of 160 cases (2.5 per cent).

57 It could be imagined that only the English party appears solvent. It could also be imagined that the law of foreign judgments of the States of origin of the other defendants appear to be much more liberal than English law in this respect. This is unquestionably the case of French law, which very liberally assesses the condition of jurisdiction of the foreign court: *supra* footnote 53. Likewise, the existence of a treaty facilitating the enforcement of judgments between the UK and the States of origin of the other defendants could be considered.

58 2020-2021: 15 per cent (18 cases out of 120); 2021-2022: 10 per cent (14 cases out of 138).

59 4 cases out of 281 international cases. If one excludes default and discontinued cases, 3 out of 160 cases (1.8 per cent).

60 2020-2021: 2.5 per cent (3 out of 120 cases); 2021-2022: 5.7 per cent (8 cases out of 138).

61 6 cases out of 281 international cases. If one excludes default and discontinued cases, 3 out of 160 cases (1.8 per cent).

41. The comparative caseload of the London Commercial Court and of the CCIP-TC is summarized in Chart 3.

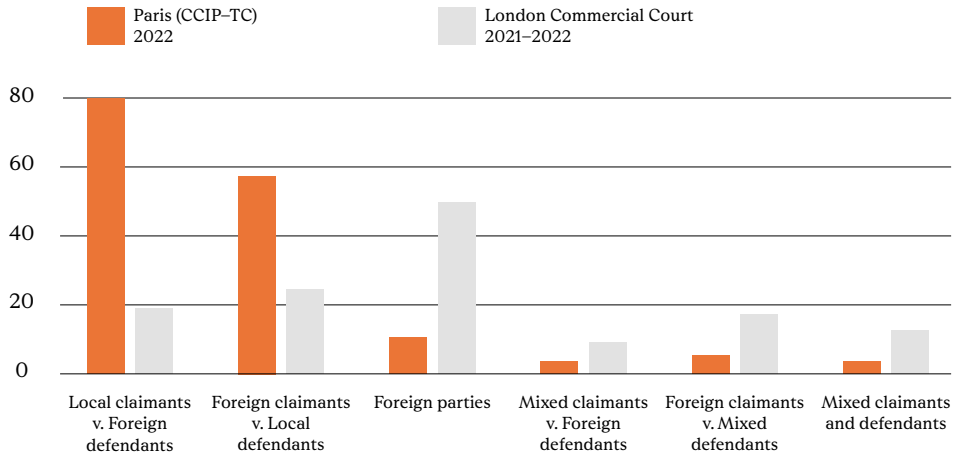

Chart 3.
Comparative caseload – International cases
(excluding arbitration, default, discontinuance)

IV. Concluding remarks

42. Will Paris eat London's lunch? The data analysed in this Article show that, while both the London Commercial Court and the CCIP-TC handle a large number of international cases, these cases are different. This suggests that London and Paris are only marginally in competition.

43. French courts primarily attract cases involving parties based in France. Half of the French cases are initiated by French claimants, and in most other cases (40 per cent), one of the defendants is based in France. The London Commercial also attract cases involving French based parties, but they are few : 10 in total in the two years studied. In half of these 10 cases, the French party was one of many claimants or defendants of various nationalities. In two other cases, the French party was the defendant in an action initiated by English claimants. The three last cases were particularly interesting. In two of them, the other party was based respectively in Italy and in the Netherlands, and the parties had provided for the jurisdiction of the English court : two parties based in the EU had thus positively chosen the London Commercial Court. Finally, in the last case, a French claimant chose to sue French, English and US co-defendants in London.

44. Unlike Paris, a large proportion (between 40 and 50 per cent) of the caseload of the London Commercial Court consists of cases involving no local party. Paris only attracts very few of such cases. In 2022, more than half of these French cases involved at least one party based in francophone Africa, which suggest that the reasons

for choosing Paris, including by jurisdiction clauses, laid in linguistic, historical and legal affinities. But there were also a few cases in which claimants from Luxembourg, Spain or China had chosen to sue in Paris defendants based in various Member States (other than France)[62] and, most importantly, where parties originating both from other EU Member States[63], or from Member States and third States[64], had chosen to grant jurisdiction to the Paris commercial court through a jurisdiction clause. It is submitted that the number of cases involving parties from other Member States, and the number of cases involving parties from third States, will be the best indicator of the attractiveness of the Paris commercial court and of the success of the French project.

62 CCIP-TC, 27 Oct 2022, case no 2022006399: Luxembourg and Portugal; CCIP-TC, 27 Oct 2022, case no 2020051861: Spain and the Netherlands; CCIP-TC, 24 Nov 2022, case no 2021040914: China (PRC) and Italy. See also the case between two English companies discussed *supra* footnote n°16.

63 CCIP-TC, 15 Sept 2022, case no 2020021815: Cyprus and the Netherlands.

64 CCIP-TC, 7 July 2022, case no 2021052259: Singapore and Myanmar; CCIP-TC, 27 Oct 2022, case no 2021046809: Germany and Russia.