

# **Internationalizing Domestic Courts in Europe: A Comparative Analysis on Procedure, Function, Organization<sup>1</sup>**

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## **1. Introduction**

Asia, and the Gulf region especially, is very familiar with international commercial courts. The international courts in the Gulf have been around since 2004 when Dubai opened the doors of the Dubai International Financial Centre (DIFC) Courts. Qatar and Abu Dhabi followed with their own international commercial courts in 2009 and 2015 respectively and Singapore opened the doors to its international commercial court in 2015 as well. Kazakhstan established its international commercial court in 2017 and China, very recently, in 2019. It took some time, but Continental Europe is now following Asia's example by establishing its own international commercial courts. In 2018, France and Germany established new international commercial courts in Paris and Frankfurt respectively and the Netherlands Commercial Court (NCC<sup>3</sup>) was established on 1 January 2019 in Amsterdam. Belgium was also working on creating its own international commercial court but these plans have been discontinued.

All these international commercial courts are different in nature and have been designed to serve different purposes. Accordingly, there is no uniform definition of an international commercial court. For the purposes of this chapter, I will use this term to refer to courts that seek to attract international commercial disputes and do that by (partially) providing for court procedures in the English language and by having an international or bi-lingual bench. This sets these international courts apart from their domestic civil and commercial counterparts.

This chapter first discusses the reasons for establishing the three new European international commercial courts; Brexit being an important one, but not the only justification. Becoming more attractive as an international business and legal hub was also an important reason to set up these courts. This chapter then sets out how the three European countries position their international commercial courts, looking at the different procedures, functions, and organization. After establishing that the three European countries have well regarded civil justice systems, but have not been very attractive forums for international disputes, the chapter discusses what distinguishes these courts from their Asian counterparts and how they compare to each other. This is done by looking at changes of legislation, whether English is used for the full procedures or only partially, by reviewing the courts' rules of procedure and by discussing their (online) accessibility. The last part of the court comparison consists of a short review of

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<sup>1</sup> This is a preprint of the article that is submitted to Cambridge University Press to become part of the book "International Commercial Courts: The Future of Transnational Adjudication"

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<sup>3</sup> Where the abbreviation NCC is used in this chapter, reference is made to the both Netherlands Commercial Court in first instance and on appeal.

the case load that these courts have generated in their short existence and how they have functioned so far.

I conclude this chapter by listing the essentials of what international users are looking for in international dispute resolution and contend that all essentials are offered by the three European international commercial courts. They are promising additions to the existing international dispute resolution scene. The NCC in particular, being the only truly English-speaking court of the three, is very well equipped to become a true player in the field of international dispute resolution.

## 2. Rationale behind the Establishment of European International Commercial Courts

An obvious answer to the question how to explain the trend of European international commercial courts is Brexit. In short: by stepping out of the European Union, the United Kingdom - and therefore the London Commercial Court - will lose the advantages of being part of the European Judicial Union which could make enforcement of its judgments more difficult – but also the obtaining of means of evidence and the serving of documents.

In Europe, and perhaps even globally, the London Commercial Court is the most popular judicial forum for the resolution of international commercial disputes. Each year, 80% of the cases submitted have at least one foreign party and in almost 50% of these cases both parties are foreign companies.<sup>4</sup> The court hears annually around 200 cases, of which nearly 20% involved parties from the continent.<sup>5</sup> Moreover, in the United Kingdom the commercial litigation legal services market represents a total of approximately 16 billion euros per year.<sup>6</sup> These numbers show the value of being an international litigation hub and it is not strange that other countries wanted to have a piece of that as well. Brexit was in that respect a good opportunity to start competing with the London Commercial Court.

Although both Germany and France already had international chambers that handled commercial disputes of an international nature, Brexit has been an important trigger for these two countries to launch new plans for their international commercial courts and re-brand their existing ones. Brexit was also the reason for Belgium to come with a plan to set up an international commercial court.

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<sup>4</sup> Portland Communications, 'Commercial Courts Report 2020' (2020), <<https://portland-communications.com/publications/commercial-courts-report-2020>> (last visited 20 July 2020).

<sup>5</sup> Prof. Dr. Dres. h.c. Burkhard Hess, 'The Justice Initiative Frankfurt am Main 2017', (Conflictolaws.net, 31 March 2017) <<http://conflictolaws.net/2017/the-justice-initiative-frankfurt-am-main-2017-law-made-in-frankfurt/>>.

<sup>6</sup> Orchard Reports, 'UK Legal Services Market Trends Report 2019' (February 2019) <[https://www.researchandmarkets.com/research/pcpfrc/uk\\_legal\\_services?w=4](https://www.researchandmarkets.com/research/pcpfrc/uk_legal_services?w=4)> (last visited 20 July 2020).

The International Chamber in Paris was created in 2010 by the Commercial Court of Paris.<sup>7</sup> At that time, there were no special rules in place to conduct (part of the) proceedings in English and there was no international chamber in the appeal court. The International Chamber was solely intended to be a specialized chamber to handle complex international commercial cases at the first instance according to the standard French procedural rules. In May 2017, at the request of the French Minister of Justice, the High Legal Committee of the Financial Market in Paris rendered a report with recommendations on why and how to raise the standards of the capital's commercial courts and how to rapidly set up specialized tribunal sections within the civil and commercial courts in Paris to hear international commercial cases.<sup>8</sup> The report points out that in international contracts, contracting parties can

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

It goes on to state that Brexit has made it more important to improve the international competitiveness of the French commercial courts.

Following the report, the Paris Court of Appeal created a new chamber specialized in disputes relating to international commercial contracts to ‘meet the expectations of international market participants seeking the benefits of an attractive judicial system’.<sup>9</sup> In February 2018, the Paris Bar and the Paris Commercial Court and Paris Court of Appeal signed two protocols that set out the procedures applicable to the International Chamber of the two chambers and the use of English during these procedures.<sup>10</sup> These protocols will be discussed below.

Germany already had a few international commercial chambers since 2010. From that time, it has been possible to conduct oral proceedings in English, if so requested by parties, before the regional courts in Cologne, Bonn, Düsseldorf and Aachen and the Higher Regional Courts in Cologne and Düsseldorf.<sup>11</sup> In November 2017, it was the regional court of Frankfurt am Main that put itself in the spotlight by announcing it will establish an English-speaking Chamber for International Commercial Matters as of 1 January 2018. The reasons

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<sup>7</sup> Legal High Committee for Financial Markets in Paris, ‘Recommendations for the creation of special tribunals for international business disputes’ (3 May 2017) <[https://publications.banque-france.fr/sites/default/files/rapport\\_07\\_a.pdf](https://publications.banque-france.fr/sites/default/files/rapport_07_a.pdf)>.

<sup>8</sup> Ibid.

<sup>9</sup> ‘Protocol relating to procedural rules applicable to the International Chamber of the Court of Appeal of Paris’ and ‘Protocol relating to procedural rules applicable to the International Chamber of the Paris Commercial Court’, (February 2018), <<https://www.cours-appel.justice.fr/paris/presentation-generale-ccip-ca-iccp-ca>>.

<sup>10</sup> Ibid.

<sup>11</sup> Matthias Lehmann, ‘Law made in Germany’: The export machine stutters’, in Xandra Kramer and John Sorabji (eds), *International Business Courts* (Eleven International Publishing 2019) 83 ff.

that were given by the so-called ‘*Justizinitiative Frankfurt*’<sup>12</sup> for establishing this chamber in Frankfurt were similar as for the Paris International Chambers. Reference was made to the popularity of the London Commercial Court as a forum for international disputes. It was felt that this might change after Brexit and that Germany could become a competing judicial hub. Frankfurt’s Chamber for International Commercial Disputes is Germany’s best known international commercial court and will be the subject of this chapter.

Belgium announced the establishment of the Brussels International Business Court (BIBC) in October 2017, which was clearly inspired by Brexit. One of the main reasons that were given for the BIBC was to fend off competition of English courts, whose current success ‘will not be facilitated’ by Brexit and also to compete with commercial arbitration.<sup>13</sup> Belgium’s BIBC proposal was different from the other European courts and would have led to an international court that was part court and part arbitral tribunal; a true hybrid court.<sup>14</sup> The BIBC proposal required legislative changes, and that is where things went wrong. First, the Council of State Council and Belgian Council of the Judiciary had some serious concerns relating to the reasons for establishment, the constitutionality of the BIBC and its financials. After that, the legislation lost support in parliament where the largest Flemish party referred to the BIBC as a ‘caviar court’.<sup>15</sup> Belgium therefore will not have its own international commercial court anytime soon.

For the Netherlands, Brexit was not the trigger. It was 2014 when the chairman of the Dutch Council for the Judiciary made a plea to establish such an international commercial court.<sup>16</sup> The subsequent legislative proposal to establish the NCC gives a couple of reasons underpinning the requirement for an English-speaking commercial court.<sup>17</sup> It firstly points out that, because of ongoing globalisation, there is a growing demand for international (English-speaking) dispute resolution processes. Since English is the *lingua franca* in international business, contracts and communications between parties (and their advisors) are frequently conducted in English so it would facilitate international business greatly, if English-speaking litigation would be possible in the Netherlands as well. Language barriers would disappear and

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<sup>12</sup> Prof. Dr. Dres. h.c. Burkhard Hess, ‘The Justice Initiative Frankfurt am Main 2017’, (Conflictolaws.net, 31 March 2017) <<http://conflictolaws.net/2017/the-justice-initiative-frankfurt-am-main-2017-law-made-in-frankfurt/>>.

<sup>13</sup> Geert van Calster, ‘The Brussels International Business Court. A Carrot Sunk by Caviar’, in Xandra Kramer and John Sorabji (eds), *International Business Courts* (Eleven International Publishing 2019) 107 ff.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Harriet Schelhaas, ‘The Brand New Netherlands Commercial Court: A Positive Development?’, in Xandra Kramer and John Sorabji (eds), *International Business Courts* (Eleven International Publishing 2019) 45, Raad voor de Rechtspraak, ‘Plan tot oprichting van de Netherlands Commercial Court’ (November 2015), <<https://www.rechtspraak.nl/SiteCollectionDocuments/plan-netherlands-commercial-court.pdf>> (last visited 20 July 2020).

<sup>17</sup> Explanatory Memorandum to the legislative proposal for enabling English-language court proceedings (Memorie van Toelichting bij het wetsvoorstel ‘Wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Wet griffierechten burgerlijke zaken in verband met het mogelijk maken van Engelstalige rechtspraak bij de internationale handeslcamers van de rechtbank Amsterdam en het gerechtshof Amsterdam’), TK 2016-2017, 34761/3, at 1-3.

translation of (court) documents would no longer be necessary, which would save time and costs.

The legislative proposal further acknowledges that a well-functioning, independent and predictable judiciary strengthens the investment climate in a country and enhances its prosperity. It was furthermore considered that international arbitration has become very expensive, especially for small and medium sized companies. For these kind of companies, international arbitration has become a less interesting option. Local English-speaking litigation would offer these companies an attractive alternative for arbitration. A final reason that was given in the legislative proposal related to the fact that the resolution of complex international cases takes up a lot of time and finances of the judiciary. If these international cases would be handled by a dedicated court and a higher court fee would be charged, it would relieve the other courts, which would be beneficial for the handling of their normal caseload.

So, regardless of Brexit, the Netherlands determined that there was a need to introduce English-speaking litigation to facilitate international business and to make the Netherlands more attractive as an international business and legal hub for international parties. This led to the launch of the NCC in 2019.

### 3. Status of European Civil Court Systems

Germany, the Netherlands and France have established and well regarded legal systems. This is consistently confirmed by the annual Rule of Law index of the World Justice Project – the independent non-profit organization that promotes the rule of law around the world. Every year, it publishes its Rule of Law Index that provides data on how the rule of law is experienced by the general public and experts. In 2020 it did that relating to 128 countries around the globe.<sup>18</sup> The World Justice Project looks at the Rule of Law per country from 8 different perspectives, including how the civil justice system works in each country.

For the assessment of Rule of Law in civil justice systems, the World Justice project examines and measures whether:

- ordinary people can resolve their legal problems peacefully and effectively through the civil justice system;
- civil justice systems are accessible; affordable; and free of discrimination, corruption, and improper influence by public officials;
- court proceedings are conducted without unreasonable delays, and if decisions are enforced effectively;
- alternative dispute resolution mechanisms are accessible, impartial and effective.

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<sup>18</sup> World Justice Project, ‘WJP Rule of Law Index 2020’ (June 2020), <<https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020>> (last visited 20 July 2020).

For a number of years in a row, the Netherlands' civil justice system has been ranked in the top 3 with Germany ranked closely behind the Netherlands.<sup>19</sup> France is ranked a bit lower – in the 18<sup>th</sup> place in 2020 – but it still has a respectable position. To compare this with some other countries that are popular for the resolution of international commercial disputes: Singapore was ranked 5<sup>th</sup> in 2020, Hong Kong 11<sup>th</sup>, the United Kingdom 17<sup>th</sup> and the United States 36<sup>th</sup>.

Within the European Union, the EU Justice Scoreboard Monitor<sup>20</sup> provides comparative data regarding the quality, independence and efficiency of national justice systems to assist the EU and EU member states in improving the effectiveness of their national justice systems. The EU Justice Monitor stresses that where judicial systems guarantee the enforcement of rights, creditors are more likely to lend, businesses are dissuaded from opportunistic behaviour, transaction costs are reduced and innovative businesses are more likely to invest. The EU Justice Monitor looks into, amongst other things, the efficiency of justice systems, and ranked the Netherlands 3<sup>rd</sup> (which included non-litigious cases), Germany 13<sup>th</sup> and France 20<sup>th</sup> in 2020.

Although the Netherlands, Germany and France have highly ranked legal systems, they are not always regarded as an attractive forum for international commercial disputes – at least not compared to courts in, for example, London, New York and Singapore.<sup>21</sup>

An important reason for this unpopularity of the continental European courts is that their official court language is not English: when all dealings of a company are conducted in English, it makes things more complicated, time-consuming and costly if all court-related documents, communications and witness statements have to be translated for parties and their international advisors. Another significant reason relates to the applicable local laws and procedural rules: research by the ICC in 2014 has shown that English law and US state laws were the two most popular sets of applicable laws for contracts.<sup>22</sup> New York, London and Singapore are some of the world's most important commercial and financial hubs and they are all common law jurisdictions. So many international businesses are simply more familiar with common law than with civil law and, accordingly, prefer English or at least common law based-fora, and not civil law fora.

But, with the arrival of international commercial courts in Europe, this might start to change.

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<sup>19</sup> Ibid.

<sup>20</sup> European Commission, 'EU Justice Scoreboard Monitor 2020' (July 2020), [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en) (last visited 20 July 2020).

<sup>21</sup> See Sir William Blair, 'The New Litigation Landscape: International Commercial Courts and Procedural Innovations', (2019) 2 *International Journal of Procedural Law* 215.

<sup>22</sup> ICC, 'ICC 2014 statistics', ICC Dispute Resolution Bulletin 2015/1

## 4. Comparison of Asian and European International Commercial Courts

Although the first Asian international commercial courts set an example for the three European countries that are the subject of this chapter, the set-up and structure of these Asian international courts differ from the European international commercial courts. The below table illustrates the main differences:<sup>23</sup>

| Country                             | Place in local court system                    | Bench – nationality of the judges | Bench – home jurisdiction of the judges |
|-------------------------------------|--|-----------------------------------|---|
| <b>Gulf countries<sup>24</sup></b>  | Special Economic Zone                          | Predominantly international       | Predominantly common law                |
| <b>Kazakhstan<sup>25</sup></b>      | Special Economic Zone                          | International                     | Common Law                              |
| <b>Singapore<sup>26</sup></b>       | Division of Singapore High Court               | Local & International             | Predominantly common law                |
| <b>France<sup>27</sup></b>          | Chamber of Paris court (district + appeal)     | Local                             | Civil Law                               |
| <b>Germany<sup>28</sup></b>         | Chamber of Frankfurt court (district only)     | Local                             | Civil Law                               |
| <b>The Netherlands<sup>29</sup></b> | Chamber of Amsterdam court (district + appeal) | Local                             | Civil Law                               |

<sup>23</sup> For the purposes of comparison, I focus in this table on the Asian International Commercial Courts that have been in existence for a number of years. The Chinese International Commercial Court is therefore not included in this table. For more information about this court, I refer to Julien Chaisse and Xu Qian, ‘The China International Commercial Court: Architecture, Pitfalls, and Promises’, in this volume.

<sup>24</sup> See ‘DIFC Courts’ <<https://www.difccourts.ae>>, ‘Qatar International Court and Dispute Resolution Centre’ <<https://www.qidrc.com.qa>>, ‘ADGM Courts’ <<https://www.adgm.com/adgm-courts>>, (all last visited accessed 20 July 2020).

<sup>25</sup> See ‘Welcome to the AIF Court’, <<https://www.aifc-court.kz>> (last visited 20 July 2020).

<sup>26</sup> See ‘Singapore International Commercial Court’, <<https://www.sicc.gov.sg/>>.

<sup>27</sup> See ‘Tribunal de Commerce de Paris’, <<https://www.tribunal-de-commerce-de-paris.fr/fr/accueil>>; Cour d’Appel de Paris, <<https://www.cours-appel.justice.fr/paris>>.

<sup>28</sup> See Chamber for International Commercial Disputes *at the Landgericht Frankfurt am Main*, <<https://ordentliche-gerichtsbarkeit.hessen.de/ordentliche-gerichte/lgb-frankfurt-am-main/lg-frankfurt-am-main/chamber-international>>.

<sup>29</sup> See Netherlands Commercial Court (NCC), <[www.ncc.gov.nl](http://www.ncc.gov.nl)>.

*Table 1: international commercial courts - compared*

As the table shows, the first area where the European international commercial courts distinguish themselves from most of the Asian international commercial courts is how they fit into their home court system. All three European countries have established their international courts within their existing court system as a specialized chamber. Germany, France and the Netherlands have all created a new chamber within their biggest domestic commercial district court. France and the Netherlands have done that both on district level and appeal level and Germany, in Frankfurt, on district level only. Of the discussed Asian international courts, only the Singapore International Commercial Court is set up in a comparable way as the European courts as it is a division of the Singapore High Court, which is part of the Supreme Court of Singapore, and is therefore part of the existing local court system.

This is in contrast to the Asian international commercial courts in the Gulf and Kazakhstan that are all part of a separate economic and legislative zone in their countries.<sup>30</sup> The reason for the creation of these special economic zones was to set up a legal and economic jurisdiction that is separate and different from the home country's legal and economic regime. This was done to facilitate the investment of international businesses. Each special economic zone has its own international commercial court to resolve the commercial disputes that businesses, that are part of that economic zone, may encounter during their business dealings.

A major advantage of the European approach is that judgments from these international commercial courts, or chambers, have the same status as other domestic judgments. Enforcement of judgments of the European international commercial courts should therefore not be more complicated than a judgment in a local case, both within as outside the country. Dubai serves as an example where the execution of judgments from the DIFC courts was successfully challenged, which is a scenario a court would like to avoid.<sup>31</sup>

Another significant difference between the European international courts and the Asian international courts is the composition of the bench. The European courts only use their own, local judges. The local judges are selected based on their experience with handling big and complex international commercial disputes and their English language skills. The Asian international commercial courts on the other hand have a predominantly international bench.

The last difference is, of course, that the three European countries have civil law based systems, while all the Asian international courts have a common law basis and their bench also predominantly comes from common law countries. This is the case even for the Gulf countries and Kazakhstan. Although the legal system of these countries is not common law based, the English common law has strongly influenced the legal regime of the special economic zones in which the international commercial courts operate. This also applies to the

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<sup>30</sup> See also Georgios Dimitropoulos, 'International Commercial Courts in the "Modern Law of Nature": Adjudicatory Unilateralism in Special Economic Zones' (forthcoming 2021) *Journal of International Economic Law*.

<sup>31</sup> Julian Bailey, 'The Interplay Between Hybrid Dispute Resolution Fora and Ordinary Courts', in this volume.



procedural rules of the international commercial courts of the Gulf countries and Kazakhstan, which are modelled on the Civil Procedure Rules of England and Wales.<sup>32</sup>

Although one could point to many differences between common law and civil law, which could mean that, inherently, there are significant differences between the practices of the Asian international commercial courts and European international commercial courts, I consider that these differences in practice are rather relative.

First, the international commercial courts of Amsterdam, Paris and Frankfurt will have to apply the law that is deemed to be applicable to the case, which can be a different law than that of the court's home jurisdiction. Often, the contract will specify the law applicable to the dispute is and - if that is not the case - international private law conflict rules will enable the court to determine the applicable law. Accordingly, a civil law based court may have to apply the laws of, for example, England and Wales. Judges are trained to apply not only their local laws but also foreign laws. The court will also be informed by parties on foreign law aspects through expert briefs and/or foreign counsel, who will generally be allowed to argue a case before the French, German and Dutch international commercial courts, alongside the local counsel of the case.

Secondly, even though the procedural rules that the European international commercial courts will apply will be based on their local legislation - and therefore be civil law based - France, Germany and the Netherlands have shown willingness to use best practices from common law procedures in their international commercial courts. By doing this, the European international commercial courts have taken a similar approach as has happened in international arbitration, where civil law practitioners, who practice in an inquisitorial, and more paper-based (evidence) system, meet common law practitioners, who practice in an adversarial system that values oral evidence highly. In international arbitration, practitioners from both backgrounds have found a middle ground, as well as their way to allow for their practices to converge – the International Bar Association Rules on the Taking of Evidence in International Arbitration illustrate this.<sup>33</sup>

## 5. The Specifics of European International Commercial Courts

Although the European international commercial courts are similar in nature, there are also some important differences that discussed below, and demonstrated in Table II.

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<sup>32</sup> Sir William Blair, 'The New Litigation Landscape: International Commercial Courts and Procedural Innovations', (2019) 2 *International Journal of Procedural Law* 215.

<sup>33</sup> IBA, IBA Rules on the Taking of Evidence in International Arbitration (2010)

<[https://www.ibanet.org/publications/publications\\_iba\\_guides\\_and\\_free\\_materials.aspx](https://www.ibanet.org/publications/publications_iba_guides_and_free_materials.aspx)>.

| <b>Feature</b>                  | <b>Germany<sup>34</sup><br/>(Frankfurt)</b>          | <b>France<sup>35</sup><br/>(Paris)</b>                                  | <b>The Netherlands<sup>36</sup><br/>(Amsterdam)</b> |
|---------------------------------|--|---|---|
| <b>Start date</b>               | 1 January 2018                                       | 1 March 2018  | 1 January 2019                                      |
| <b>Change of Legislation</b>    | No   | No  | Yes   |
| <b>Court Fee</b>                | Substantial court fee, depending on value of case    | Low fee: €235,-   | A flat court fee, ranging from € 7,500 to € 20,000  |
| <b>How English is procedure</b> | Only oral proceedings + exhibits                     | Only oral proceedings + exhibits  | Both oral and written proceedings                   |
| <b>Judgment</b>                 | In German (with an English translation if requested) | In French (with an English translation if requested)                    | In English  |
| <b>Rules of Procedure</b>       | Standard provisions of civil procedure               | Specific set of Rules of Procedure                                      | Specific set of Rules of Procedure                  |
| <b>e-filing</b>                 | No   | No  | Yes   |
| <b>Website</b>                  | Very limited English content                         | No English content (district level), informative website (appeal level) | Very informative                                    |

*Table II: features of the European international commercial courts*

### 5.1. Start Date, Change of Legislation and Court Fees

Germany and France have not changed their existing legislation and could therefore act swiftly after announcing that they would set up an international commercial court. What they did was taking advantage of the possibility that their existing legislations provided to have a hearing in a different language than the official language of the court as used for pleadings and judgments.

The Netherlands on the other hand did decide to change its existing legislation to be able to offer more than just oral hearings in English. The legislative process in the Netherlands

<sup>34</sup> Chamber for International Commercial Disputes at the Landgericht Frankfurt am Main, <<https://ordentliche-gerichtsbarkeit.hessen.de/ordentliche-gerichte/lgb-frankfurt-am-main/lg-frankfurt-am-main/chamber-international>>.

<sup>35</sup> ‘Tribunal de Commerce de Paris’, <<https://www.tribunal-de-commerce-de-paris.fr/fr/accueil>>; Cour d’Appel de Paris, <<https://www.cours-appel.justice.fr/paris>>.

<sup>36</sup> Netherlands Commercial Court (NCC), <[www.ncc.gov.nl](http://www.ncc.gov.nl)>.

was not particularly quick – it started in 2015 and the final legislative hearing was held in December 2018. The topic discussed the most was not so much the establishment of the international commercial court itself but the increase of the standard court fee from €3,000 to €15,000 for first instance<sup>37</sup>. €15,000 court fee per party is, at least from an international arbitration perspective, relatively insignificant. In the Netherlands this increase however led to concerns that this higher fee might make the NCC less accessible to smaller companies and could also open the door for court fee increases for domestic proceedings. Ultimately, the legislation was approved, including the higher court fee, in December 2018.

As far as court fees are concerned, all three courts have a different approach. The court fees in France are exceptionally low – just €235, which is the standard fee for the commercial court in Paris. In Frankfurt, the court fee depends on the value of the case and could be rather substantial; a €10 million claim comes with a court fee of €113,000 in first instance. The Netherlands Commercial Court has a fixed fee of €7,500 for summary proceedings, €15,000 for first instance and €20,000 for appeal.<sup>38</sup>

## 5.2. How ‘English’ are the Procedures and Judgment?

As explained above, in Germany and France, only the oral part of the hearings can be done in English. Additionally, exhibits in English don’t need to be translated. Written pleadings must however still be submitted in French and German and the judgments and any court orders will be rendered in the local language as well. An official translation of the judgment in English can be provided to the parties upon request. This means that there are two versions of one judgment, which could lead to conflicts in interpretation, but the official judgment in either French or German version will prevail.

In the NCC, every part of the proceedings is done in English, including both the oral as the written submissions. This also includes the judgment, which is rendered in English. The Netherlands Commercial Court is therefore the only truly English speaking court on the Continent.

## 5.3. Rules of Procedure

The international commercial courts of Germany, France and the Netherlands will all use their own local, civil law based procedural rules. France and the Netherlands have both used the flexibility that their standard rules of procedure offer to come with their own set of rules for their international commercial courts. France has its own protocols,<sup>39</sup> one for each instance of the international court; and the Netherlands has its NCC Rules that apply to both district level as appeal.<sup>40</sup> In these special procedure rules, both countries have implemented best practices

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<sup>37</sup> Harriet Schelhaas, ‘The Brand New Netherlands Commercial Court: A Positive Development?’, in Xandra Kramer and John Sorabji (eds), *International Business Courts* (Eleven International Publishing 2019) 55-56, 58-60.

<sup>38</sup> NCC, ‘NCC and other European Courts’,

[https://www.rechtspraak.nl/SiteCollectionDocuments/Other\\_European\\_commercial\\_courts.pdf](https://www.rechtspraak.nl/SiteCollectionDocuments/Other_European_commercial_courts.pdf).

<sup>39</sup> ‘Protocol relating to procedural rules applicable to the International Chamber of the Court of Appeal of Paris’ and ‘Protocol relating to procedural rules applicable to the International Chamber of the Paris Commercial Court’, (February 2018), <<https://www.cours-appel.justice.fr/paris/presentation-generale-ccip-ca-iccp-ca>>.

<sup>40</sup> ‘NCC Rules’, <<https://www.rechtspraak.nl/English/NCC/Pages/rules.aspx>>.

from international arbitration and the common law-systems into their international court procedures. The below will set out the main innovations to the standard civil law procedures:

1. Both France and the Netherlands recognize the importance of safeguarding fast and efficient proceedings. In an early phase of the procedures, Case Management Conferences will be organized to discuss preliminary matters, motions, fact-finding and a timetable. In the Netherlands, as soon as a claim is submitted, a case will be assigned to a designated judge and a designated clerk who will be in charge of case management. That case management may start directly after the submission of the claim and in most cases will involve a case management conference. The French protocols require that in each case a case management conference will be held after which the court will set a timetable for the full proceedings, including date of the judgment.

With their focus on case management, both countries make tailor-made proceedings possible, in a similar way that parties are used to in international arbitration. In the Netherlands, this starts even in an earlier phase than in arbitration, since a judge will already be designated at the time of the statement of claim, where arbiters still need to be appointed at that stage.

A last point to make is that courts generally make sure that proceedings stay on track to avoid unnecessary delays. The NCC confirms on its website that it can and will sanction dilatory tactics and other types of obstruction, so NCC proceedings in any case will be kept moving.

2. France and the Netherlands have both adapted their evidentiary practices to focus more on oral submissions and evidence than is typically the case in civil law procedures, where written pleadings form the core of a case. Written witness statements may be submitted in advance of an oral witness testimony. Both countries have also expressly stipulated in their rules the possibility of cross-examination of witnesses and experts by counsel. While it is possible for counsel in standard proceedings to ask questions to a witness or an expert, cross-examination generally does not happen in France or the Netherlands in the adversarial way as in common law countries. In both the NCC Rules as the French protocols, counsel however appears to be given more room to conduct a cross-examination in the way that they want to do, under the supervision of the court. The NCC Rules further acknowledge that parties can enter into an evidentiary agreement in which they can customize their proceedings from an evidentiary perspective and can deviate from the statutory rules of evidence.
3. Both France and the Netherlands have included some provisions on obtaining evidence from the other party or a third party and thereby acknowledging the importance of disclosure requests to parties. While there will be no room for fishing expeditions, it is expected that both courts may be more open to disclosure of documents-requests than is usually the case in civil law procedures. Both courts may also fall back on the IBA Rules on the Taking of Evidence in International Arbitration.

The NCC Rules are overall more elaborate than the French protocols and include some other interesting elements, like the possibility of having a court reporter prepare a verbatim transcript of a hearing instead of the usual, more concise summary of the hearing drawn up by the court. The NCC Rules also make it possible to have a combined hearing with a closely connected foreign case, so counsel can argue both cases at the same time. Lastly, an interesting element in the NCC Rules is the allocation of costs at the end of the proceedings. The standard rule is that the unsuccessful party will bear the costs of the proceedings and that the lawyers' fees will be calculated based on fixed fees per process act. However, parties can deviate from these standard rules with an agreement on costs.

#### 5.4. (Online) Accessibility of the Court

Accessibility to the court and easy access to court information, including judgments, is an important feature of a court to make transparent how it rules and what its practices are. (Online) accessibility is furthermore relevant for both local as well as international lawyers so that they can familiarize themselves with the court and know how they can submit documents or reach out to clerks. All three European international commercial courts have in this respect a different online presence, as is set out below.

The International Commercial Court of Frankfurt am Main has one page on the website of the State of Hessen<sup>41</sup> that contains some general information about the court and about the proceedings under the German Code of Civil Procedure. There are no judgments posted nor is any contact information for the court available, so its use is rather limited.

The French International Commercial Courts do not have a shared website but have their own pages on the website of their host court. The Paris International Chamber has its own link on the Tribunal de Commerce de Paris website.<sup>42</sup> The French version of the website contained some general information about the International Chamber, its procedures and judges but no judgments. The English website did not contain any information other than contact information at the time of writing this chapter. The International Chamber of the Court of Appeal does have a better website with information in French and English about the background of the International Chamber, the protocols, the judges.<sup>43</sup> It also contains a list of judgments of the appeal court with a short summary of the case in French and English and a link to the French judgment and, for most, but not all, cases, also the English translation.

Finally, the (English) website of the NCC contains detailed information about the court, its procedures and judgments.<sup>44</sup> The NCC furthermore uses e-filing (referred to as 'eNCC') for all court procedures and submissions so cases are easily started and pleadings submitted, with little extra paperwork. The NCC reaches out to the legal market itself as well with news

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<sup>41</sup> See <<https://ordentliche-gerichtsbarkeit.hessen.de/ordentliche-gerichte/lgb-frankfurt-am-main/lg-frankfurt-am-main/chamber-international>>.

<sup>42</sup> See <<https://www.tribunal-de-commerce-de-paris.fr/fr/accueil>>.

<sup>43</sup> See <<https://www.cours-appel.justice.fr/paris>>.

<sup>44</sup> See <<https://www.ncc.gov.nl>>.

updates and webinars, and in that sense resembles a well-oiled arbitration institute and not so much a governmental court.<sup>45</sup>

## 6. Experience, So Far

In the last part of my comparison of the three courts, I look into what these courts have accomplished during their short existence.

The launch of the Frankfurt Chamber for International Commercial Disputes generated a reasonable amount of publicity in 2018.<sup>46</sup> Against the backdrop of Brexit and the announcement of new European international commercial courts there was significant interest in Germany's International Chamber in Frankfurt. There is however little to no new information published that relates to the practices of the newly established Chamber for International Disputes in Frankfurt. According to Burkhard Hess and Timon Boerner,<sup>47</sup> there was a first case transferred to the Chamber for International Commercial Disputes in December 2018, but it is unknown how this case proceeded. Matthias Lehmann tries to explain in an interesting article why the Frankfurt International Commercial Court has not generated any more cases yet and why the earlier international chambers that were established in Bonn and Cologne have only heard 2 cases since 2010.<sup>48</sup> In his view, Germany is, at least at the moment, not an attractive hub for transnational dispute resolution but things might, of course, change in the future.

The Paris International Commercial Courts appear to have been busier than the Frankfurt court in the almost 2.5 years of their existence in their current form. Since the judgments of the International Chamber of the Paris Commercial Court are not published on their website, nor are to be found on other websites, it is unclear what the caseload is of this court at district level. More is known about the International Chamber of the Paris Court of Appeal. At the time of writing this chapter, there were 34 judgments published on the website of the International Chamber of the Court of Appeal.<sup>49</sup> Of these 34 cases, 20 cases were appeals against judgments from a chamber of the Paris Commercial Court. The appeal judgment did in most cases not specify from which chamber of the Commercial Court the appealed judgment came –it is thus unclear whether they came from the International Chamber. Of the remaining

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<sup>45</sup> The NCC organized in June 2020 its first webinar to discuss case management, videoconference hearings and the eNCC during Covid-19, see <<https://www.rechtspraak.nl/English/NCC/news/Pages/NCC-News-Updat-nr-9-Webinar-invitation-COVID19--.aspx>> accessed.

<sup>46</sup> See for example Christoph Just, 'Landmark in International Commercial Litigation? The Frankfurt High Court installed a specialized Chamber for International Commercial Matters' <<https://www.schulte-lawyers.com/schulteblog/2882017-6y2e6>>, Burges Salmon, 'Plans afoot for English-speaking commercial courts in Europe post-Brexit' <<https://www.burges-salmon.com/news-and-insight/legal-updates/plans-afoot-for-english-speaking-commercial-courts-in-europe-post-brexit/>>.

<sup>47</sup> Burkhard Hess and Tilman Boerner, 'Chambers for International Commercial Disputes: The State of Affairs' (2019) *Erasmus L Rev* 33.

<sup>48</sup> Matthias Lehmann, "Law Made in Germany" – The Export Engine Stutters', in Xandra Kramer and John Sorabji (eds), *International Business Courts* (Eleven International Publishing 2019) 83f f.

<sup>49</sup> Décisions CCIP-CA / ICCP-CA Judgment, <<https://www.cours-appel.justice.fr/paris/decisions-ccip-ca-iccp-ca-judgment>> (last visited 20 July 2020).

14 cases, 7 cases were appeals against judgments from courts outside Paris and the last 7 judgments related to challenges against arbitration awards. The International Chamber of the Paris Court of Appeal has been given jurisdiction to decide on the challenge and enforcement of arbitral awards, so these cases can be brought directly to the International Chamber.

The Court of Appeal's judgments do not specify whether any part of the (oral) proceedings were conducted in English. Although all cases were international disputes, this does not necessarily mean that the oral proceedings will have been conducted in English, which is optional for parties. This will especially not be the case when the district level proceedings have been fully conducted in French. Emmanuel Jeuland<sup>50</sup> notes in this respect that very few hearings are held in English before the Paris International Commercial Courts. While it is clear that the Paris International Commercial Courts have been handling cases since early 2018, a big question remains as to how much of the case load was conducted in English.

The NCC has had to date a modest case load of five cases in which final rulings were given since the start of its operations on 1 January 2019.<sup>51</sup> In all these cases, there was one Dutch party (either claimant or defendant) and an international counterparty. Of these five cases, four were summary proceedings and one was a standard claim procedure. The governing law of the latter case was English law. Both parties were supported by an English barrister or Queen's Counsel to brief the court on some aspects of English law.<sup>52</sup>

Of the four summary proceedings, one case was particularly interesting; it was a COVID-19-related case between a US based party (claimant) and a Dutch party (defendant). They had been in negotiations for several months about a deal to take over claimant's 50% stake in an equestrian show-jumping business for EUR 169 million when COVID-19 started to change the world and defendant wanted to walk away from the deal without further payment. This case led to two judgments in April 2020, the first being an interim judgment regarding the jurisdiction of the NCC.<sup>53</sup> The Defendant argued that there was no agreement to refer summary proceedings to the NCC and, alternatively, the NCC had no jurisdiction because arbitration was not pending yet. The NCC held that there was a valid NCC clause in which parties had agreed that 'any Party may apply to the [NCC] in Summary Proceedings for preliminary injunctive relief or similar interim measures necessary to preserve its rights pending resolution of any dispute arising out of or in connection with this [agreement] through arbitration'. The NCC furthermore held that the summary proceedings were 'within the scope of the NCC clause because the ordinary meaning of the word "pending" in the present circumstances is that an interim measure precedes and is without prejudice to the resolution of the dispute in arbitration'.<sup>54</sup> Following the interim judgment, a second video-conference

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<sup>50</sup> Emmanuel Jeuland, 'The International Chambers of Paris: A Gaul Village', in Xandra Kramer and John Sorabji (eds), *International Business Courts* (Eleven International Publishing 2019) 78.

<sup>51</sup> Judgments NCC, <<https://www.rechtspraak.nl/English/NCC/Pages/judgments.aspx>> (last visited 20 July 2020).

<sup>52</sup> Information provided by NCC Registrar Willem Visser.

<sup>53</sup> *McCourt Global Sports & Media LLC vs Tennor Holding B.V.* [14 April 2020], ECLI:NL:RBAMS:2020:2277

<sup>54</sup> *Ibid.*

hearing was held and one week later the final judgment was issued.<sup>55</sup> The NCC dismissed the claim to compel the transfer of Claimant's 50% stake to defendant but granted payment of the agreed walk-away fee of EUR 30 million instead to claimant. The NCC was not persuaded by defendant's arguments to modify or reduce this fee given the COVID-19 circumstances. The Court relied in this respect on the parties' judgment, who were considered to be 'experienced professionals, well guided and ably counselled by an array of experts. They set the fee and expressed their considered view that it was reasonable. They set their contractual equilibrium. The payment of the fee will preserve that equilibrium'.<sup>56</sup> The NCC therefore honored the terms that parties agreed on in their letter of intent.

After the NCC's first case, the lawyers who represented the parties were asked to participate in a survey. The respondents to the survey were positive about the way the court handled the case.<sup>57</sup> One of the lawyers stated that '[e]specially the professionalism, speed, quality of the judge and quality of the decision were impressive', and his colleague praised the court for being 'responsive, flexible and quick. The judge had obviously read the documents and (in my view successfully) directed the debate to address only the relevant issues. The - for Dutch standards - novel use of the first person in the decision was quite convincing'.

Considering the above, it is clear that both the French and Dutch international commercial courts are open for business. The caseload of the French and Dutch courts may be modest at this time, but this can be explained by the fact that it is only since the start date of these international commercial courts that forum selection clauses can be included in international commercial contracts to designate the International Chamber of the Paris Commercial Court or the NCC as their forum of choice. It can therefore be expected that their caseload will increase overtime. It is unclear whether the same can be said about Frankfurt's Chamber for International Commercial Disputes, since this court does not appear to be very active.

## 7. Conclusion

The question is frequently posed whether international commercial courts can really compete with international arbitration.<sup>58</sup> There are advantages to both forms of dispute resolution and it will depend on what the parties in question are looking for. The caseload of Paris and Amsterdam in any case shows that international commercial courts complement international arbitration, by offering summary proceedings, where this is not always a (viable) option in arbitration, and by offering an English speaking forum in case an award of an international arbitration tribunal is being challenged.

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<sup>55</sup> *McCourt Global Sports & Media LLC vs Tennor Holding B.V.* [29 April 2020], ECLI:NL:RBAMS:2020:2406

<sup>56</sup> *Ibid.*

<sup>57</sup> NCC News Update #6, <<https://www.rechtspraak.nl/English/NCC/news/Pages/NCC-Update-nr-6.aspx>>.

<sup>58</sup> See for example Janet Walker, 'Specialized International Courts: Keeping Arbitration on Top of its Game' (2019) 85 *Arbitration* 2-23, Dorothee Ruckteschler and Tanja Stooss, 'International Commercial Courts: A Superior Alternative to Arbitration?', (2019) 36 *Journal of International Arbitration* 431-450.



Sir William Blair gave a lecture in 2016 at the Durham University, where he talked about what international users are looking for from international commercial dispute resolution.<sup>59</sup> He suggested the following 8 components: (1) Certainty – application of ascertainable legal principles to the underlying dispute; (2) Accessibility of justice; (3) Predictability – application of known procedures; (4) Transparency – party awareness of the process; (5) Independence; (6) Experience and expertise of the court or tribunal; (7) Efficient case management; (8) Effective outcome and enforcement; adding reasonable cost of procedure as a possible 9th component.

European international commercial courts tick all these boxes. Because of the very fact that we are dealing with courts – instead of tribunals, they offer more safeguards in that their judges are independent and impartial, comply with known ethics standards and, last but not least, have the coercive powers to manage cases efficiently or join parties. The European international commercial courts provide the essentials of what international users are looking for in international dispute resolution, and are a promising addition to the existing international dispute resolution scene. The NCC in particular, being the only real English-speaking court of the three European international commercial courts, is very well equipped to become a true player in the field of international dispute resolution. Let us follow them closely and give them a chance to live up to their potential.

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<sup>59</sup> Sir William Blair, “Contemporary Trends in the Resolution of International Commercial and Financial Disputes” (January 2016), <<https://www.judiciary.uk/wp-content/uploads/2016/01/blair-durham-iccl-lecture-2016.pdf>>.