

Eyeing Cross-border Disputes

A new international chamber of the Paris Commercial Court was launched in 2018, with the aim of creating an important hub for the resolution of cross-border commercial disputes.

Paul-Louis Netter, president of the Paris Commercial Court, discusses the reasons for the initiative and the opportunities posed by Brexit

IQ: Can you describe the role of the international chamber of the Paris Commercial Court?

Paul-Louis Netter (PLN): The international chamber is one of 13 chambers of the Paris Commercial Court, all dedicated to commercial disputes. It is the primary commercial court in France, both in terms of number of judges (180) and the level of expertise and specialisation of each of its chambers. Disputes are distributed by the court to a particular chamber, depending on the nature of the litigation and the issues under debate. The areas of specialisation span a broad range of economic activities, including banking and finance, corporate, contracts, transportation, antitrust, distribution, construction and media.

The international chamber is primarily responsible for ruling on cross-border litigations in the first instance. The cross-border nature of a litigation could take many forms, arising from the nationality of the litigating parties, the foreign law governing the agreement or the market in which the transactions were entered into. But counterparties can now also contractually give jurisdiction to the international chamber directly.

IQ: Are you seeing increased interest from international parties choosing Paris as a forum for dispute resolution? Why might parties opt for the international chamber of the Paris Commercial Court?

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PLN: Globalisation is obviously a key factor. In this context, Paris has, we believe, great assets to promote it. For one thing, France has a long tradition of having the greatest respect for the rule of law. The justice system comprises two tiers – first instance and appellate – with independent and highly competent courts. The Paris bar is one of the most developed in the world, with US, English and French international firms present and operating here since the end of World War I. Our case law has

also consistently recognised the efficiency of netting, and the statutory safe harbour has been confirmed on many occasions by French courts, including in insolvency. French courts have the greatest respect for contracts, with strong emphasis on the intent of parties.

In addition, Paris is a major financial market, with both the European Securities and Markets Authority and the European Banking Authority based here. A number of large financial institutions with expertise in



investment banking, derivatives and/or asset management also have a presence in Paris.

These are all, by themselves, important legal and financial assets. But there is more, we believe. Brexit will be a game changer for cross-border litigation in Europe. Judgments of English courts will cease to benefit from the European judicial system organised under the Brussels I-bis Regulation. This means they will cease to be immediately and automatically enforceable in the EU 27. This will result in greater

expense and difficulty in obtaining such recognition and enforcement – likely to be a key consideration, especially in financial and collateral matters.

This further strengthens the position of Paris as a centre for commercial disputes in Europe. Those strengths have already been recognised by both buy- and sell-side market participants, and the court is receiving more and more questions about its jurisdiction and the best way to elect for it.

IQ: What measures have been taken to make Paris a viable and attractive option for foreign counterparties when choosing a forum for dispute resolution?

PLN: An early decision was made by French authorities and regulators following recommendations made by the Legal High Committee for Financial Markets of Paris in 2017 to make every possible use of the flexibility authorised by French law to adapt and accommodate our procedural rules to international disputes. This has resulted in quite remarkable – and I believe unrivalled – changes.

As an illustration, I would highlight the fact that documents and agreements, together with tape recordings, can be brought before the Paris Commercial Court – as well as the Paris Court of Appeal – as valid evidence in English, with no need for a French translation. Interactions with the court, pleadings, submissions, conclusions, opinions and all hearings can be in English. A greater focus has also been given to hearings: parties will be able to ask experts to be heard by the court and cross-examined by the other party, all in English. Looking ahead, we strongly believe procedural rules globally will further converge and harmonise.

IQ: How would the international chamber of the Paris Commercial Court source expert judges to deal with complex financial judgements like derivatives?

PLN: I would first emphasise that all judges at the Paris Commercial Court are former business executives, each in the relevant market or domain that their respective chamber deals with. Among them are several bankers and financial experts.

This proximity with business, markets and companies stands as a guarantee to litigants of the best possible understanding of the issues at stake in a dispute, as well as the general context in which it takes place.

When it comes to derivatives or complex financial structured transactions, the court will make sure any case brought before it will be heard by a judge who is an expert in the field, whether he or she is a member of the international chamber or another chamber.

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→ **IQ:** Most disputes involving derivatives have been subject to English or New York law and the jurisdiction of English or New York courts. Would the Paris Commercial Court take previous English and New York law rulings into account to inform its judgements?

PLN: The banking industry and financial sector have grown rapidly over the past 30 years. We are, of course, aware that the financial centres where this growth has been concentrated are New York and London. French banks have a strong presence in these markets, and have played their part in this development. We recognise that courts in these financial centres have been pivotal in this expansion by ensuring stability and legal certainty and encouraging financial, legal and contractual innovations. The Paris Commercial Court is eager to play a similar role for the European markets.

We fully appreciate that legal certainty is a key issue for market participants. I want to make this point clear: in any situation where there is an issue regarding the interpretation of a particular section of the ISDA Master Agreement (or any provision of another international market

netting agreement), the Paris Commercial Court will first look for and examine previous court decisions on that section or provision. We will seek to ensure consistency and predictability to the greatest extent permitted by French law and by the specificities of the case.

In other words, the Paris Commercial Court does not see itself as a new ‘Christopher Columbus’ in the derivatives markets. Rather, we intend to offer a solid and stable alternative forum for global participants, with a sense of continuity and legal certainty.

IQ: Have you seen any indications that counterparties are opting for governing law other than English or New York law in derivatives or other financial transactions?

PLN: You do not change 30 years of market practice overnight. But major corporates and some French banks have picked up early on the French law ISDA Master Agreement. The legal and credit committees of many organisations have now approved the new agreement, and we have no reason to believe this will slow down any time soon,

particularly because of Brexit.

Things can change, sometimes quite unexpectedly. We are patient and determined. Our conviction is that, with the continuous and formidable support we have had from the French authorities and regulators, Paris will, in a few years, be a more popular place for cross-border financial disputes that it has ever been before.

IQ: What steps has the court taken in response to the coronavirus outbreak?

PLN: As elsewhere, government regulations closed businesses and courts in the very early stages of the lockdown. The Paris Commercial Court quickly reacted and adjusted. This was a necessity at a time when companies, funds and institutions were under unprecedented pressure.

Priority was immediately given to restructuring, pre-insolvency and insolvency proceedings. The main role of the court is to assist companies and markets by promptly dealing with financial difficulties and by resolving complex situations quickly to save and protect businesses and jobs. Hearings were quickly held by video conference using encrypted software used by French judicial courts. The process ran relatively smoothly, and we have not encountered any particular difficulty.

Our level of activity on the prevention and pre-insolvency fronts has remained strong. All insolvency practitioners and administrators requested by distressed companies were appointed by the court, and they were able to start resolving difficulties with creditors under our supervision.

On April 20, we resumed hearings for less urgent disputes, again through video conference. As soon as permitted by the government, the court’s premises will reopen. We have a return-to-work plan in place, and will ensure all required health precautions are taken and observed.

There is obviously nothing that couldn’t be improved, but in such extraordinarily challenging times, the Paris Commercial Court has maintained its operations. There is now a long and difficult period before us. As with any other crisis in the past, we will learn a lot and we will use this to further improve and better serve our industries and markets. 