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P.R.I.M.E. Finance and the resolution of financial disputes

LLM 2012-2013

Transnational and European Commercial Law and Alternative Dispute Resolution

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I.INTRODUCTION

One of the most significant current discussions in the legal world concerns the best way to react when confronted with conflicts and disputes. Traditionally, the adjudicatory powers of State Courts guaranteed a method for the resolution of disputes. It is becoming, though, increasingly difficult to ignore the overwhelming growth of the popularity of International arbitration as an alternative dispute resolution mechanism. Proof of the gradual awareness of the benefits of arbitration and its adequacy as an effective means of dispute resolution for International disputes can be found in the International Community's efforts to establish a predictable and durable framework for the arbitral process[1]. Undoubtedly, when it comes to dispute resolution, parties demand credibility and impartiality. Notwithstanding the safety and efficacy of the public adjudicatory proceedings, the need to modernize the legal and judicial system boosted the development of arbitration, as the preferred mechanism for the resolution of International business disputes.

Very recently, in 2010, the same need expanded to the area of complex financial disputes with the attempt to introduce an independent tribunal and educational resources dedicated to such matters[2]. It is noteworthy that arbitration traditionally had a limited role in international finance and financial services[3]. The previously unmet need for an alternative to legal warfare has grown with the proliferation of derivatives that have expanded almost tenfold in the past decade. The fast-moving and increasingly complex financial markets require flexibility and technical expertise, and arbitration may reveal itself, in some cases to be a very effective and efficient solution, suitable and appropriate to the needs of the modern financial world[4]. Moreover, the global financial crisis acted as a catalyst to the creation of a robust

[1] Andrew Tweeddale and Keren Tweeddale, 2007. Arbitration of Commercial Disputes, International and English Law and Practice, OXFORD, Oxford University Press.

[2] P.R.I.M.E. Finance, History [online] Available at: http://www.primefinancedisputes.org/index.php/about-us/history.html.

[3] Andrew Pullen, Hi Chong (Sylvia) Ko, Allen & Overy, Singapore, September 2011, The Rise of Arbitration in Financial Transactions: Key Issues for Users and Practitioners, Westlaw [e-journal], Available through: International Hellenic University Library.

[4] Stefano Cirielli, 2003. Arbitration, Financial Markets and Banking Disputes, 14 Am. Rev, Int'l Arbitration 243, Available through: International Hellenic University Library (lexis nexis).

international legal and institutional framework, with the aim to protect economic interests.

To achieve this, a group of experts, including representatives from the European Central Bank, the U.S. Securities and Exchange Commission and the New York Federal Reserve, lawyers, judges, regulators and founders of the derivatives and structured finance industries, together with the generous support from the Dutch government, the Dutch Central Bank and the City of The Hague, established the Panel of Recognized International Market Experts in Finance (P.R.I.M.E. Finance). It consists of a body administering the arbitral proceedings relating to derivatives and other complex financial products. It offers, also, its own arbitration rules, the P.R.I.M.E Finance Arbitration Rules, that have been adapted to meet the needs of the financial markets. Principally, the major key elements of P.R.I.M.E. Finance are its panel of expert arbitrators and its customized arbitration rules.

In the history of arbitration it is widely known that there has been a historical antipathy of banks towards arbitration[5]. The great reluctance within the banking sector towards international arbitration left some space for negative reviews and criticism considering the appropriateness of this dispute resolution mechanism for financial disputes. However, the complexity of financial disputes, due to the increased involvement of parties from emerging markets, such as the CIS countries, Brazil, India and China, as a consequence of the so called globalization, brought to the limelight the big advantages that arbitration provides for and therefore triggered the changing attitude of the financial sector towards arbitral proceedings.

The present thesis, after a brief introduction to the world of arbitration (Section II), attempts to examine the role that this private dispute resolution method plays in the context of the financial markets that have gradually adopted a more welcoming attitude towards it (Section III). Next, special attention is given to the establishment of the P.R.I.M.E. Finance institution (Section IV-i), which is focused on the resolution of disputes concerning complex financial transactions and to the customized P.R.I.M.E. Finance Arbitration Rules that mirror the market's intention for regulatory reform

[5]William W. Park, 2012, Arbitration of International Business Disputes, Studies in Law and Practice, Chapter: Arbitration in Banking and Finance, OXFORD: Oxford University Press.

(Section IV-ii). Further, this thesis discusses some of the existing set of rules for financial disputes (Section V) and concludes with the initiative of the ISDA to produce model clauses for its Master Agreements (Section VI), fact that confirms the current trend of extensive recourse to arbitration within the financial sector.

II.INTERNATIONAL ARBITRATION

i) A brief historical review

A brief consideration of the history of arbitration in international matters is useful as an introduction to contemporary international arbitration. History is not a neglected subject as far as arbitration is concerned. The inception of arbitration dates back many years. International arbitration is "the oldest method for the peaceful settlement of International disputes"[6]. In one way or another, it was used throughout the Hellenic world for five hundred years[7], with Plato writing about arbitration amongst the ancient Greeks. However, the lack of sources obstructs the accurate knowledge regarding the development of arbitration across the globe. Indeed, writing such a history would be like trying to put together an immense jigsaw puzzle, with many of the pieces missing and lost forever[8]. It was, though, perceived to constitute "an apparently rudimentary method of settling disputes, since it consists of submitting them to ordinary individuals whose only qualification is that of being chosen by the parties"[9].

Over the past century there has been a dramatic change in the overall concept of arbitration. As the pace of global integration has dramatically increased, national borders became more permeable. Therefore, the interconnectedness of national markets led to an enormous emerging market where international trade has liberalized and international business transactions proliferated. When disputes arise in such

[6]Wolters Kluwer Law and Business, <http://www.aspenpublishers.com/%5CAspenUI%5CSampleChaptersPDF%5C625.pdf>, pg 2.

[7] ibid, pg 3.

[8] Nigel Blackaby, Constantine Partasides et al. Redfern and Hunter, 2009. An Overview of International Arbitration, Wolters Kluwer/Kluwer Law International, pg 5.

[9] Ibid.

international business transactions, which is something inextricably linked to the human nature, the different laws that get involved hinder the effective and speedy resolution.

There is little doubt that the idiosyncracies of national procedural law contributed to the indubitable increase in the demand of arbitration. In light of this international arbitration gained pace in the legal world, with the concurrent assistance of contemporary international treaties and conventions that are linking together national laws and provide, so far as possible, a specialized and highly supportive system of worldwide enforcement, both of arbitration agreements and of arbitral awards. Indicatively, the Geneva Protocol of 1923, the New York Convention of 1958, the UNCITRAL Arbitration Rules, the UNCITRAL Model Law and the revised Model Law of 2006 are of paramount importance in this sector.

ii)The significance of International arbitration in the legal framework

Over the past 50 years, arbitration has been increasingly embraced by the International Community, with many acknowledging its importance as the primary means of resolving complex transnational disputes. The multiplicity and complexity of the different national laws involved contributed to the establishment of an alternative non-judicial framework for the settlement of disputes that arise in the area of international transactions. Additionally, the workload of State Courts, the litigation costs and the need of confidentiality highlighted the need of creating a flexible and worth-trusting/credible scheme with a view to ensuring an effective and immediate response of the International Community to the resolution of disputes.

Features such as the procedural simplicity and flexibility, neutrality, confidentiality, technical expertise and experience, speed efficiency and international enforceability render arbitration an attractive mechanism for resolving disputes. At this point it is important to make a short reference at these features that will be also further analyzed in the context of their contribution in banking and finance disputes.

Procedural simplicity and flexibility

Arbitration rules are generally far simpler and more flexible than Court rules. As a result they can be better understood by the parties and even better tailored to meet the specific requirements of each dispute. This means that parties are better able to adapt the dispute resolution process to suit their relationship and the nature of their dispute.

Confidentiality

The confidentiality of the arbitral process has traditionally been perceived as being a cornerstone of arbitration law[10]. Indeed, arbitration proceedings are surrounded by a veil of confidentiality, which is a feature of great importance, especially when the parties involved are not willing to risk exposing trade secrets or competitive methods. It is, thus, very attractive that disputants are able to avoid unnecessary and negative publicity. However, one potential downside is that arbitral tribunals do not rely on precedent, so helpful decisions cannot be used to prevent future disputes from developing either on arbitration or litigation.

Neutrality

When disputes arise out of international transactions the parties usually come from different countries. Thus, the local Courts of each party will constitute a foreign forum for the other. In this context, arbitration provides for a neutral forum where each party has the opportunity to participate to the constitution of the arbitral tribunal, with the aim of precluding the national Courts and the respective judges that might be biased. In this manner neutrality is ensured through a mutual agreement between the parties.

Technical expertise and experience

Very often, several disputes require experience and knowledge. One of the most significant advantages of arbitration is that the parties can present their case before persons with experience on the issues that are able to comprehend and resolve the dispute in question in a effective way. Thus, parties can appoint arbitrators with the relevant expertise or experience.

[10] Supra note 1, pg 349.

Costs and speed

The International Community having experienced the excessive delays and huge costs of litigation, fully benefits from arbitration, which is famous as a less time-consuming and less-expensive mechanism, mainly because, as a rule, the decision reached by the arbitral tribunal is final[11]. Arbitration often does not involve the same amount of discovery or appellate review as litigation. It is also true that there are no pending cases before an arbitral tribunal that contribute to the delay of the dispute's resolution.

Final and binding decision and enforceability

When the arbitral proceedings come to an end the arbitral tribunal will issue a decision that is final and binding. This means for one that the parties are not free to accept or reject this award and for another that within some very particular time limits, the award will be final. In other words it will not be subject to appeal.

A party that succeeds in obtaining an award in its favor may have to enforce it, particularly when the other party won't comply with voluntarily[12].The New York Convention provides for an extensive enforcement regime. The robust international legal framework for enforcement constitutes one of the biggest advantages of International arbitration and enhances the credibility of this mechanism.

III.ARBITRATION IN BANKING AND FINANCE

i)The traditional reluctance of the financial sector against arbitration and its changing attitude

Arbitration, by virtue of its main attractions that have also led to its prominence in the international arena, is a popular method for the resolution of disputes among[13] participants in business areas, such as trade, international commerce insurance and reinsurance markets, as well as in the shipping and construction industries. However, historically, the financial community, and primarily the banking sector have not

[11] Stefano Cirielli, supra note 4.

[12] Supra note 1, pg 407, 408.

[13] Stefano Cirielli, supra note 4.

embraced arbitration in the same way that other sectors did. It has been noted that in regards to financial dispute resolution, arbitration has been relatively rare, even ill-favored. The financial market participants, such as the financial and banking institutions were not used to relying on this method for the resolution of any financial dispute and have been quite timid in preferring arbitration over Court litigation. They would rather submit their disputes to State Courts than resort to any arbitration proceedings. Moreover the bankers' tendency towards a mentality that often leads them to fear the "hex effect" of innovation has deeply contributed to the preference of litigation. It is, nevertheless, worth mentioning that this remarkably different attitude of the financial sector towards arbitration, contrasts substantially with its privileged position as an alternative adjudicatory mechanism in trans-border commercial relationships.

Despite the longstanding reservations of the banking sector to rely on arbitration when it comes to the resolution of disputes that arise out of financial transactions, international arbitration is gradually gaining popularity. Participants in the financial emerging markets and bankers draw away their reluctant attitude towards arbitration, deeming it to be a more appropriate venue for the resolution of financial and banking-related disputes. The gradual acceptance of arbitration is also evidenced by the fact that arbitration clauses can already be found in various banking and financial documents[14]. It is, therefore, clear that the historical aversion of the financial and banking sector towards arbitration, has been progressively eroded[15].

ii) Litigation v Arbitration

Over time, the representatives of the financial sector favored litigation over arbitration as the best means for resolving international disputes. This customary hesitation from the banker's part is not something unanticipated. Major banks have, traditionally, had sufficient bargaining power in international transactions to insist upon the legal

[14] Stefano Cirielli, supra note 4.

[15] Simon James and Robert Lambert, Arbitration in the finance sector: avoiding the "Italian torpedo",2006. International Arbitration Law Review.

framework surrounding the resolution of the disputes to come[16]. In light of this, the basic approach had been to apply the governing law of their choice, which used to be either the English or the New York law[17] that are generally considered to be bank friendly and flexible in accommodating the parties' needs and in minimizing any possibility for debtors to evade the performance of the financial contracts[18]. Additionally, Banks, being able to exercise their financial muscle, were able to impose forum selection clauses that granted exclusive competence to Courts of their own jurisdiction. In virtue of their advantageous position, they usually insisted upon the jurisdiction of English and New York Courts. Both jurisdictions have a reputation for upholding the sanctity of control and permitting only limited defenses for the non performance of contractual obligations[19]. Moreover, the presence of commercially-minded judges bound be previous cases has given parties the comfort that outcomes will be to a certain extent, predictable.

However, these are not the only reasons in favor of litigation. It is, therefore, necessary to refer to some additional factors that until so far conduced to the preference of litigation over arbitration. Firstly, when it comes to financial disputes, arising out of simple financial transactions, the claims are usually confined to straightforward payment and do not involve any complex legal questions or fact finding. The main objection was that there was in reality nothing to arbitrate, given that the claim isn't but a simple matter of debt collection (the so- called one shot money disputes), which can be dealt by way of summary judgment in Court[20]. Thus, Court litigation is deemed to be sufficient enough for such claims, on the basis that there is no real difference between the parties, but just some doubts on the part of the

[16] Audley Shepard, Arbitration of International Financial Disputes, Kluwer Arbitration Blog, 19 March 2009, Available at: <http://kluwerarbitrationblog.com/blog/2009/03/19/arbitration-of-international-financial-disputes/>.

[17] At this point we need to consider a recent survey (SIA 2010) by the School of International Arbitration, Queen Mary University of London and PricewaterhouseCoopers, according to which 40% of the transactions were executed under English law and 17% under New York law.

[18] Dimitry Vlasov, P.R.I.M.E. Finance Arbitration: A new look at the new institution, 01.02.2012, CIS Arbitration Forum, Available at: <http://cisarbitration.com/2012/02/01/p-r-i-m-e-finance-arbitration-a-new-look-at-the-new-institution/>.

[19] Audley Shepard, supra note 16.

[20] Supra note.

bank that the debtor might not be able to repay the debt[21]. Secondly, the lack of default judgments or summary judgments in arbitration proceedings contributed to a more favorable approach towards the judicial proceedings. In a more practical vein, bankers resisted the use of arbitration clauses because they could operate to bar the benefits of the summary procedures, available to lenders under many national systems. Thus, the availability of summary and default judgments in Court procedures favored litigation especially for financial disputes and particularly when disputes related to overdue payments. Of course this allegation dates before the arbitral tribunals managed to issue interim measures. Thirdly, in the arbitral process, which is a private method of dispute resolution, the jurisdiction of the tribunal is solely derived from the agreement of the parties. Thus, any doubts relating to the jurisdiction, in cases of not clear clauses, can cause unjustified and unnecessary delays. Arbitration can, similarly, permit extensive document production as opposed to civil law jurisdictions. In a word, it has been viewed as comparatively inefficient and uneconomic in the financial sector.

Whilst arbitration often prevails because of its advantages, these can often constitute a disadvantage or can be of no interest to a party. More particularly, the confidentiality of the arbitral proceedings, which is a characteristic of great importance, causes less embarrassment to the debtor and usually this is not satisfactory enough for the Banks. Not only the adverse publicity against the debtor is reduced, but Banks are prevented from exercising any pressure through this negative publicity. Likewise, the maximum flexibility that international arbitration provides for permits the parties to create a procedure tailored to the needs of the dispute. However, this is not often in the bankers' interest, since it gives the debtors the freedom to negotiate and also creates legal uncertainty. Moreover, arbitral awards are final and therefore do not constitute the first step on a ladder of appeals. Likewise, this is not always something that bankers anticipate, given that they appreciate control of decisions by higher Courts through the appealing process. The idea of multi-party arbitration is also quite problematic; therefore there is one more reason in favor of the public adjudicatory powers of State Courts. Finally, arbitral awards have limited precedential value. It is

[21] Stefano Cirielli, supra note 4.

true that they do not constitute precedent in the way of judgments in common law countries[22].

It is, thus, generally acceptable that the conservative nature of the financial institutions enhanced the preference of litigation over arbitration. However, over the last few years this stance has been undergoing gradual and systematic reforms. Bankers' belief that Courts offer the most reliable forum for strict enforcement of contract terms has come under challenge[23]. Financial matters get to be arbitrated more often and the financial sector is now addressing a boost in the use of arbitration. Because of the widespread introduction of arbitration into the securities markets, an ever-growing number of financial market participants developed experience and greater comfort levels with the choice of arbitration[24]. In few words, the current tendency as regards financial matters is that the global justice is quickly maturing following the rapid developments in the financial sector.

Arbitration can offer financial-sector users a number of advantages over litigation. The main drivers responsible for cultivating this more welcoming attitude is for one the rising awareness of the benefits of arbitration in an increasingly more sophisticated modern financial society and for another the inadequacy of the public adjudicatory system for the resolution of such complex financial disputes that has caused a relevant dissatisfaction[25]. However as it has been reckoned, the driving force behind this shift seems to be globalization.

The current global economic crisis in the emerging market is deemed to be the most serious such event since the 1930s. Its role has been crucial in revealing the discrepancies of the litigation system and, thus, promoted arbitration as a susceptible method to overcome them. One of the major advantages of arbitration lies in the fact that the parties can appoint arbitrators of their own choice, meaning that they have the possibility to influence who will decide the dispute. When it comes to complex financial transactions the parties using these instruments need reassurance that any

[22] supra note 3.

[23] Mark Kantor, OTC Derivatives and Arbitration: Should Counterparties embrace the alternative?, pg 3 September/October 2000. Banking Law Journal, Available through: Westlaw.

[24] ibid.

[25] Stefano Cirielli, supra note 4.

disputes that arise will be handled by persons that have the relevant expertise and experience. Therefore, the general practice whereby the parties appoint the arbitrators enables them to make sure that their dispute is decided by somebody on whose expertise and understanding they can rely[26].

The arbitrators chosen by the parties for their specialized knowledge of the financial sector may for one understand the complexity and technicality of the transaction involved far better than a judge and for another they are not subjected to various forms of governmental interference, which may encompass legislative changes that may force judges to apply them and declare the clause of the contract ineffective[27]. Due to the rapid expansion of financial activities, a judge might lack the necessary financial expertise and might not be familiar with the new financial services and financial transactions, many of which can have a very technical content[28]. It is also true that very often judges risk being perceived as less interested in understanding the specificities of the financial products involved and may be themselves a source of systemic risk.

Therefore, this gap in the litigation process is fulfilled with the establishment of arbitral bodies and institutions expressly designed to provide a method of resolving disputes in the financial and banking industry as an alternative to national Courts. The people who are nominated, in order to participate to the resolution of the dispute are highly qualified arbitrators with vast professional and practical experience in the financial sector and are indisputably more capable of assessing the crucial parts of the relevant dispute as well as financial trade and usage. This is surely an important point, considering that modern financial transactions and financing mechanisms are becoming increasingly complex and sophisticated and are often tailor-made.[29]

The disproportionate delays and the enormous costs of Court litigation in addition to the neutrality[30] of the arbitral tribunal oriented the financial community in favor of

[26] Susanne Kratsch, The financial crisis: arbitration as a viable option for European financial institutions, 2010, Arbitration, 681.

[27] Stefano Cirielli, supra note 4.

[28] ibid.

[29] ibid.

[30] For more on the neutrality feature see supra, pg 6, [Neutrality].

arbitration. It is irrefutable that when the parties come from different countries, the national Courts of one of the parties will always be foreign for the other. At any case, one of the most important reasons to arbitrate in an international framework is that corporations and government institutions "are simply not willing to litigate in the other party's hometown", on a "perceived chauvinistic basis"[31]. The home jurisdiction of the adversary's own judicial system is often unacceptable for international banks that doubt the impartiality of the local Courts. Consequently arbitration can prove to be the best solution, since it provides a neutral forum acceptable to both sides.

Even the attractiveness of the "second chance" avenue afforded by the appellate Courts and the motions practice of trial courts is subjected to gradual review[32]. In the case that a bank has prevailed in a contested trial the right to appeal can work against it. The debtor through its lawyers' skilful manipulation of the appellate process can delay the time of repayment, which is to the detriment of the banking litigant. Therefore, nowadays, due to the complexity in the banking and financial sector, where institutions seek for sound legal rulings, the right to appellate review is overestimated.

The veil of confidentiality surrounding the arbitral process constitutes also an important factor for the preference of arbitration in these disputes[33]. It can definitely favor financial institutions, since they are willing to avoid getting to the arduous and uncomfortable position of sharing details of their affairs and watching them appear in the financial press, which is an unavoidable result of the right of the public to attend Court proceedings[34].

Another factor, probably the most important, weighing in favor of arbitration is the ease of the enforceability of the arbitration award. There is no doubt that the continuing success of international arbitration in the legal and business world is due to

[31] Stefano Cirielli, supra note 4.

[32] Laurence Shore, The advantages of arbitration for banking institutions, 1999 Editorial. Journal of International Banking Law.

[33] For a more general approach of the confidentiality feature in International Arbitration see supra, pg 6, [Confidentiality].

[34] Mark Kantor,supra note 23.

the existence of the New York Convention[35] that constitutes the most important universal instrument for the recognition and enforcement of arbitral awards. Unlike judgments, for the enforcement of which there is no such instrument[36] that applies throughout the world, awards enjoy near-universal worldwide enforcement through national Courts[37]. A global regime for judgments is therefore a long way off.

In virtue of the NYC, to which some 140 States are party, arbitral awards made in other contracting states can be easily enforced subject only to limited grounds of defenses related to procedural matters, such as the validity of the arbitration agreement, the opportunity to be heard etc. In consequence, when addressing this issue from a more practical point, the comprehensive legal framework surrounding the recognition and enforcement of arbitral awards is likely to prove more beneficial for the financial institutions, since it provides for stability and predictability that constitute a powerful business advantage.

When bankers contemplate Court adjudication, they presume enforceable judgments. But, unfortunately, national Court litigation is, in many jurisdictions, a process that is not designed with the particular values and interests of banking institutions in mind[38].Moreover it is often that the bank's debtor doesn't have assets in the country where the judgment was issued. Of course, if the assets are within the EU the successful litigant will be able to enforce the judgment under the Brussels Regulation. But what happens when the party's assets are outside the EU? Indeed, foreign judicial decisions are not always easily enforced as domestic ones. In this case the enforcement of judgments can be a very difficult, complex and time-consuming process, unless there are reciprocal arrangements or bilateral or multilateral recognition of judgment treaties between the jurisdiction where the debtor has its assets and the dispute resolution forum. In the absence of such arrangements, the successful litigant is dependent on the local law in the country of enforcement. At the

[35] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958.

[36] The Hague Convention on Choice of Court Agreements may one day provide an equivalent regime for cross-border enforcement of Court judgments, but so far only Mexico has ratified.

[37] Susanne Kratsch, supra note 26.

[38]Laurence Shore, Supra 32.

best case scenario the litigant will suffer extra procedures and at the worst his judgment might be unenforceable. Thus, the more exotic the jurisdiction in which the other party or its assets might be located, the more must the financial community contemplate arbitration as the best resolution method, in order to benefit from an award enforceable under the NYC. Therefore, the financial institutions, having woken up to the advantages of the NYC for emerging market deals and willing to ensure that their claim will be satisfied in case that the other party doesn't comply voluntarily, prefer arbitration, where the award granted by the tribunal will be for one enforceable in a universal level and for another final and binding.

IV.P.R.I.M.E. FINANCE ARBITRATION

i) Introduction

Over the last few years and especially under the pressure of the recent market turmoil the global financial governance realized that there is a need of restructure, since it has witnessed a huge growth in complex and innovative financial products, including in the over-the-counter (OTC) derivatives markets. Litigation to the financial world is rapidly increasing, but reliance on national Courts is often unsatisfactory, too decentralized, unnecessarily slow and unpredictable[39]. The sheer fiddliness of some financial cases threatens to overwhelm the skills and patience of standard commercial Courts.

To this context, in 2007 Jeffrey Golden[40] recommended the creation of a World Financial Court for International Financial Disputes with Specialist Judges. According to him "the need for such a Court stems from the need to ensure 1) that Courts stay up to date with global financial market developments, 2) that judges have the requisite competence to unravel facts and apply laws that often pre-date and did not anticipate current practices, or that were too hastily drafted in response to political pressure and 3) that the risk of a wrong decision contributing to systemic risk in a global, highly

[39] Jeffrey Golden, World financial markets need a world financial Court, 03.11.2010, The Guardian.

[40] Jeffrey Golden is a special US Counsel and global derivatives senior partner at Allen &Overy LLP.

interconnected marketplace is mitigated"[41]. Jeffrey Golden argued that national judges are not best equipped to settle disputes regarding the complex and transnational transactions. The standardization efforts in the financial markets that are more than interconnected can be obstructed by decentralized and non-coordinated dispute resolution methods. Furthermore, Jeffrey Golden questioned himself, "Is there any reason why finance is different – less complicated, less specialized, less important – and would benefit less in having more specialized judges?[42]" Around the world there are bankruptcy, traffic and tax Courts, so why not establishing one for finance as well?

Indisputably, a World Financial Court would constitute the most solid base for the development of jurisprudence, but in order for a Court to be established, States should transfer part of their jurisdiction through a treaty to an International Court and this would take many years[43]. Therefore, the Community thought that standardization of the judicial process can be achieved by a private initiative. International arbitration was condemned to be the appropriate mechanism, so Lord Woolf of Barnes[44] and Jeffrey Golden began to inquire the need for an independent tribunal and educational resource dedicated to complex financial transactions.

Therefore, the massive step forward was made in 2010, when an expert Round-table[45], chaired by Lord Woolf of Barnes, was set in Hague and particularly in the

[41] Cesare Romano, Loyola Law School Los Angeles, Do we really need a World Financial Court? Kluwer Arbitration Blog, 19 March 2009, Available at: <http://kluwerarbitrationblog.com/blog/2009/11/04/1221/>.

[42] Emily Flitter, Do we need an International Financial Court?, September 2004. Amerikan Banker, Available at: <http://www.americanbanker.com/bankthink/international_court-1002358-1.html> .

[43] Frank Zwetsloot, Director of the Science Alliance at the World Legal Forum.

[44] Lord Woolf Barnes is a former Lord Chief Justice of England and Wales and Member of the P.R.I.M.E. Finance Advisory Board, <http://www.primefinancedisputes.org/index.php/about-us/prime-finance-advisory-board.html>.

[45] A Round-table with top finance experts including lawyers, judges, market practitioners, regulators, central bank officials, and founders of the derivatives and structured finance industries.. <http://www.primefinancedisputes.org/index.php/about-us/history.html>.

Peace Palace[46] followed by a series of meetings with market players from the emerging financial markets, with the aim of establishing the P.R.I.M.E. Finance[47]. The idea to create an independent tribunal gained widespread support and almost two years after, on 16 January 2012, a new arbitral institution – the Panel of Recognized International Market Experts in Finance - was launched at an inaugural conference held in The Hague, under the auspices of the Dutch government[48].

Of course, the choice of the Hague as the hosting city is not a coincidence, since it has a great international judicial tradition. Furthermore, over the last years the Netherlands intention is to be promoted internationally as a centre of arbitration, through the full incorporation of the UNCITRAL Model law. Although the city hosts the majority of International Courts and Tribunals, such as the International Court of Justice, the Permanent Court of Arbitration and the International Criminal Court, it is not a financial center. But the presence of the Permanent Court of Arbitration, which will have a cooperative relationship with P.R.I.M.E. Finance is a factor that contributed to the attractiveness of the Hague. Moreover, traditionally, the city of the Hague was perceived neutral for financial actors from emerging countries and finally the many highly trained and multilingual staff and experts available worked as a catalyst for the tribunal's seat[49].

P.R.I.M.E. Finance seeks to be more efficient, cheaper and predictable than both domestic Courts and established arbitral centers. It is a new financial resolution body, registered as a foundation under Dutch law. More particularly, this new arbitral institution is focused on the resolution of complex financial disputes, inter alia, disputes deriving out of derivatives, swaps, wholesale financial market trading and other financial products and contributes in a "complementary way to the on-going

[46] President Wellink, during his speech on October 25 2010, referred to the Peace Palace as a symbol of peace that, at the time of its opening in 1913, as acclaimed to be a "dream palace as big and mighty as the idea of world peace itself.

[47] Panel of Recognized International Market Experts (P.R.I.M.E Finance), Available at:<www.primefinancedisputes.org>.

[48] P.R.I.M.E. Finance, Available at: <http://www.primefinancedisputes.org/index.php/about-us>.

[49] Eric de Brabandere, P.R.I.M.E. Finance: The role and function of the new arbitral institution for the settlement of financial disputes in the Hague, 8.2.2011, Insights, American Society of Law, Available at: <http://www.asil.org/pdfs/insights/insight120208.pdf>.

financial market regulatory reform process". In short, it offers a combination of practical finance and international arbitration experience. It is structured on three pillars, each one of which constitutes one core activity. Firstly, it provides for dispute resolution services, including arbitration, mediation, expert opinions, determinations and risk assessment. Secondly, it entails judicial support and educational resources. It is increasingly recognized as alone in offering the specialized information jurists need to better assess the merits of the complex financial disputes which they are being asked to adjudicate, including the often differing opinions expressed by expert witnesses in judicial proceedings[50]. And finally, it combines a central database of international precedents and source materials[51].

Its mission is to fill the international gap in this area and to provide a more stable global economy and financial marketplace by reducing legal uncertainty and systemic risk, and especially, in emerging markets, promoting the rule of law. Legal uncertainty derives from the mistrustfulness to the public adjudicatory system at the area of rendering decisions that can be relied upon with confidence, from the market participants in an increasingly diversifying global market. It also derives from innovation that is so much a feature of complex financial transactions and it is true that only few are able to constantly follow their "why", "how" and "wherefore". What is more, different interpretations and contradictory decisions from some of the national Courts do not have place in interconnected and independent markets, because it may often result to systemic consequences. So, it is not irrational that markets are interested in the outcome of many cases, maybe more than the involved parties. Aiming, therefore, at over passing the immense black hole of legal uncertainty, P.R.I.M.E. Finance tends to be more efficient, cheaper and predictable than both domestic Courts and established arbitration centers.

The case for P.R.I.M.E Finance is to provide market participants with a stable and authoritative body of law and a panel of neutral, legally and financially sophisticated arbitrators with ethical responsibility and market knowledge to resolve and arbitrate

[50] P.R.I.M.E. Finance, Available at: <http://www.primefinancedisputes.org/index.php/other-services/judicial-training.html>.

[51] P.R.I.M.E Finance, Available at: <http://www.primefinancedisputes.org/index.php/about-us.html>.

complex financial disputes[52]. Just as financial transactions have become more complex, the disputes that arise highlight complex issues, not to mention the intricacy of the documentation. With a group of many experts, from a wide range of disciplines, backgrounds and cultures, such as retired and sitting judges, central bankers, regulators, representatives from private practice and derivative market participants, P.R.I.M.E. Finance intends to represent an unprecedented source in the world of collective knowledge and experience of documentation, law and market practice[53], ideal to the task at hand. Moreover, it also provides expert valuation advice, quite important for regulators, since they need certainty when assessing for example assets and liabilities, and advisory opinions in relation to complex financial transactions issues and disputes[54].

ii)P.R.I.M.E. Finance Arbitration Rules

As part of its innovative "raison d'être" the center of P.R.I.M.E Finance has also promulgated its own arbitration and mediation rules, the so called "P.R.I.M.E. Finance Arbitration and Mediation Rules". The set of rules particularly drafted for arbitration are based heavily on the tested and widely used at a global scale UNCITRAL Arbitration Rules, as revised in 2010[55]. In essence this fact ensures that parties can rely on the available commentaries, when confronting any ambiguities regarding their interpretation and practical application. Of course, they deviate to some extent from the UNCITRAL Arbitration Rules especially with a view to the role of the Permanent Court of Arbitration.

The United Nations Commission on International Trade Law (UNCITRAL) developed the UNCITRAL Arbitration Rules aiming at the resolution of trade disputes between countries with differences in their legal, social and economic

[52] P.R.I.M.E. Finance, Available at:<http://www.primefinancedisputes.org/index.php/expert-list.html>.

[53] P.R.I.M.E. Finance, Available at:<http://www.primefinancedisputes.org/index.php/about-us/why-choose-us.html>.

[54] Jonathan Ross, The case for P.R.I.M.E. Finance: P.R.I.M.E. Finance Cases, 22.06.2012, Capital Markets Law Journal, Available at: <http://cmlj.oxfordjournals.org/content/7/3/221.extract>.

[55] P.R.I.M.E. Finance, Available at: <http://www.primefinancedisputes.org/index.php/arbitration.html>.

systems. Primarily, these rules were intended to guide ad hoc arbitration, but along their existence they have been often used to guide administered arbitrations in agencies such as the ICC (International Chamber of Commerce) or the AAA (American Arbitration Association) as well. In such cases parties agree to replace the institutions' rules for UNCITRAL Arbitration Rules, mainly due to their flexibility and success throughout the years. The new revised rules of 2010 are an answer to the need of bringing the rules in to line with modern practices in international arbitration. They are indisputably well known, widely accepted and extensively practiced throughout the world. It is therefore reasonable, why P.R.I.M.E. Finance based its rules on the UNCITRAL Arbitration Rules, modified of course in accordance to the special needs of finance. Furthermore, they have been tailored to reflect the fact that they provide for an arbitration institute that will administer the arbitral proceedings (P.R.I.M.E. Finance).

The UNCITRAL Rules underwent some customizations, in order to be institutionalized so that they reflect that they provide for an arbitration institution that will administer the arbitral proceedings. In addition to these formalistic changes, the P.R.I.M.E. Finance Arbitration Rules contain several specific provisions and annexes allowing parties to arbitral proceedings to shorten time frames in several ways, like the ICC Rules of Arbitration, because of the market need of prompt and speedy resolution of disputes[56]. In this regard, the most significant adjustments include, firstly, the active participation of the Secretary General of the Permanent Court of Arbitration, as appointing authority. Secondly, the P.R.I.M.E. Rules also contain three specific procedures addressing the issue to rapidly settle urgent disputes. These are the "Expedited Proceedings"[57], the "Emergency Arbitral Proceedings"[58] and the "Referee Arbitral Proceedings"[59]. Finally, a quite innovative, for arbitration proceedings, provision, included in these rules, is the one that refers to the publication of the award, either in its entirety[60] or some of its excerpts. More particularly:

[56] P.R.I.M.E. Finance, Available at:<http://www.primefinancedisputes.org/index.php/arbitration.html>.

[57] Article 2a, P.R.I.M.E. Finance Arbitration Rules.

[58] Article 26a, P.R.I.M.E. Finance Arbitration Rules.

[59] Article 26b, P.R.I.M.E. Finance Arbitration Rules.

[60] Article 34 (5), P.R.I.M.E. Finance Arbitration Rules.

i) Permanent Court of Arbitration as the appointing authority

Pursuant to the P.R.I.M.E. Finance Arbitration Rules, unless the parties agree otherwise, the Secretary General of the PCA will act as the appointing authority[61], as opposed to the UNCITRAL Arbitration Rules[62] that provide for a variety of options to agree on an appointing authority[63]. It is more than clear that the PCA is propelled through these arbitration rules.

The PCA Secretary General can also actively participate in the appointment of the arbitrators. In P.R.I.M.E. Finance Arbitration only the persons listed on the P.R.I.M.E. Finance's list of approved arbitrators are eligible for appointment as such[64]. To this context there have been drafted two lists of experts, the "Finance Experts" list and the "Dispute Resolution Experts" list.[65] Parties in arbitration have the option either to agree that the arbitration will be conducted by a sole arbitrator (article 8) or by three arbitrators. In the latter case each party will appoint one arbitrator and the party-appointed arbitrators will then appoint the chairman from one of the lists (article 9). However, if no agreement can be reached between the parties in either case the PCA Secretary General will intervene and appoint the presiding arbitrator.

ii) Availability of arbitrators

Arbitrators must always fulfill the basic requirements of impartiality and independence and are obliged to disclose any circumstances that give rise to justifiable doubts. But, apart from their impartial and often prestigious personage, the P.R.I.M.E. Finance Arbitration Rules require from arbitrators to disclose whether there are doubts as to their availability. More particularly, a candidate arbitrator must confirm that he can devote the time necessary to conduct the arbitration diligently, efficiently based of course on the information each time available to him. Notwithstanding that reference to the availability feature is also made in article 13 of

[61] Article 6 (1-4), P.R.I.M.E. Finance Arbitration Rules.

[62] Article 6 (1), UNCITRAL Arbitration Rules.

[63] Andrea Marco Steingruber, The P.R.I.M.E. Finance Foundation: Dispute Resolution in Global Financial Markets, 04.06.2012, Jusletter.

[64] Articles 8(1) and 9(1), P.R.I.M.E. Finance Arbitration Rules.

[65] P.R.I.M.E. Finance Available at: <http://www.primefinancedisputes.org/index.php/expert-list>.

the ICC Rules (where the administrative body examines the availability of the arbitrator to be confirmed or appointed) it is an oddity that the arbitrator itself must declare its availability. As a consequence the P.R.I.M.E. Finance Rules contribute to an efficient and speedy arbitration process, where the arbitrator appointed will be absolutely focused on the resolution of the particular dispute.

iii) Special Arbitral Proceedings

An issue of paramount importance in international arbitration is the possibility of arbitral tribunals to grant interim measures. Very often the successful outcome of international arbitration proceedings depends on timely obtained provisional measures. The tribunal established under the P.R.I.M.E. Finance Arbitration Rules possesses regular competence to order provisional measures. Pursuant to article 26 of the P.R.I.M.E. Arbitration Rules "the arbitral tribunal may, at the request of a party, grant interim measures if it finds that it has prima facie jurisdiction to decide the claim".

However, there is often the case that the arbitral tribunal has not been yet constituted and that the party in need of urgent provisional measures cannot await the constitution. Therefore, the party has the possibility to make an application for such measures to be rendered by an emergence arbitrator in the form of an order under article 26a and the Emergency Arbitration Rules attached to the P.R.I.M.E. Finance Arbitration Rules, as set out in Annex C. Under these proceedings P.R.I.M.E. Finance can order the appointment of an "Emergency Arbitrator" from the approved lists of experts, within 72 hours of receipt of an application by either of the parties[66].

Apart from the "Emergency Arbitral Proceedings" parties can apply for provisional measures through the "Referee Arbitral Proceedings" that allow for fast track proceedings resulting in an enforceable award within the timeline of thirty to sixty days[67]. An important feature of this procedure is that it constitutes an application of the Dutch Code of Civil Procedure [Article 1051(1)]. Therefore, the Referee Arbitral Proceedings are only available to parties that have agreed that the seat of arbitration is

[66] ANNEX C, Emergency Arbitral Proceedings of P.R.I.M.E. Finance Arbitration Rules.

[67] Article 26(b) and ANNEX D of P.R.I.M.E. Finance Arbitration Rules.

in The Netherlands[68]. Furthermore, the proceedings are conducted by a specially appointed tribunal, which is composed by a sole arbitrator, appointed by P.R.I.M.E. Finance form the approved list of experts.[69] At this point it is crucial to refer to the fact that both the order issued by the "Emergency Arbitrator" and the referee arbitral award cannot prejudice the final decision of the arbitral tribunal.

Finally, the P.R.I.M.E. Finance Arbitration Rules permit the parties to shorten the timelines set out in the Rules, in order to expedite proceedings. This is regulated by article 2a, entitled Expedited Proceedings, which provides parties and arbitrators with a well-balanced system of procedural rules for the conduct of fast track arbitration. It should be noted that these timelines can only become effective after the approval by the arbitral tribunal. In practice, in order that these rules do not remain just an empty nutshell, arbitrators and parties must acknowledge their enhanced responsibility for the efficiency and success of the expedited conduct of the arbitration. It is obvious that the P.R.I.M.E. Finance Rules provide parties and arbitrators with a well-balanced system of procedural rules for the conduct of fast-track arbitrations within the institutional framework of the P.R.I.M.E. Finance.

iv) Transparency

The private nature of international arbitration has the meaning that awards, unlike judgments, rarely enter the public domain[70]. Additionally, it should be borne in mind that arbitral awards do not constitute precedents in the way judgments do. More particularly, in the financial sector, where market-standard documentation is widely used and where well-reasoned awards can provide valuable guidance, the lack of transparency can be quite problematic[71]. Indeed this fact can result as an obstacle to practitioners and academics all of whom desire precedent, authority, or information

[68] Article 26(b)(1) and (2) of P.R.I.M.E. Finance Arbitration Rules.

[69] ANNEX D, Referee Arbitral Proceedings ("Arbitraal Kort Geding") of P.R.I.M.E. Finance Arbitration Rules.

[70] Supra note 3.

[71] ibid.

about the arbitral process. In other words, resolving disputes through arbitration may act as a brake on the development of law[72].

A great novelty in the area of international arbitration is the possibility of the publication of the awards. P.R.I.M.E. Finance Arbitration Rules and particularly article 34(5), first sentence, which reflects article 34(5) of the UNCITRAL Arbitration Rules provides that an award can be made public with the consent of all parties. However, unusually for arbitration, P.R.I.M.E. Finance also permits that excerpt of an award is published without specific consent of the parties. Moreover, it allows an award to be published in its entirety, in anonymised form, under the condition that no party objects to such publication within one month after receipt of the award[73]. The anonymity feature can take away any reluctance of the parties as to the publicity of their awards. The specificity of these Rules is in accordance with the need for stability and predictability of the financial markets and is intended to facilitate the development of a body of law on financial disputes. Not to mention that it ties with P.R.I.M.E. Finance's overall goal to promote legal certainty and uniformity in the interpretation of financial instruments, through a database of arbitral awards that will gradually gain precedential value.

So far, only the awards rendered under the International Convention on the Settlement of Investment Disputes (ICSID) and by the Court of Arbitration for Sport (CAS) are regularly published[74]. The basic feature of international arbitration is its confidentiality and constitutes one of the main reasons for which parties traditionally choose arbitration over Court proceedings. Overall, it is clear that P.R.I.M.E. Finance Arbitration Rules introduce an innovation in this area, which makes them of great importance, given that they manage to develop a vast body of law in order to ensure predictability in the financial sector.

[72] ibid.

[73] Article 34 (5) of P.R.I.M.E. Finance Arbitration Rules.

[74] Supra note 63.

V.OTHER FINANCIAL DISPUTES ARBITRATION RULES

P.R.I.M.E. Finance, although being the first institution focused on the resolution of disputes concerning complex financial transactions, it is not a pioneer in providing for a set of rules corresponding to the needs of financial disputes. The "China International Economic and Trade Arbitration Commission" - CIETAC along with the American Association Arbitration - AAA, both placed in the major leagues of arbitration institutions, released a set of Arbitration Rules dedicated to financial disputes.

CIETAC Financial Disputes Arbitration Rules

China's history of arbitration dates back in 1950s, when the CIETAC was founded. Almost 30 years after, in 1978, when the chinese market economy strengthened substantially, China's formal and informal legal institutions proliferated. The various market reforms removed the centralization of economic authority and thus the centralization of dispute resolution authority[75]. Additionally, as the number of financial transactions conducted in China kept growing, there was a relevant increase of the disputes arising. In that climate, reasonably, arbitral institutions, together with an accelerated Court-use, developed and expanded in order to keep pace with the market's needs. It is, therefore, clear that the Chinese Financial Community very early considered the benefits of the use of arbitration and the strong urgency to establishing special bodies for the resolution of financial disputes.

CIETAC constitutes the most prominent arbitral institution active in China, dealing, inter alia, with disputes arising out of financial transactions. It was founded by the China Council for the Promotion of International Trade, in order to meet the needs of continuing development of China's economic and trade relations with foreign countries. It is noteworthy that CIETAC, besides making prominent contributions to the Chinese Arbitration Law, it established a financial dispute resolution system to deal with financial disputes across the nation[76]. In this context it also promulgated, in 2003, a set of Financial Disputes Arbitration Rules, which serve as an expeditious and

[75]Shahla Ali, Hui Huang, Financial Dispute Resolution in China: Arbitration or Court Litigation, 14.01.2012, Arbitration International, Volume 28 No.1 2012.

[76] ibid.

professional method for resolving financial disputes[77]. These rules were adopted by the China Council for the promotion of International Trade/China Chamber of International Commerce, became effective on May 2005 and were last revised in 2008[78].

The main purpose for their formulation was the need for impartial and prompt resolution of disputes arising from financial transactions between the parties[79]. It is interesting that within these rules there is an attempt of defining what a financial transaction is,[80] including just an indicative and by no means exclusive reference. Additionally, in cases that the parties do not expressly specify in their agreement their choice as regards the arbitration institution, but do agree on the CIETAC Rules, it is deemed to have also agreed to refer their dispute to arbitration by CIETAC.[81] Similarly to P.R.I.M.E. Finance Arbitration Rules, parties are allowed to appoint an arbitrator from the list of arbitrators, designated by CIETAC. Once again, the importance of expertise and capacity for resolving financial disputes appears. Of course, the appointment of arbitrators by the parties is not final, as it needs to be confirmed later by the CIETAC Chairman. However, as opposed to the P.R.I.M.E. Finance Arbitration Rules, the CIETAC Rules contain no provisions referring to expedited arbitral proceedings in the first drafts. However, in the newly revised

[77] <http://www.cietac.org/index/rules.cms>.

[78] P.R.I.M.E. Finance Available at:<http://bankrecht.uni-koeln.de/76/content/154/prime-finance/en>.

[79] Article 1 of the CIETAC Financial Disputes Arbitration Rules "These Rules are formulated for the purpose of impartial and prompt resolution of disputes arising from financial transactions between the parties."

[80] Article 2 of the CIETAC Financial Disputes Arbitration Rules "The term "financial transactions" shell refer to transactions arising between financial institutions inter se, or arising between financial institutions and other natural or legal persons in the currency, capital, foreign exchange, gold and insurance markets that relate to financing in both domestic and foreign currencies, and the assignment and sale of financial instruments and documents denominated in both domestic and foreign currencies, including but not limited to: loans, deposit certificates, guarantees, letters of credit, negotiable instruments, fund transactions and fund trusts, bonds, collection and remittance of foreign currencies, factoring, reimbursement agreements between banks, and securities and futures.

[81] Article 4(4) of the CIETAC Financial Disputes Arbitration Rules, "Where the parties agree to refer their dispute to arbitration under these Rules without providing the name of an arbitration institution, they shall be deemed to have agreed to refer the dispute to arbitration by CIETAC.

arbitration Rules (2008), parties can benefit from a summary route, which involves simpler procedures and takes shorter time to conclude a case[82].

CIETAC is striving to maintain its dominant position as the prime choice of arbitration in Mainland China. The Financial Arbitration Rules offer both domestic and foreign parties entering to financial transactions in China the alternative avenue of quick expert and objective resolution of disputes regarding financial disputes. The flexibility and the swiftness of the proceedings constitute a decisive factor for financial institutions to consider including a clause referring their disputes to CIETAC Arbitration.

AAA Commercial Finance Rules

Apart from the CIETAC, the AAA[83] in cooperation with the ACCFL[84] and representatives from financial institutions have prepared procedures, the Dispute Resolution Procedures for Commercial Financial Disputes, and a set of rules, the Arbitration Rules for Commercial Financial Disputes, for resolving disputes involving commercial financial products and services. Highly qualified panel members can resolve, through specialized approach and experience, disputes that could involve loan agreements, multi-credit arrangements, participations, subordinations, guaranties, letters of credit and other transactions, or conduct relating thereto[85]. The overall purpose of these rules and procedures is to provide for the efficient, flexible and

[82] Article 54 of the Revised CIETAC Financial Disputes Arbitration Rules.

[83] The American Arbitration Association is a not-for-profit, public service organization, established in 1926 and is the best known arbitral institution in the US. It offers a broad range of dispute resolution services to business executives, business entities, attorneys, individuals, trade associations, unions, management, consumers and all levels of government. <http://www.adr.org> .

[84] American College of Commercial Finance Lawyers is a not-for-profit organization of professors and lawyers who have earned the recognition of their peers as experienced and highly qualified attorneys and academicians in the area of commercial finance, bankruptcy and related litigation. <http://accfl.com/>.

[85] <http://www.adr.org/aaa/faces/aoe/commercial/financialservices/commercialfinance;jsessionid=JjftSB3Gc9RBpcvDF1Jhck1Qqh5ThHfnzj0hhrltQ2LyV1jvQfVT!1064099277?_afrLoop=825830032957120&_afrWindowMode=0&_afrWindowId=null#%40%3F_afrWindowId%3Dnull%26_afrLoop%3D825830032957120%26_afrWindowMode%3D0%26_adf.ctrl-state%3D14ok8ala1z_4>.

economical resolution of large complex disputes that may arise in the commercial finance area. Notably, they are particularly designed to give parties wide discretion in most aspects of the process to fit the nature of the dispute.

More particularly in order to meet the financial sector's interest in speedy proceedings, these Rules provide a limited period for arbitration proceedings. Further, for disputes where only small amounts of money are involved, an expedited procedure applies, according to which a sole arbitrator will decide the dispute, preferably after only one day of hearing[86]. Moreover, the AAA Rules include the "National Roster for Commercial Financial Disputes". The ACCFL has assisted the AAA in establishing the National Roster and the qualification criteria for those who serve in commercial finance arbitrations[87]. The AAA National Roster of Arbitrators consists of highly accomplished and respected experts from the legal and business communities who offer diverse experiences across a wide range of fields. People with exceptional subject-matter expertise and the ability to understand the essence of the dispute can manage the dispute resolution process.

VI.ARBITRATION UNDER THE ISDA – A PRACTICAL EXAMPLE

Over recent years and mainly at the core of the economic crisis there has been a growing trend in derivatives trading and in the diversity of counterparties and jurisdictions that are involved. ISDA, the International Swaps and Derivatives Association[88], through its Master Agreements, which constitute the market leading standard form agreements for documenting derivatives transactions, endeavored to enable OTC derivatives transactions to be documented fully and flexibly. In the first documents judicial resolution clauses are included. It is therefore, interesting to examine how the use of arbitration proliferated in the derivatives transactions or even better how the revised ISDA Master Agreements and the ISDA Guide to Arbitration

[86] Susanne Kratsch, supra note 26.

[87] Commercial Finance Guide resolving disputes, 2012, AAA Dispute Resolution Services Worldwide.

[88] <http://www2.isda.org/>.

together with P.R.I.M.E. Finance provide an unprecedented banking and finance industry endorsement for arbitration[89].

The ISDA path towards Courts, through the 1992 and 2002 Master Agreements, rather than arbitral panels was inextricably linked to the preference of commercial banks for judicial dispute settlement[90] . Both the 1992 and 2002 Master Agreements, that in simple words consist of a document completed between the parties setting the basic terms and rules that will apply to the transactions agreed, apply either to transactions between parties located in the same jurisdiction who are transacting in only one currency (local currency - single jurisdiction) or between parties located in different jurisdictions transacting in different countries (multicurrency - cross-border).

So far, the default choices in these agreements included judicial resolution clauses providing for submission to the exclusive jurisdiction of the English or New York Courts, depending on whether the parties have stated that English law or New York law is applicable, which have developed reputations as experienced and impartial forums for financial disputes[91]. However, in light of changed market circumstances, especially the rising number of cases related to the financial crisis and the fact that not only banks, but also increasingly businesses represented by the ISDA were counterparties to derivative master agreements banks have been forced to reconsider their decades-long aversion to arbitration[92]. The shift towards arbitration and the fact that financial institutions became more receptive to the use of it to resolve disputes over financial transactions makes good sense in the area of OTC derivatives. More particularly, the decision-making dynamic for resolving disputes arising out of these types of transactions is quite different than the one for credit agreements. Usually, most derivatives contain bilateral, mutual obligations. Therefore, the sympathetic image of the unfortunate borrower protecting home by resisting the uncompromising

[89] Loukas A. Mistelis, School of Law, Queen Mary, University of London for ITA, Are Banks Changing? The New Big Industry for International Arbitration?, Kluwer Arbitration Blog, Available at: <http://kluwerarbitrationblog.com/blog/2013/10/02/are-banks-changing-the-new-big-industry-for-international-arbitration/>.

[90] Mark Kantor, supra note 23.

[91] ibid pg3.

[92] ISDA and Arbitration, Available at:< http://bankrecht.uni-koeln.de/77/content/153/isda/en>.

demands of the hardhearted banker is thus mitigated in the derivatives market by the recognition that either counterparty can be the net debtor or the net creditor when a transaction is unwound[93].

Consequently, responding to the industry demand, in January 2011, ISDA issued a Memorandum named "The use of Arbitration under an ISDA Master Agreement"[94] with the aim to trigger members' interest in providing for arbitration in relation to all derivatives transactions documented under the ISDA 1992 and 2002 Master Agreements. Following the January Memorandum, a short consultation was produced in November 2011. In that ISDA sought views as to the steps that ISDA might usefully take to assist members in the use of arbitration when they conclude that arbitration is the appropriate method to choose. ISDA' s support for arbitration means that disputes relating to the derivatives markets are likely to be an increasingly prominent feature of the arbitration landscape in years to come.

In 2013, with a view to confirming the trend and enhancing the use of arbitration, ISDA released on September the 2013 ISDA Arbitration Guide, after discussions and meetings in New York, Singapore and London, which reflects the comments of members and interested stakeholders around the world[95]. Its main purpose is to highlight arbitration as an effective means for resolving disputes in the swaps and derivatives markets[96]. Albeit the model arbitration clauses recommended in the Guide are primarily drafted for use in the 2002 ISDA Master Agreement, the Guide contains additional language, which allows to use them also with the 1992 ISDA Master Agreement[97]. This Guide is supplemental to and in relation to Section 13 of the 2002 and 1992 Agreement and respectively amends the guidance in the ISDA User's Guide to each of those forms[98].

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[93] Mark Kantor, supra note 23 pg 3.

[94] < http://www2.isda.org/search?keyword=arbitration >.

[95] 2013 ISDA Arbitration Guide, International Swaps and Derivatives Association, Inc.

[96] On 1 March 2010, the ISDA and the IIFM (International Islamic Financial Market) introduced the ISDA Tahawwut Master Agreement, a global Master Agreement for transactions in Islamic derivatives and provides for English or New York Courts, if so specified by the parties, or for Arbitration under the ICC Rules or such other Rules.

[97] Supra note 92.

[98] Supra note 95, INTRODUCTION.

It comprises a guidance section, including an overview of arbitration, and seven Appendices containing model clauses. In general, these clauses provide for an alternative to the traditional jurisdiction clause in the 1992 and 2002 ISDA Master Agreement and cover disputes relating to non-contractual claims arising out or in connection with the ISDA Master Agreements. Inter alia, the Guide emphasizes to the need to ensure that the forum selection clause of Section13(b) of the 2002 Master Agreement is actually replaced by the arbitration clause, such that it does not result in simultaneous and contradictory agreement of jurisdiction clause and an arbitration clause in the same Master Agreement.[99] Therefore, in order to avoid any confusions relating to the real choice of the parties as regards the dispute resolution method, the ISDA Guide insists that parties delete Section 13 together with the choice of one of the arbitration clauses.

The ISDA Model Arbitration clauses cover a number of institutions and seats of arbitration around the globe. However, the most interesting of all is that the ISDA Model clauses provide for P.R.I.M.E. Finance Arbitration Rules. ISDA through the Vice Chairman of the Board and Non-Executive Chairman Europe of the International Swaps and Derivatives Association, Gay Evans has long before expressed its support towards P.R.I.M.E. Finance. This support was finally demonstrated by including model arbitration clauses under P.R.I.M.E. Finance for use in conjunction with the ISDA Master Agreement[100]. The clause offers a choice of 3 seats of arbitration, which are London, New York and the Hague and the governing law options are the English and New York Law.

i)MODEL CLAUSE FOR P.R.I.M.E. FINANCE RULES (LONDON SEAT)[101]

The arbitration clause is intended for the use where:

- The underlying agreement is a 2002 Agreement (see footnotes for suggested amendments for use with a 1992 Agreements)

[99] Supra note 92.

[100] Daniella Strik, Launch of P.R.I.M.E. Finance Arbitration Rules: dispute resolution in global financial markets, 17.01.2012, Kluwer Arbitration Blog, Available at: <http://kluwerarbitrationblog.com/blog/2012/01/17/launch-of-p-r-i-m-e-finance-arbitration-rules-dispute-resolution-in-global-financial-markets/>.

[101] 2013 ISDA Arbitration Guide, APPENDIX G, PART 1.

- The institutional rules are the P.R.I.M.E. Finance Rules
- The seat of arbitration is London
- The underlying agreement is governed by English law

Where not all of the above conditions are met, this clause may require adaptation.

ii) MODEL CLAUSE FOR P.R.I.M.E. FINANCE RULES (NEW YORK SEAT)[102]

This arbitration clause is intended for use where:

- The underlying agreement is a 2002 Agreement (see footnotes for suggested amendments for use with a 1992 Agreements)
- The institutional rules are the P.R.I.M.E. Finance Rules
- The seat of arbitration is New York
- The underlying agreement is governed by New York law

Where not all of the above conditions are met, this clause may require adaptation.

iii)MODEL CLAUSE FOR P.R.I.M.E. FINANCE RULES (THE HAGUE SEAT)[103]

This arbitration clause is intended for use where:

- The underlying agreement is a 2002 Agreement (see footnotes for suggested amendments for use with a 1992 Agreement)
- The institutional rules are the P.R.I.M.E. Finance Rules
- The seat of arbitration is The Hague
- The underlying agreement is governed by English law or New York law
- The governing law of the arbitration clause is Dutch law

Where not all of the above conditions are met, this clause may require adaptation.

In general, each model clause contains a provision of the law governing the ISDA Master Agreements. Moreover, there is a provision deleting the existing jurisdiction clause in the ISDA Masters. There is also an arbitration clause that covers the choice of rules, the seat, the language, the number of arbitrators and the appointment process. And finally there are provisions amending the wording of other sections of the ISDA

[102] 2013 ISDA Arbitration Guide, APPENDIX G, PART 2.

[103] 2013 ISDA Arbitration Guide, APPENDIX G, PART 3.

Masters to bring them in line with the arbitration clause. It is noteworthy that the English and New York law remain the default governing law options. During the consultation process it was proposed whether to provide for other alternatives in the ISDA Masters. It was, however, decided that the choice of solely English and New York law maintain the Universal Standard that the ISDA Masters offer.

Basic characteristic of these clauses is that of being user-friendly, able to cover common combinations of arbitration rules and seats. This means that they can be amended, for example parties can opt for arbitration under the P.R.I.M.E. Finance Arbitration Rules seated in Hong Kong or Singapore. Another distinctive feature of these clauses is their deliberate simplicity, aiming to give ISDA members the freedom to tailor each clause, by adding provisions to cater specific requirements or transactions. For example, a fast-track arbitration provision can allow for accelerating proceedings; a provision giving parties the freedom to choose between arbitration and litigation after the disputes arises is another case in point; or even a requirement for the arbitrator to have particular expertise or qualifications.

To sum up, ISDA Arbitration Guide not only confirms the changing attitude towards arbitration in the financial sector but works as a catalyst to the members' decision to opt for it, by simplifying the process. Indisputably, the publication of arbitration clauses for the Master Agreements leads to more awareness of arbitration in the financial sector and leaves ground for arbitration to prove itself as a viable process for derivatives contracts[104]. Of course, it is necessary to clarify that the choice of seats and arbitral institutions does not constitute an official endorsement by ISDA. Changes in the market preferences may result to new clauses issued by ISDA in the future, if necessary.

These are the eleven model clauses divided into seven Appendices. They each provide for different combination of arbitration rules, seat and governing law.

[104] CMS Cameron McKenna, Guy Pendell, Kushal Gandhi and Will Dibble, Arbitration for ISDA: a trend for the financial sector?, September 13 2013, Global, Available at: <http://www.lexology.com/library/detail.aspx?g=e7cbb808-9a4c-4cd4-bd88-0212c2b2c7d2>.

Rules	Seat	Governing law
ICC	London	English law
	New York	New York law
	Paris	English or New York law
LCIA	London	English law
AAA-ICDR	New York	New York law
HKIAC	Hong Kong	English or New York law
SIAC	Singapore	English or New York law
Swiss Rules	Geneva or Zurich	English or New York law
P.R.I.M.E. Finance	London	English law
	New York	New York law
	The Hague	English or New York law

VII.CONCLUSION

It is apparent that the skepticism of the financial sector and the conservative nature of the financial institutions towards international arbitration have indubitably smoothed over the last years. Arbitration is used with ever-increasing frequency in the settlement of disputes related to financial market claims. Due to the limitations of the judicial systems and, above all, the growing awareness of the benefits that arbitration may provide, banks and financial institutions are giving due consideration to this alternative method of resolving disputes[105]. Consequently, arbitrators and arbitration institutions rise from being mere auxiliaries of justice to become specialized complementaries[106].

[105] Stefano Cirielli, supra note 4.

[106] ibid.

The global re-appraisal of the objections to the appropriateness and efficiency of the arbitral process as a dispute resolution mechanism are apparent through the establishment of an arbitration-friendly legal and institutional framework. To this context the arbitration community needs to develop expertise in the financial products that they will deal with and must also improve the arbitral process according to the market's needs. Servicing a significantly developing market, including practitioners from Europe, Middle East and Africa, innovation and pragmatism are more than required.

The establishment of the P.R.I.M.E. Finance and the ISDA consultation reflect the growing popularity of arbitration as a dispute resolution option for finance transactions. It is asserted that P.R.I.M.E. Finance's position can bring clarity and authority to the financial world and can contribute to fill the immense black hole of legal uncertainty. Markets and market participants need certainty and predictability and also need confidence in the outcome of the resolution of their disputes. My modest conclusion is that P.R.I.M.E. Finance is well-placed to assist in the need of confidence. After all it has generated considerable enthusiasm and interest in the market and it is hoped that the years to come will see substantial uptake of its services and that it will proved to be a viable novelty.

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