P.R.I.M.E. FINANCE ARBITRATION – A LIGHTHOUSE SAFE HARBOUR IN THE MARE MAGNUM OF FINANCIAL DISPUTE RESOLUTION?

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ABSTRACT

Attention to litigation in financial matters is becoming an important issue for both investors and lending institutions. The recent trend has witnessed a shift from litigating before Courts towards arbitrating disputes on complex financial instruments. Quite recently, a new institution has been established in The Hague with the aim of becoming a milestone in the settlement of disputes on complex financial transactions: P.R.I.M.E. Finance. A Panel of financial markets and dispute resolution experts support the activity of such institution. The aim of this paper is to assess whether or not the use of arbitration in financial disputes and transactions may constitute a valid option, when compared to Court litigation. Furthermore, a particular focus will be on the institutional aspects of P.R.I.M.E. Finance arbitration.

I. Introduction. Financial Disputes Settlement: Arbitration and Litigation on Comparison.

The involvement in the resolution of disputes between lenders and borrowers is a corollary of the world's bifurcation into debtors and creditors.[1] Usually, credit agreements provide that potential controversies will be settled in the Bank's home jurisdiction or before Courts of some important financial centre, while an alternative would be an agreement to resolve any dispute by arbitration. Traditionally, litigation has been favoured over arbitration to settle such disputes for several reasons.[2] As Financial Disputes relate mainly to the payment of sums, banks may want to retain the possibility to appeal a decision before higher courts, whereas through arbitration parties would certainly exclude any further

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[1] *See* W. W. Park, *Arbitration in Banking and Finance, in* ESSAYS IN INTERNATIONAL FINANCIAL AND ECONOMIC LAW (The London Institute of International Banking, Finance & Development Law) 5 (1997) [hereinafter Park].

[2] While, to the other hand, arbitration has long been common in settling commercial disputes, where it is well established that its use tends to reduce litigation costs, avoid the application of complex rules of Private International Law as well as the complicacies related to the other side's "hometown justice". *See* Park, *supra* note 1 at 5.

appeal. Moreover, disputes on arbitral jurisdiction, as well as the absence of summary judgments issued by arbitral tribunals, make arbitration time consuming and less efficient than court proceedings. Banks might also be concerned by the limited precedential value of the arbitral awards as well.[3] This traditional preference of judges over arbitrators is not surprising: since a debtor may be either unable or unwilling to pay, it may be not necessary to resort to arbitration when the complaint does not relate to contractual terms.[4] The bargaining power owned by major banks in international transactions resulted in the application of a governing law of their choice, as well as on the choice of a friendly jurisdiction: very often New York or English laws and Courts.[5] Such governing laws are considered bank-friendly,[6] and such Courts have judges with an understanding of sophisticated financial instruments.

The reverse side of the medal, however, is that it could be difficult to enforce a New York judgment outside the U.S. or an English judgment outside the European Community, while the enforcement of arbitral awards might be relatively easier pursuant to the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards.[7] As the number of transactions with counterparties that did not have assets in the U.S. or the E.U. increased, banks were persuaded of the opportunity of including arbitration clauses in such agreements.[8]

The financial community may find arbitration and ADR beneficial,[9] particularly in connection with securities transactions, guarantees, documentary credits,

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[3] *See* Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 2007 ARBITRATION INTERNATIONAL, 23(3).

[4] Quoting Park, *supra* note 1 at 6, it may appear as an unnecessary invitation to a "split the difference" award.

[5] *See* Sheppard, Arbitration of International Financial Disputes, KLUWER ARBITRATION BLOG (Mar. 19, 2009), http://kluwerarbitrationblog.com/blog/2009/03/19/arbitration-of-international-financial-disputes/[hereinafter Sheppard]

[6] *See* Sheppard, *supra* note 5.

[7] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 U.N.T.S. 3 (New York Convention).

[8] Even then, banks very often preferred to keep their options open, id est to provide that a dispute will be referred to courts, with an option – exercisable by the bank once the dispute arises – to refer the dispute to arbitration instead. Such option has been held to be valid by the New York and English courts. *See,* for instance, Sablosky v. Edward S. Gordon Co., 535 N.E.2d 643 (N.Y. 1989) in New York and Law Debenture Trust Corp. plc v. Elektrim Finance BV [2005] EWHC 1412 (Ch.) in England. Those cases have been reported by Sheppard, *supra* note 5.

[9] *See* S. F. Ali and J. K. W. Kwok, The Future of Financial Dispute Resolution in Hong Kong: Promoting a Comprehensive "Multi-Tier Dispute Resolution System" with

consumer loans, public sector lending and M&A. The success of arbitration in the settlement of financial disputes will depend on an accurate drafting of the arbitration agreement, as well as on the interaction and interconnectedness of the elements of a given financial transaction.[10] Arbitration should be kept distinct from other non-judicial forms of alternative dispute resolution, for it implies not only the consent of the parties to settle their dispute out of court, but also a binding and final award. An arbitration agreement and an arbitral award imply that assets can be attached and competing litigation precluded, while other ADR mechanisms, for instance mediation or conciliation, may be neither binding, nor enforceable.

Bankers sometimes need to enforce court judgments in their favour outside the place where judgments have been rendered, but not all banks will benefit from an adequate Treaty and regulation network for the recognition of foreign judgments.[11] These instruments, providing for a mechanism of enforcement of court judgments, are useless in non-Treaty countries and outside the EU. In contrast, a thick network of bilateral and multilateral treaties provides for the enforcement of arbitral awards. The most important, as mentioned, is the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards; moreover, many Latin American countries have adopted the Inter-American Arbitration Convention (Panama Convention).[12] Both systems

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reference to the "Lehman Brothers Mediation Scheme" (2010) (unpublished paper,from the Selected Works of Shahla F. Ali), http://works.bepress.com/shahla_ali/5.

[10] *See* Park, *supra* note 1 at 6, who also suggests that arbitration merits special consideration when borrower's assets are found in jurisdictions lacking judgment treaties with the probable litigation forum, when loans are subject to exchange controls, and when debtors might file punitive damage or "lender liability" actions. It may also be appropriate when there exists a need for special expertise, such as in the settlement of documentary credit disputes subject to the Uniform Customs and Practices of the International Chamber of Commerce. Generally speaking, to resort to arbitration may be useful when there is a need of evaluating the application of customs and practice in an industry sector.

[11] *See* the Convention On Jurisdiction And The Enforcement Of Judgments In Civil And Commercial Matters, Brussels, Sep. 27, 1968 O.J. C. 27, 26.1, 1968 [hereinafter Brussels Convention]; *see* the Convention On Jurisdiction And The Enforcement Of Judgments In Civil And Commercial Matters, Lugano, Sep. 16, 1988, O.J. (L 319) 9 [hereinafter Lugano Convention]; *see* Council Regulation (EC) 44/2001 (Dec. 2000) [hereinafter EU Reg. 44/2001].

[12] Inter-American Convention on International Commercial Arbitration, Panama, Jan. 30, 1975, 9 U.S.C.Sect. 305, 1975.

See http://www.sice.oas.org/dispute/comarb/iacac/iacac2e.asp. Are members of the Panama Convention the following Countries: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, United States, Uruguay, and Venezuela.

provide for a vast recognition of foreign arbitral awards.[13] The arbitral procedure set by the Washington Convention,[14] is also relevant since many investment treaties define investment as "all categories of assets," including claims to money.[15]

Another advantage of arbitration over litigation is that arbitrators can ignore "Act of State" defences arising from foreign exchange controls in cases of financial disputes.[16] Borrowers sometimes see these defences as an argument against loan recovery, on the assumption that such controls constitute a foreign "Act of State". For instance, the United States has eliminated the Act of State defence in actions to enforce arbitration agreements and awards.[17] Another principle often invoked to avoid the repayment of loans is that of the "sovereign immunity", which operates to prevent one country from commencing a suit against another country in its courts.[18] Sovereign immunity and the Act of State doctrine have the least common multiple that judges should not interfere with the executive branch of government in its conduct of foreign relations.[19] The grant of immunity to foreign Governments and their agencies is subject to several exceptions, like immunity covering "public" rather than "commercial" acts. Immunity from a suit will be further restricted by an arbitration clause, as

[13]However, the Panama Convention provides for a more limited enforcement scheme.
[14]Convention on the Settlement of InvestmentDisputesbetweenStates and Nationals of OtherStates, Washington, Mar. 18, 1965, 4 I.L.M, 524, 1965.
[15]*See* Park, *supra* note 1 at 9. See (although not exhaustively): BIT between Germany and Afghanistan, art. 1(1)(c); BIT between Albania and United Kingdom, art. 1(a)(iii); BIT between United Kingdom and Angola, art. 1(a)(iii) and BIT between Italy and Angola, art. 1(1)(c); BIT between Antigua and Barbuda and Germany, art. 1(1)(c) and BIT between Antigua and Barbuda and United Kingdom, art. 1(a)(iii); BIT between Argentina and Australia, art. 1(a)(iii); BIT between Argentina and United Kingdom, art. 1(a)(iii); BIT between Argentina and India, art. 1(a)(iii); BIT between Argentina and United States of America, art 1(a)(iii); BIT between India and United Kingdom, art. 1(b)(iii); BIT between United Arab Emirates and United Kingdom,art. 1(a)(iii). A list of international investment agreements can be found here;http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-Tools.aspx
[16] *See* Park, *supra* note 1, at 13.
[17] *See* 9 U.S.C. § 15: "Inapplicability of the Act of State Doctrine. Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine".
[18] *See* Park, *supra* note 1 at 14.
[19] *See* Park, *supra* note 1 at 14.

some national legal systems,[20] deny sovereign immunity in an action to enforce an arbitration agreement or to confirm an arbitral award. An arbitration clause in a loan agreement may also be effective when the borrower is an International Organization.[21]

As to interbank disputes, court selection clauses to have a dispute settled by a neutral judge in a neutral country may be cumbersome since some jurisdiction may not allow the judge to hear the case provided that the selected forum lacks enough links with the parties or the controverted facts.[22] In particular, a Court may decline to hear a case, basing such decision on the ground of inconvenient forum, especially when both litigants are foreign entities and the transaction or the controversy does not have sufficient connection with the State where the claim has been filed.[23] On the contrary, arbitrators will rarely refuse to hear a dispute because of *forum non conveniens* issues even though arbitration may have some uncertainty, particularly when consolidation of related claims becomes desirable.

Another field where arbitration is relied on is securities-related disputes,[24] involving broker-dealers. In the United States, arbitration can be useful to reduce costs and delay dealing with such disputes, as well as the risk of punitive damages awarded by juries, and it is presumed by the securities industry that arbitrators will be more reasonable in awarding such damages than the latter; moreover, the law of some States may prohibit arbitrators from giving a claimant anything more than compensation for actual loss.[25]

International business transactions often rely on a payment mechanism known as "documentary credit" (or letter of credit).[26] The advantage of a documentary credit lies in its independence from the underlying business relationship. But, not

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[20] *See* Park, *supra* note 1 at 14.Regarding the United States of America, United Kingdom, Hong Kong (that however grants the applicability of Sovereign immunity),Germany, Brazil, *see* Mayer Brown, White Paper, *Sovereign Immunity and Enforcement of Arbitral Awards: Navigating International Boundaries* (2012): http://www.mayerbrown.com/files/Publication/2e0f7077-9b25-430e-8b70-6a8f8c1a9d76/Presentation/PublicationAttachment/1be4c54c-bfc2-4d78-9403-85e37c560f43/12270.PDF.

[21] *See* Park, *supra* note 1 at 16.

[22] *See* Park, *supra* note 1 at 16, also discussing the US perspective.

[23] *See* Park, *supra* note 1 at 19.

[24] *See* M. C. Boeglin, *The Use of Arbitration Clauses in the Field of Banking and Finance, Current Status and Preliminary Conclusion*, 1998 JOURNAL OF INTERNATIONAL ARBITRATION 15(3) at 20 [hereinafter Boeglin].

[25] *See* Park, *supra* note 1 at 22.

[26] *See* Park, *supra* note 1 at 26.

surprisingly, documentary credit transactions often give rise to disputes (concerning different interpretation of the letter of credit terms) between banks and their customers as well as between issuing and confirming banks. To reduce costs and delays of documentary credit litigation, parties sometimes agree to submit their controversy to arbitration under the rules of an experienced institution in documentary credit disputes.[27] An alternative would be a settlement made by "experts" under the auspices of the International Chamber of Commerce ("ICC"), also known as "Rules for Documentary Credit Dispute Resolution Expertise".[28]

The advantages of arbitration are granted only if an arbitration agreement exists. The most important rule in drafting an arbitration agreement is to ensure clarity and avoid any uncertainty that may add an unpleasant layer of contention to business relationships.[29] The most important aspects of an arbitration clause include, among others:

- a mechanism for appointing arbitrators;
- designation of the place of arbitration;
- the standard for fixing the arbitrators' fees;
- the language of the arbitration;
- the number of arbitrators; and
- a choice of law clause should be provided.

Many of these issues are covered by procedural rules of arbitral institutions. However, the choice of the seat of arbitration is the most important component of the arbitration agreement because national arbitration laws provide some grounds for setting aside awards made within their own territory,[30] which thing may go to the advantage of a party seeking to resist to the enforcement of an award. The most suitable place for arbitration would be in a Country where the judiciary does not interfere with the arbitration. Furthermore, if the provision of a right of appeal on points of law would maximize judicial certainty, the other side of the medal is to make the entire dispute time consuming, to the detriment

[27] *See* Park, *supra* note 1 at 29.
[28] *See* Park, *supra* note 1 at 29.
[29] *See* Park, *supra* note 1 at 34.
[30] Quoting Park, *supra* note 1 at 37, "judicial review of awards under national law at the place where rendered (as contrasted with the enforcement forum) falls into several categories. The first model allows appeal on the legal merits, as well as for procedural irregularities such as arbitrator bias and excess of authority. The second limits courts to review of procedural fairness only. Under a third but less popular paradigm, the arbitration seat provides no grounds at all on which an award may be set aside. Under the arbitration law of many countries, grounds for judicial review are hybrids of the above paradigms".

of the whole scope of arbitration, namely a quick settlement of disputes. Even though the parties assume some risk of a "bad award", in the case the arbitrator gets wrong on the facts or the law, this does not mean that they agree on a departure from fundamental procedural fairness, or may accept that arbitrators may exceed their mandate.[31]

Another feature that may constitute an advantage of arbitration over litigation is the absence of US style discovery,[32] thereby limiting the amount of documents that have to be disclosed. As a matter of fact, the taking of the evidence in International Commercial Arbitration is more flexible than in Court litigation, for the exigency of celerity would be jeopardized by a time consuming discovery of evidence and constitute a danger for precious proprietary information. The standard followed is embodied in the IBA Rules on the Taking of Evidence in International Arbitration, which set the grounds in which a request to produce documents can be made.[33]

Last but not least, the rules of some arbitral institutions, as well as some national laws on arbitration, allow consolidation of arbitrations.[34] Through consolidation separated arbitral proceedings with connected subject matters are brought together and decided in a single arbitration. Not providing for a consolidation of different arbitration proceedings may have inconsistent results in connected financial disputes. However, when a dispute implicates a party that has not signed any arbitration clause at all, consolidation of claims may not be possible.

In the pursuit of a more efficient dispute settlement strategy, a lending institution would want to give a twofold option: to arbitrate the dispute or to go to court, leaving a unilateral right to arbitrate. It is not easy to respond whether or not such optional clauses are enforceable, but it has been reported that courts have sometimes invoked the principle of "mutuality" (of remedy or obligation) to invalidate unilateral arbitration agreements: if both parties are not bound, then neither is bound.[35] As far as choice-of-court clauses are concerned, there has been a tendency to impose a double standard in forum selection, the bank reserving the right to sue customers at their domiciles but requiring litigation against itself to be brought only in the contractually chosen forum (namely, the bank's headquarters or designated branch office). To this extent, the Brussels,[36]

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[31] *See* Park, *supra* note 1 at 37.
[32] *See* K. P. Berger, *The aftermath of the financial crisis: why arbitration makes difference for banks or financial institutions*, in LAW AND FINANCIAL MARKET REVIEW (2009) at 57.
[33] *See* IBA Rules on the Taking of Evidence in International Arbitration, May 29, 2010, ISBN: 978 0 948711 54X, Art. 3(3).
[34] *See* Park, *supra* note 1 at 47.
[35] *See* Park, *supra* note 1 at 38.
[36] *Supra* note 11.

and Lugano Conventions,[37] seem to admit unilateral jurisdiction selection, as well as the EU Reg. 44/2001.[38]

The preference of arbitration over litigation is not automatic. Rather, it relies on different factors such as the experience of the person who decides a financial controversy and the legal framework governing the merits of the dispute.[39] In this context, professionals working in the financial services industry are called to evaluate the reliability of arbitration agreements versus court selection clauses, the effectiveness of which will depend from the interplay of the geographic and transactional context. One has to always bear in mind that in some countries court judgments and jurisdiction clauses will not benefit from enforcement treaties. To the contrary, the New York Convention mandates enforcement of arbitration agreements and awards throughout the world. Arbitration, of course, has some extent of uncertainty, for instance, the consolidation of related claims.

After careful revision of these factors, an arbitration clause can sometimes prove more reliable and efficient than a court selection agreement, for several reasons. First of all, when borrower's assets are located in a jurisdiction where are lacking agreements to enforce foreign judgments, to enforce an arbitral award pursuant to the New York Convention may be more effective Second, when loans are subject to possible exchange controls, an arbitration clause reduces the likelihood of an Act of State defence to loan enforcement. Third, an arbitrator may be more reasonable than a jury in considering punitive damages claim (if any), or a lender liability action against a banker. Lastly, arbitration may be used occasionally to resolve documentary credit disputes more efficiently than in judicial proceedings.

The interplay of these diverse elements however, makes it dangerous to rely on a "one size fits all" dispute resolution clause in financial transactions, based on a matter of practice rather than informed analysis. Financial lawyers need to learn tailoring the dispute resolution clause to each particular type of transaction.

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[37] *Supra* note 11.

[38] However there is a caveat, since the enforceability of such unilateral clauses may be subject to the scrutiny of the judiciary and the outcome may be uncertain. See for instance the case dealt with by the French Court of Cassation, Arrêt n° 983 du 26 septembre 2012, (claimant: *La société Banqueprivée Edmond de Rothschild Europe*; defendant: *Mme X*...) where a unilateral jurisdiction clause under Council Regulation (EC) No 44/2001 has been invalidated.

[39] *See* Park, *supra* note 1 at 57.

II. Complex Financial Transactions and the Reasons why a Centralized Dispute Settlement System is Desirable.

Of late, the market has experienced an increasing use of financial derivatives, i.e., complex instruments linked to a specific financial instrument, indicator or commodity, and traded in financial markets in their own right. Financial derivatives are traded either through specialized stock exchanges (ETD) or through over-the-counter (OTC) markets. OTC derivatives are usually divided into futures, swaps and options and represent an important way of fund raising, among other important functions.[40] Due to their intrinsic risk, different provisions at different levels regulate these instruments:

- Public law;
- Stock exchange regulations; and
- Master agreements.

Fast development of derivatives market has called for harmonization of some operations related to derivatives transactions and risk control procedures, leading to the creation of uniform agreements (also called "master agreements") by market makers, such as dedicated associations or investment banks. As discussed in the introduction, the choice of law and jurisdiction in these agreements is usually London or New York. The reason to prefer such jurisdictions has been that London and New York Courts are very specialized and able to deal with such intricate matters.[41] On the other hand, exchange traded derivatives follow the dispute settlement method set by individual stock exchanges, and arbitration is used relatively often.[42]

After the financial crisis, banks have reconsidered arbitration as an alternative to litigation for the settlement of financial disputes. There are different reasons on which such an argument is based. First of all, the increasing number of financial transactions, as well as the poor performance of banks has led to an increment in litigation, with the result of costs increment for banks.[43] The second reason is that modern global commerce requires more sophisticated financial instruments. Derivatives, although representing only one class of such financial instruments, have been capable of generating unthinkable sums of money. Though disputes arising out of such transactions needs to be settled fairly and quickly, the non-

[40] *See* M. C. Boeglin, *supra* note 24, at 21.
[41] *See* M. C. Boeglin, *supra* note 24, at 22.
[42] *See* M. C. Boeglin, *supra* note 24, at 22.
[43] *See* A. Helen, *Banking: Litigation could seriously damage banks' health*, EUROMONEY (June 2011).

familiarity with this complex subject by State Courts Judges or arbitrators may delay this process.[44]

The volume and the complexity of Complex Financial Transactions (hereinafter CFTs) represent a proportionate share of the world's major civil disputes.[45] In the absence of an international forum to settle such disputes, they will be settled by local Courts, with the danger of conflicting decisions and concerns on the influence of potential bias. A coherent and uniform interpretation of the instruments used to document CFTs is, in the end, what markets look for, as it makes certain kind of transactions predictable, where their pathologic implications are concerned. Common interpretation of international instruments is at the base of legal uniformity, fair perception of justice, confidence in markets and financial instruments,[46] and last but not the least, an invitation for developing markets, as it sets a more stable environment.[47] However, the absence (or the weakness) of such an international venue to settle CFTs disputes still creates uncertainties, amplifying all the concerns that have been raised as a consequence of the financial crisis.[48]

Different legal solutions to the same legal problem are justifiable when geographical distribution of social values is concerned, as in the case of rules protecting the values of a particular community.[49] However, since CFTs do not pertain to such a category, there exists no scope for different interpretation of their underlying documents. Of course, issues of public policy, that vary from country to country may affect the validity of some clauses in a transaction, but it might be claimed that this does not contrast with the latter assumptions: first, that the invalidity is the result of those laws that protect the values of a particular country (for instance, a more or less accentuated consumers protection or insolvency and bankruptcy laws) and it regards only the validity of a clause, that may not imply invalidity of the whole contract or instrument; second, that as a matter of policy, there may be efforts in the direction of seeking uniformity through the harmonization of legislations,[50] which may reduce, to a certain

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[44] *See* D. Baragwanath, *How should we resolve disputes in complex international financing transactions?,*7 CAPITAL MARKETS LAW JOURNAL, No. 3, at 205 [hereinafter Baragwanath].
[45] *See* Baragwanath, *supra* note 44, at 206.
[46] *See* Baragwanath, *supra* note 44, at 207.
[47] *See* generally, Baragwanath, *supra* note 44, at 211, pointing out that the role of P.R.I.M.E. Finance should be to "secure markets confidence and support" also "engaging with practitioners, academics and the media in developed and developing markets".
[48] *See* Baragwanath, *supra* note 44, at 207.
[49] *See* Baragwanath, *supra* note 44, at 207.
[50] An important role is also played at an international level by trade usages and practices.

extent, public policy implications. The ISDA Master Agreements are examples of such international transactions, representing the standardization and internationalization of contractual terms.[51] The ISDA Master Agreements, in both their 1992 and 2002 versions, are master service agreements in which the parties agree to most of the terms that will govern future transactions or agreements. In such cases, an international forum would be desirable in order to provide certainty that has positive effects on markets and at the end represents a full implementation of the Rule of Law, meant as a system with rules that are clear and stable to guide actions and behaviours.[52] The implementation of the Rule of Law, however cannot shield from a physiological problem inborn in the administration of justice, namely that there can be more than one rational answer to a legal problem. On a larger scale, division of opinions is present also at an international level, when different Courts decide issues involving international transactions differently. Quoting D. Baragwanath:

> *"The truth is that courts of each state jurisdiction can be of very high quality, and yet be affected by social, cultural and historical factors, among them rules of precedent, which can tend to affect the answer to any problem. These factors as well as differing standards of perceived competence give rise to problems of forum shopping. International adjudication requires a judge to focus on more than his or her own narrowly domestic focus.".*[53]

A rational answer to this lack of legal certainty would be a truly international approach to the settlement of CFTs disputes.

III. P.R.I.M.E. Finance: Scope, Proceedings And Cases.

It has been argued that arbitration of CFTs would have an advantage over Court litigation. Although many institutions administering arbitration may fulfil the needs related to the prompt settlement of CFTs disputes, the lack of a centralized dispute resolution system related to such transactions may disperse the attempt of creating an international forum with its own body of law, rules, and experts.

The call for such a venue has found a response in 2012 with the establishment of P.R.I.M.E. Finance.[54]

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[51] International Swaps and Derivatives Association, http://www2.isda.org.

[52] *See* D. Baragwanath, *supra* note 44, at 207, quoting John Finnis, Natural Law and Natural Rights (OUP 1980) 270.

[53] *See* D. Baragwanath, *supra* note 44, at 208.

[54]http://www.primefinancedisputes.org.

It is an independent non-profit institute based in The Hague, Netherlands, that includes a panel of renowned legal and financial experts, providing for an international forum for resolving complex financial disputes, supporting judges in sophisticated financial transactions and compiling a database of relevant law including international precedents and source materials. Its mission is to foster a more stable global economy and financial marketplace by reducing legal uncertainty and systemic risk, and promoting the rule of law especially in emerging markets. A guiding principle of the organization is independence, which will distinguish it from industry associations and other financial market participants. The goal of P.R.I.M.E. is ambitious, as it would be the ideal point of reference for the solution of CFTs disputes.

There are basically some aspects of the P.R.I.M.E. Finance projects that should be underlined in order to understand how it is a distinct entity from other institutions that administer arbitration in a broader context, inclusive of CTFs. Preliminarily, the scope of P.R.I.M.E. is narrow, including only complex financial transactions. A narrow scope is synonymous with dedicated service. In particular, attention is drawn on the fact that P.R.I.M.E. Finance has implemented some amendments in the 1992 and 2002 ISDA Master Agreements in order to make them coherent with the use of arbitration in disputes arising out of CTFs. Is it reasonable then to imply that disputes on derivatives and swaps are the main object of attention from the P.R.I.M.E. Finance perspective? The answer seems to be affirmative. An interpreter may infer that there is an ideal link between P.R.I.M.E. Finance and the work of ISDA.

The interest of the ISDA for the settlement of financial disputes by arbitration took form in 2011 with a document titled "The use of arbitration under an ISDA Master Agreement".[55] This document, meant to be a memorandum for the ISDA Members, describes some features of arbitration, the market trends, the reasons for the use of arbitration and the problematic issues. Not surprisingly, particular attention is drawn to the phenomenon of globalization and the participation of emerging Countries (markets) in international finance, which may be reluctant to accept the jurisdiction of English or New York State Courts, as well as the difficulty of enforcing foreign judgments in such emerging jurisdictions. Even though a prospective solution is to litigate such disputes in the country where the defendant has its assets, so as to avoid the pitfalls of the enforcement of foreign judgments, some considerations may be made for reconsidering arbitration to settle such disputes:-

[55] The use of arbitration under an ISDA Master Agreement, ISDA, http://www2.isda.org/search?headerSearch=1&keyword=arbitration [hereinafter The use of arbitration under an ISDA Master Agreement].

- judicial authority perceived as biased or corrupted;
- potential delay;
- lack of experience by counsels or judges dealing with derivatives contracts;
- failure to respect the foreign law chosen to regulate the contract and lack of familiarity of such law;
- inconsistent decision making process;
- use of different language in the litigation, which may give rise to the need of translations.[56]

If these considerations lead to considering arbitration as a better option than court litigation, some issues need to be considered. Attention should be drawn to drafting a valid arbitration agreement,[57] as well as choosing to insert an optional arbitration clause (whose validity may be questioned in some jurisdictions). The importance of drafting a valid and enforceable arbitration agreement should not be undervalued: although the concept is abundantly reiterated by scholars and practitioners, inadequately drafted clauses are found with some frequency.

Particular emphasis is also put on the arbitrators' experience,[58] as well as on the value of precedents.[59] In particular, the absence of the "*stare decisis*" rule is of concern because awards interpreting an ISDA agreement would be useful in setting a rationale to be applied in further cases. The problem, however, does not lie in the value of precedent of an arbitral award, but rather the fact that an award is made public, hence its rationale made clear and virtually being object of debates by scholars or practitioners.[60] It may be noted how some arbitral institutions are now making their awards available to the public, which may weaken the concerns related to the value of an arbitral award as a guidance to the market.

After the first memorandum, ISDA issued a second one, titled "The use of arbitration under an ISDA Master Agreement: feedback to members and policy options",[61] in which members were asked to provide feedback on the following issues, in order to optimize ISDA's initiative:

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[56] *Id.*, at 3.

[57] To this extent, it is suggested an amendment of the ISDA agreements (1992 and 2002) to the extent of deleting Section 13(b) in its entirety and replaced with the arbitration clause, while Sections 13(c) and (d) should be amended in the sense of taking into account of the change of dispute resolution process to arbitration

[58] *See* "The use of arbitration under an ISDA Master Agreement", *supra* note 61, at 6.

[59] *Id.*, at 6.

[60] *Id.*, at 7.

[61] The use of arbitration under an ISDA Master Agreement: feedback to members and policy options, ISDA, http://www2.isda.org/search?headerSearch=1&keyword=arbitration[hereinafter The

- Drafting of a proper arbitration clause;[62]
- Availability of qualified arbitrators with experience in derivatives;[63]
- Developing jurisprudence on ISDA documentation.[64]

With regard to the first point, it is made clear that an arbitration clause must specify the relevant arbitral rules. The proposal of ISDA was to publish at least one model clause suitable for arbitration under the rules of arbitration of the following institutions:

- The United Nations Commission on International Trade Law (UNCITRAL);
- The International Chamber of Commerce (ICC) Commission on Arbitration;
- The London Court of International Arbitration (the LCIA);
- P.R.I.M.E. Finance (Panel of Recognized Market Experts in Finance).

The inclusion of the first three institutions was based on the consideration that they have been the most chosen for the settlement of financial disputes. The mention of P.R.I.M.E. Finance is due to the fact that, although recently established, it is a dedicated institution for the purpose of giving valuable assistance in the resolution of financial disputes. After these two efforts, ISDA recently issued an arbitration guide,[65] reflecting all comments made after issuing the first two memoranda. This arbitration guide reflects an interest in using arbitration for disputes arising in connection with derivatives transactions documented under the Master Agreements, as well as the need of the publication of model arbitration clauses, inclusive of key issues like seats and rules of arbitration.

The Guide is organized in a manner similar to the first memorandum, and divided in three sections. The first and the second section contain an overview of arbitration and an explanation of its key features, while the third provides for an introduction to the model clauses set out in the Appendices. Among the model clauses provided for in this Guide, some are dedicated to P.R.I.M.E. Finance arbitration with the seat of the Arbitral tribunal in England, New York or The Hague.

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use of arbitration under an ISDA Master Agreement: feedback to members and policy options].

[62] *Id.*, at 2.

[63] *Id.*, at 4.

[64] *Id.*, at 4.

[65] ISDA Arbitration Guide 2013, http://www2.isda.org/search?headerSearch=1&keyword=arbitration.

Summing up the current status, it is a perception and a concern that there is a black hole of legal uncertainty where CFTs are concerned. Such uncertainty is caused by a lack of top-quality case law, as well as increasing doubts that State Courts may not be able to address the issue in a manner that may bring stability to markets. Financial instruments are also becoming more complex as a result of innovation in the field, which gives rise to more complex disputes.[66] To this fact, one may add the perception of local bias (if any) and the danger of geographically contrasting decision on similar issues. Last but not least, disputes arising out of the ideal canonical venues, namely London or New York, should not be ignored, since markets may be affected by the outcome of such cases.[67] It is hence necessary to implement reliable dispute settlement facilities, since another problem is the lack of experience on CFTs by Judges, not to mention the difficulties in enforcing foreign judgments. Although such transactions are documented through a system of standardized agreements, one of the most used being the ISDA Master Agreement (but not the only one);[68] there is no standardized dispute settlement system. On the contrary, banks, especially those operating in emerging markets, find ad hoc arbitration a reliable method to settle financial disputes.[69] However, this system is not yet well established and settled, due to some shortcomings like the dearth of arbitrators with enough experience on CFTs.

Would P.R.I.M.E. Finance add more to this state of affairs? Quoting J. Ross:

> "*P.R.I.M.E. Finance seeks to fill the international void*[…] *by providing market participants with a panel of neutral experts with market knowledge to resolve and arbitrate their CFTs disputes.*[…]*Care also needs to be taken at this juncture not to make extravagant claims about what P.R.I.M.E. Finance is or should be able to do.*[…]*Put briefly, while state and national courts will always have an important place, P.R.I.M.E. Finance is nevertheless established to fill an international void, alongside those courts.*[…]*P.R.I.M.E. Finance will be a permanently available, centralized, multi-linguistic and multi-cultural 'college of expertise'. P.R.I.M.E. Finance has brought together a group of nearly a hundred 'experts' from a range of disciplines, backgrounds and cultures, comprising judges, arbitrators and mediators, specialized lawyers and academics, and market participants. P.R.I.M.E. Finance has drawn up two lists of experts, a list of finance experts and a list of dispute resolution experts.*

[66] Disputes are multi-jurisdictional and involve both civil law and common law countries.*See* J. Ross, *The case for P.R.I.M.E. Finance*, 7 CAPITAL MARKETS LAW JOURNAL, No. 3, at 222 [hereinafter Ross].
[67] *See*Ross,*supra* note 66, at 223.
[68] *See*Ross,*supra* note 66, at 222.
[69] *See* Ross, *supra* note 66, at 225.

The 'college of expertise' will arbitrate and mediate CFTs disputes. It will also provide expert valuation advice and services in relation to CFTs; guidance where necessary to state and national courts hearing a CFTs dispute; advisory opinions in relation to CFTs issues and disputes; and judicial training in relation to CFTs".[70]

P.R.I.M.E. Finance Arbitration, the core of CFTs dispute settlement

The P.R.I.M.E. Finance arbitration is modelled on the UNCITRAL Arbitration Rules, with some differences to fit the needs of the administration of CFTs arbitration. The first difference with the UNCITRAL Arbitration Rules, commonly used for ad hoc arbitrations is that P.R.I.M.E. Finance arbitration rules are provided for an administering institution, P.R.I.M.E. Finance.[71] The Rules cover all the aspects of the arbitration, with the exception of conflicts with provisions of the law applicable to the arbitration (*lex arbitri*),[72] and apply when the parties agree that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration by P.R.I.M.E. Finance or under the P.R.I.M.E. Finance Arbitration Rules.[73]

The arbitration begins with the filing of a notice of arbitration with P.R.I.M.E.[74] Finance. Subsequently, the claimant is notified of the receipt of the notice of arbitration, and a copy of it is transmitted to the counter-party (the "respondent"), along with an invitation to submit a response to the notice of arbitration. The Arbitral proceedings are considered to have commenced on the

[70] *See* Ross, *supra* note 66, at 227-8.

[71] While one may recall the UNCITRAL arbitration Rules are mostly used for ad hoc arbitrations.

[72] *See* art. 1(2) P.R.I.M.E. Finance Arbitration Rules.

[73] *See* art. 1(1) P.R.I.M.E. Finance Arbitration Rules.

[74] *See* art. 3 P.R.I.M.E. Finance Arbitration Rules. As set in the UNCITRAL Arbitration Rules, the notice of arbitration must contain some essential elements, as well as it may contain some eventual ones. Essential elements are considered: (a) a demand that the dispute be referred to arbitration; (b) the names and contact details of the parties; (c) identification of the arbitration agreement that is invoked; (d) the identification of any contract or other legal instrument out of or in relation to which the dispute arises or, in the absence of such contract or instrument ,a brief description of the relevant relationship; (e) a brief description of the claim and an indication of the amount involved, if any; (f) the relief or remedy sought; (g) a proposal as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed thereon. *See* art. 3(2) P.R.I.M.E. Finance Arbitration Rules.
Eventual elements are considered: (a) a proposal for the appointing authority referred to in article 6, paragraph 1; (b) a proposal for the appointment of a sole arbitrator referred to in article 8, paragraph 1; (c) notification of the appointment of an arbitrator referred to in article 9 or 10. *See* art. 3(3) P.R.I.M.E. Finance Arbitration Rules.

date of receipt of the notice of arbitration by P.R.I.M.E. Finance. The response must be filed with P.R.I.M.E. Finance, within 30 days from the date of the invitation.[75] After the notice of arbitration is filed, the claimant has to pay the registration[76] fee and the administrative costs.[77]

As delay is unpleasant in dispute settlement, P.R.I.M.E. Finance Arbitration Rules provide for a default appointing authority (being in charge of appointing of an independent and impartial arbitrator),[78] the Secretary-General of the PCA, when the parties have not agreed otherwise by the time of commencement of the arbitration.[79]

Three arbitrators usually compose a P.R.I.M.E. Finance arbitral tribunal, unless the parties have not agreed on a sole arbitrator or specified the number of arbitrators.[80] Arbitrators are appointed by the parties, or by the appointing authority, from a list of P.R.I.M.E. Finance approved arbitrators.[81] A procedure similar to the one set for the appointment of an arbitrator is provided for the replacement of arbitrators,[82] with the consequence that the proceedings will resume at the stage where the arbitrator who was replaced ceased to perform his or her functions.[83] A person that is likely to be appointed as arbitrator has a duty to disclose any circumstances that could give rise to justifiable doubts as to his or her impartiality, independence or availability. This duty remains from the time of

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[75]Similarly to what happens to the notice of arbitration, the Arbitration Rules distinguish between essential information andthose that may be eventually provided for. The first group encompasses the following: (a) The name and contact details of each respondent; (b) the response to the information set forth in the notice of arbitration, pursuant to article3, paragraphs 3(c) to (g) of the P.R.I.M.E. Finance Arbitration Rules. *See* art. 4(1) P.R.I.M.E. Finance Arbitration Rules.
To the second group belong the following: (a) a plea that an arbitral tribunal to be constituted lacks jurisdiction; (b) a proposal for the designation of an appointing authority; (c) a proposal for the appointment of a sole arbitrator; (d) a notification of the appointment of an arbitrator; (e) a brief description of counterclaims or claims for the purpose of a set-off, if any, including where relevant, an indication of the amounts involved, and the relief or remedy sought; (f) a notice of arbitration in accordance with article 3 in case the respondent formulates a claim against a party to the arbitration agreement other than the claimant. *See* art. 4(2) P.R.I.M.E. Finance Arbitration Rules.

[76] *See* art. 3(6) P.R.I.M.E. Finance Arbitration Rules.

[77] *See* art. 3(7) P.R.I.M.E. Finance Arbitration Rules.

[78] *See* art. 6(4) of P.R.I.M.E. Finance Arbitration Rules.

[79] *See* art. 6(1) of P.R.I.M.E. Finance Arbitration Rules.

[80] *See* art. 7(1) of P.R.I.M.E. Finance Arbitration Rules.

[81] *See* art. 8 and 9 of P.R.I.M.E. Finance Arbitration Rules.

[82] *See* art. 14 of P.R.I.M.E. Finance Arbitration Rules.

[83] *See* art. 15 P.R.I.M.E. Finance Arbitration Rules.

the appointment throughout the arbitral proceedings.[84] A doubt about impartiality or independence may give rise to a challenge of the arbitrator.[85] The appointing authority is competent of making a decision on the challenge.[86]

The arbitral tribunal has ample liberty in conducting the arbitration in the manner it deems appropriate, provided that the parties are treated with equality and given a reasonable opportunity of presenting the case.[87] It is always opportune to set a timetable of the arbitration.[88] The arbitral tribunal also has the power to allow third person party to the original arbitration agreement to be joined in the arbitration, unless it is opportune to act differently.[89] This is a key provision, since many CFTs are complex and multiparty.

The arbitral tribunal will determine the place of arbitration in case the parties have not determined it.[90] The arbitral tribunal may meet at any location it considers appropriate for deliberations and, unless otherwise agreed by the parties, at any location it considers appropriate for any other purpose, including hearings.[91] The seat of arbitration is of particular importance, since its efficient planning may represent an advantage in terms of the relevant provision of the *lex arbitri* (for instance, right of appeal) and future enforcement of an arbitral award.[92] A P.R.I.M.E. Finance arbitration seat is intended to be in The Hague, but the parties may choose a place that suits their needs better, without renouncing to the 'college of expertise' that P.R.I.M.E. offers. Moreover, The Hague has a widespread international tradition, hosting International Tribunals, the ICJ and the PCA thus being able to offer facilities like translation services.

The language of arbitration is a detail that parties should pay attention to in order to avoid problems related to translation (potential inaccuracy, costs, delay, etc.). Parties may determine the language of the proceedings. In the absence of such an agreement, the arbitral tribunal will determine the language to be used in the proceedings. Such a decision will apply to all the documents related to the arbitration as well as oral hearings.[93] The arbitral

[84] *See* art. 11 P.R.I.M.E. Finance Arbitration Rules. Annex B to the Rules provides for a model statementof independence pursuant to article 11.
[85] *See* art. 12(1) P.R.I.M.E. Finance Arbitration Rules.
[86] *See* art. 13(4) P.R.I.M.E. Finance Arbitration Rules.
[87] *See* art. 17(1) P.R.I.M.E. Finance Arbitration Rules.
[88] *See* art. 17(2) P.R.I.M.E. Finance Arbitration Rules.
[89] *See* art. 17(5) P.R.I.M.E. Finance Arbitration Rules.
[90] *See* art. 18(1) P.R.I.M.E. Finance Arbitration Rules.
[91] *See* art. 18(2) P.R.I.M.E. Finance Arbitration Rules.
[92] *See*UNCITRAL Notes on OrganizingArbitralProceedings, 28 May - 14 June,1996 (New York), at 10.
[93] *See* art. 19(1) P.R.I.M.E. Finance Arbitration Rules.

tribunal may order that any document submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.[94]

As stated earlier, the arbitration starts with a notice of arbitration, with the claimed relief contained in the statement of claim, accompanied by all documents and other evidence relied upon by the claimant. The reply to the statement of claim is contained in the statement of defence.[95] Both claim and defence may be amended during the course of the arbitral proceedings unless the arbitral tribunal considers it inappropriate, having regard to the delay in proceedings or prejudice to other parties as well as any other circumstances. Such amendments however cannot be made in such a manner that the amended or supplemented claim or defence falls outside the jurisdiction of the arbitral tribunal.[96] To the same extent, the arbitral tribunal will decide which further written statements shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.[97]

The arbitral tribunal has the power to rule on its own jurisdiction, including any objection to the existence of the arbitration agreement. The arbitral agreement, according to the severability doctrine, is treated as something separated from the main agreement, and hence a decision on the invalidity of the contract will not automatically reflect on the invalidity of the agreement.[98] The arbitral tribunal may rule on a plea related to its jurisdiction, either as a preliminary question or in an award on the merits. Moreover, it may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.[99]

Another important feature of the P.R.I.M.E. Finance Arbitration Rules is that at the request of the party, the arbitral tribunal may grant interim measures, provided that it has *prima facie* jurisdiction to decide the case,[100] and that the party asking for the measure satisfies the tribunal that the harm resulting if the measure is not issued would be irreparable by an award on damages, and that there is a possibility that the requesting party may succeed on the merits of the claim.[101] Interim measures may be directed to maintain or restore the status quo

[94] *See* art. 19(2) P.R.I.M.E. Finance Arbitration Rules.
[95] *See* art. 21 P.R.I.M.E. Finance Arbitration Rules.
[96] *See* art. 22 P.R.I.M.E. Finance Arbitration Rules.
[97] *See* art. 24 P.R.I.M.E. Finance Arbitration Rules.
[98] *See* art. 23(1) P.R.I.M.E. Finance Arbitration Rules.
[99] *See* art. 23(3) P.R.I.M.E. Finance Arbitration Rules.
[100] *See* art. 26(1) P.R.I.M.E. Finance Arbitration Rules.
[101] *See* art. 26(3) P.R.I.M.E. Finance Arbitration Rules.

pending determination of the dispute; to prevent or refrain from taking action that would cause current or imminent harm or prejudice to the arbitral process itself; to provide means of preserving assets out of which a subsequent award may be satisfied; to preserve evidence that may be relevant and material to the resolution of the dispute.[102] The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure[103]. Interim measures can be modified, suspended or terminated by the arbitral tribunal[104], both upon party application or upon its own initiative (in exceptional circumstances and upon prior notice to the parties).

Two expedite proceedings are provided for under P.R.I.M.E. Finance rules in case urgent provisional measures are needed: emergency arbitral proceedings,[105] and Referee arbitral proceedings (if the seat of Arbitration is in Netherlands, as it is regulated by article 1051 paragraph 1 of the Dutch Code of Civil Procedure).[106]

Regarding the taking of the evidence, each party bears the burden of proving the facts relied on to support its claim or defence. There is indeed some flexibility, since it may be heard as a witness any individual, notwithstanding that he or she is a party to the arbitration or in any way related to a party.[107] The arbitral tribunal may appoint one or more independent experts to report to it, in writing, on specific issues to be determined by the arbitral tribunal. The expert shall submit to the arbitral tribunal and to the parties, a description of his or her qualifications and a statement of his or her impartiality and independence.[108]

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[102] *See* art. 26(2) P.R.I.M.E. Finance Arbitration Rules.
[103] *See* art. 26(6) P.R.I.M.E. Finance Arbitration Rules.
[104] *See* art. 26(5) P.R.I.M.E. Finance Arbitration Rules.
[105] *See* art. 26a P.R.I.M.E. Finance Arbitration Rules. Emergency Arbitral Proceedings allows the parties to apply for "urgent provisional measure(s) that cannot await the constitution of the arbitral tribunal." Accroding to the relevant applicable rules, P.R.I.M.E. Finance can order the appointment of an "Emergency Arbitrator" from the approved list of experts within seventy-two hours of receipt of an application by one of the parties. The order issued by the "Emergency Arbitrator" cannot prejudice the final decision of the arbitral tribunal and is not binding on the arbitral tribunal finally established.
[106] *See* art. 26b P.R.I.M.E. Finance Arbitration Rules. Referee Arbitral Proceedings have some similarities with the Emergency Arbitral Proceedings, providing for speedy proceedings culminating in an enforceable award within thirty to sixty days. The award may not prejudice the final decision of an arbitral tribunal on the merits of the case. Referee Proceedings are conducted by a specially appointed tribunal, composed of a sole arbitrator appointed by P.R.I.M.E. Finance from an approved list of experts.
[107] *See* art. 27 P.R.I.M.E. Finance Arbitration Rules.
[108] *See* art. 29 P.R.I.M.E. Finance Arbitration Rules.

The law applicable to the dispute is a crucial point in arbitration. Unlike what happens in transnational civil litigation, where the applicable law is the outcome of a process where rules of Private International Law are applied, arbitration represents a departure from this rule and gives the parties freedom to determine the law applicable to their dispute. In P.R.I.M.E. Finance arbitration, the arbitral tribunal will apply the rules of law designated by the parties as applicable to the substance of the dispute or the law which it determines to be appropriate in case the parties fail to designate the applicable law.[109].

In the decision making process, the arbitral tribunal will take into account the terms of the contract as well as any usage of trade applicable to the transaction.[110] Decisions *ex bono* are possible only if expressly authorized by the parties.[111]

Awards, as well as other decisions of the arbitral tribunal, are made by a majority of the arbitrators (unless there is a sole arbitrator).After the award is issued, and within 30 days after its receipt, a party can request the arbitral tribunal for an interpretation of the award,[112] as well as to correct any error in computation, clerical or typographical error, or any error or omission of a similar nature.[113] When an interpretation of the award, or its correction, is required, the tribunal shall provide within 45 days after the receipt of the request.[114] The tribunal may also make corrections on its own initiative, within 30 days after the communication of the award.[115] Litigation in Courts is usually seen as more transparent, since judgments are published and constitute a body of precedents, while arbitral awards are published only if parties so consent. P.R.I.M.E. Finance, to the contrary, is a sub-version of the order of things, since article 34(5) of its Arbitration Rules explicitly allows the publication of excerpts of an award without the consent of the parties. Awards can be published if P.R.I.M.E. Finance has a legal duty to act in this sense and, last but not the least, P.R.I.M.E. Finance has the right to publish an award or an order in its entirety, in anonymous form, provided that one of the parties does not "object to such publication within one month after receipt of the award". This provision fills an important gap and gives more stability and predictability for market players.

The final part of the rules is dedicated to the fees and expenses of the arbitrators. Such fees and expenses must be reasonable in amount, taking into

[109] *See* art. 34(1) P.R.I.M.E. Finance Arbitration Rules.
[110] *See* art. 34(3) P.R.I.M.E. Finance Arbitration Rules.
[111] *See* art. 34(2) P.R.I.M.E. Finance Arbitration Rules.
[112] *See* art. 37(1) P.R.I.M.E. Finance Arbitration Rules.
[113] *See* art. 38(1) P.R.I.M.E. Finance Arbitration Rules.
[114] *See* art. 37(2) and 38(1) P.R.I.M.E. Finance Arbitration Rules.
[115] *See* art. 38(2) P.R.I.M.E. Finance Arbitration Rules.

account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case.[116] After the constitution of the arbitral tribunal, the parties are informed as to how the tribunal proposes to determine its fees and expenses. This determination may be subject to review by the appointing authority, if so asked by a party.[117] Costs of arbitration shall, in principle, be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.[118]

No mention is made in the Arbitration Rules to the right of appeal of the award, which thing is reasonable, being arbitration meant to settle disputes on a first instance basis and in a reasonable amount of time. The practitioner may know very well that arbitral awards are subject to annulment according to the law of the seat. Similarly, the law of the seat may provide for the right of appeal. There is, however, a difference between jurisdictions as far as the right of appeal and setting aside an arbitral award are concerned. We may focus our attention on the relevant jurisdictions that may be the seat for P.R.I.M.E. Finance arbitration.

England

According to the English Arbitration Act 1996, it is possible to challenge, on jurisdictional grounds or on the ground of serious irregularities affecting the tribunal, the proceedings or the award.[119] A party may also appeal an award on a point of English law. However, this right of appeal may be excluded by agreement, and the rules of a number of arbitral institutions provide for such exclusion.[120]

New York

Arbitral awards made in New York may face limited grounds for judicial review under 9 U.S.C. § 10, such as, where the award was procured by corruption or fraud, where there was evident partiality or corruption in the arbitrators, where the arbitrators were guilty of misconduct, or where the arbitrators exceeded their powers.[121] In all these cases no appeal is provided for.

France

[116] *See* art. 41 P.R.I.M.E. Finance Arbitration Rules.
[117] *See* art. 41(3) P.R.I.M.E. Finance Arbitration Rules.
[118] *See* art. 42(1) P.R.I.M.E. Finance Arbitration Rules.
[119] *See* The Arbitration Act, 1996 (c. 23) § 67 and 68 (U.K.) [hereinafter Arbitration Act].
[120] *See* Arbitration Act, *supra* note 128 at § 69.
[121] *See* 9 U.S.C. § 10. *See* also N.Y. CVP. LAW § 7511.

In France, international arbitral awards may be set aside in circumstances where the arbitral tribunal has wrongly upheld or declined jurisdiction, where there was lack of due process or where recognizing or enforcing the award would violate international public policy.[122] By way of specific agreement, parties can waive the right to bring an action to set aside the award.[123] International awards are not subject to appeal, while domestic awards are, if parties so agree.[124]

Hong Kong

In Hong Kong, grounds to set aside international arbitral awards are limited to circumstances such as invalidity of the arbitration clause or that the dispute did not fall within the terms of the arbitration clause, or where the constitution of the tribunal or the arbitral procedure was not in accordance with the parties' agreement or the law.[125]

Singapore

In Singapore, where the legislation is based on the UNCITRAL Model Law on International Commercial Arbitration, arbitral awards may only be set aside in limited circumstances such as where the arbitration clause is not valid or the dispute did not fall within the terms of the arbitration clause, or where the making of the award was affected by fraud or corruption or there was a breach of natural justice in connection with the rendering of the award.[126]

Switzerland

In Switzerland, an international arbitral award may be set aside in circumstances where the arbitration clause is not valid, the dispute did not fall within the scope of the arbitration clause, the making of the award was affected by serious procedural irregularity or the award itself violates international public policy. If neither party has its domicile, habitual residence or place of business in Switzerland, the parties may, by way of a specific agreement, expressly waive their right to apply for setting aside of arbitral awards.[127]

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[122] *See* French Code of Civil Procedure, 1806, Art. 1518 & 1520.
[123] *See* French Code of Civil Procedure, 1806, Art. 1522.
[124] *See* French Code of Civil Procedure, 1806, Art. 1489.
[125] *See* Arbitration Ordinance, Cap. 609, §81 (H.K.).
[126] *See* UNCITRAL Model Law on International Commercial Arbitration, Art. 34, Sales No.E.08.V.4 (1985); The International Arbitration Act (Chapter 143A), § 24 (Sing.).
[127] *See* The Swiss Federal Statute on Private International Law, (c. 12) Art. 190, 192.

The Netherlands

In the Netherlands, international arbitral awards may be set aside in circumstances such as where the arbitration clause is not valid, the arbitral tribunal was constituted in violation of the applicable rules or the award violates public policy.[128] Appeal to a second arbitral tribunal is possible if parties have agreed thereto.[129]

Where the *lex arbitri* leaves to the parties to decide whether to provide for appeal or not, arbitration rules may contain some default provision in the sense of excluding such a right. However, it is always care of the party to check carefully both the arbitration rules and the applicable law and to decide accordingly.

P.R.I.M.E. Finance cases

As P.R.I.M.E. Finance was created with the attempt of bringing certainty and clarity on CFTs, we may have a look at the potential cases this facility will deal with, albeit exhaustively. One may divide such cases in three areas:

- Jurisdiction cases;
- Interpretation cases; and
- Mis-selling cases.

Not surprisingly, international transactions, as well as CFTs that present some multi-jurisdictional elements (foreign parties, foreign laws, foreign assets, parallel proceedings), often rise questions of which court is competent to hear the dispute.[130] CFTs are regulated by market standard agreements (for instance ISDA) that often contain understood and "familiar" clauses, such as choice of law and submission to exclusive or not exclusive, jurisdiction and related waivers; it may happen that neither party has been incorporated, or is legally domiciled, in the chosen jurisdiction.[131]Dissatisfaction with the deal may lead a party to raise forum-shopping-type arguments, so to bring the dispute in its own national Courts.

Among this field of jurisdictional disputes, of particular interest is the *ultra vires* context, occurring when a statutory or municipal entity has entered into a financial transaction, later claiming invalidity of the transaction because of the absence of the powers to enter into it. One may recall that in the 90s there was a

[128] *See* The Dutch Code of Civil Procedure, Art. 1065.
[129] *See* The Dutch Code of Civil Procedure, Art. 1050.
[130] *See* Ross, *supra* note 67, at 231.
[131] *See* Ross, *supra* note 66, at 232, pointing out that such clauses are widely regarded as boilerplates.

legislative and regulative wave to the effect that statutory or municipal entities had the power to enter into financial transactions, such capacity being subject to various restrictions[132]. The scheme may be summarized following the *Berliner Verkehrsbetriebe Anstalt Des Öffentlichen Rechts* v. *JP Morgan Chase Bank N.A. and JP Securities Ltd.*[133] In this case, BVG, asked to pay US$112 million, alleged that an English-law governed credit default swap, to which and JP Morgan and BVG were counterparties, was ultra vires, *id est* beyond powers. Arguments of BVG were based on articles 22 and 25 of EU Reg. 44/2001, and that the ultra vires was to be determined according to German Law, and the law of incorporation.[134] Eventually, after a complex judicial *iter*, the question arrived before the European Court of Justice, where it was held that:

> "*in a dispute of a contractual nature, questions relating to the contract's validity, interpretation or enforceability are at the heart of the dispute and form its subject-matter. Any question concerning the validity of the decision to conclude the contract, taken previously by the organs of one of the companies party to it, must be considered ancillary. While it may form part of the analysis required to be carried out in that regard, it nevertheless does not constitute the sole, or even the principal, subject of the analysis*".[135]

The core of ultra vires cases is to distinguish a genuine claim of lack of powers to enter into a transaction from a mere surreptitious attempt of delaying a payment under a contract.

Ultra vires cases are just an aspect of jurisdiction cases. *Non ultra vires* jurisdiction cases also form an important share of litigation. As J. Ross wrote:

> "*in the CFTs world, the ultra vires line of cases is but the tip of a jurisdiction iceberg. That there should be such an iceberg is hardly surprising. We do not need a global financial crisis to tell us that parties to cross-border transactions, or to transactions governed by a law different from their own*

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[132] *See* Ross, *supra* note 66, at 233.

[133] [2010] EWCA Civ 390 (CA) [U.K.]. This case is quoted by J. Ross, *supra* note 66, at 233.

[134] Article 22(2) provides that, if proceedings before a court have as their object the validity of decisions of the 'organs' of a company, then, notwithstanding a contractually agreed exclusive jurisdiction clause, the courts of the Member State where the company has its seat have exclusive jurisdiction.
Article 25 provides that, where a court (here, the English court) is seized of a claim that is 'principally concerned with' a matter over which the courts of another Member State (here, Germany) have exclusive jurisdiction, then that court must declare that it has no jurisdiction.

[135] [2011] EUECJ C-144/10, 12 May (E.C.J.).

domicile, are disposed to raise the question of jurisdiction.

Many pairs of contractual parties enter into several contracts, including ISDA Master Agreements and other ISDA agreements, with different governing law and jurisdiction clauses. Some of the jurisdiction clauses are exclusive, some non-exclusive. Many transactions, particularly structured finance transactions, involve multiple agreements and multiple parties domiciled in different jurisdictions. A number of the transaction agreements are often governed by different laws. In those circumstances, a single transaction often involves agreements that contain submissions to the exclusive or non-exclusive jurisdiction of different courts. Some aspects of the parties' relationship are naturally governed by one law rather than another. This does not preclude them choosing exclusive jurisdiction clauses. Further, a bank may operate in different markets through one or more branches in those markets. As a result, a global customer of the bank, despite best intentions or documentation policies otherwise, can reasonably be expected to enter into different agreements, or even the same agreement, with different branches in different jurisdictions that contain different choice of law and jurisdiction clauses. A dispute between the two parties may, and often does, arise under more than one of these agreements.

Needless to say, therefore, multiple and parallel proceedings are not only possible, they are also likely. The risk of inconsistent decisions is writ large".[136]

An example that may be quoted is *Deutsche Bank AG* v. *Sebastian Holdings Inc.*,[137] where the English Court of Appeal stressed the necessity of construing jurisdiction clauses broadly, as parties to multiple agreements do not expect their disputes to be settled by different tribunals. The interpretation of multiple (related) agreements should be made so as to determine the parties' intention, hence being relevant whether such agreements were, or were not, part of an overall transaction. This judgment did not apply the 'commercial centre' approach that instead would be a valid alternative when the agreements have been concluded over a short period of time.

In another case, *Deutsche Bank AG* v. *Tongkah Harbour Public Co Ltd.*,[138] the issue was whether in a series of agreements providing for optional arbitration and for litigation, Deutsche Bank, as a party to the agreements, could choose to litigate under one agreement and arbitrate under the other. The argument of Deutsche

[136] *See* Ross, *supra* note 66, at 236.
[137] [2010] EWCA Civ 998 (U.K.).
[138] [2011] EWHC 2251 (QB) (U.K.).

Bank that different divisions involved in the transactions allowed for different dispute settlement options was unsuccessful, since the Court looked at Deutsche Bank as a sole contracting entity.

These cases show a tendency of parties to CFTs to bring the dispute to their own home jurisdiction. This fact should not be undervalued, due to the increasing cross-border impact of such transactions.

Would P.R.I.M.E. Finance constitute a solution for these cases? From the perspective of the application of the EU Reg. 44/2001, it would not be possible to rely on issues of exclusive jurisdiction, since the afore mentioned regulation does not apply to arbitration.[139] Moreover, parties may psychologically benefit from having their dispute settled in a neutral venue, with the possibility of appointing highly specialized experts. Last but not the least, a final submission to an arbitral tribunal of the disputes that may rise out of a contractual relationship is sufficient to exclude Court jurisdiction, since a Court would stay the proceedings if one of the parties claims the existence of an arbitral clause.

CFTs disputes raise issues of interpretation related to their documentation or related to the relevant statutes and regulations. However, why interpretation should give rise to disputes if standardized agreements and boilerplate clauses are the basis of documenting transactions? The answer depends on different factors, of which we may recall the most important:

- When there is no dispute about the principles to be used in the interpretation of contracts, what is controversial is the act of interpretation itself;
- Market consensus and understanding about what a particular agreement or provision means can be frustrated when faced with a judicial decision that does not take into account that consensus or understanding, as well as in the case of conflicting judicial decisions about the meaning or intent of a particular provision;
- Such agreements are a compromise between brevity and completeness, since they have to fit the need of working in a multi-jurisdictional environment. Ambiguities cannot be avoided easily. Such compromise may hence give rise to interpretation issues.[140]

These points deserve clarification. CFTs are documented by agreements that have been developed over a long period of time and with substantial uniformity. Such uniformity is to the benefit of an efficient and time saving conclusion of transactions. When judges, particularly in England, are faced with such

[139] *See* EU Reg. 44/2001, *supra* note 11 at art. 1, 2(d).
[140] *See* Ross, *supra* note 66, at 239.

agreements, interpretation is a question that may arise, as said, not in relation to the principles to be applied, but to the act of interpreting itself. An example may clarify the issue. In the case *Chart Brook Limited & another* v. *Persimmon Homes Limited & another*,[141] at para 14 Lord Hoffman said:

> **"***There is no dispute that the principles on which a contract (or any other instrument or utterance)should be interpreted are those summarised by the House of Lords in Investors Compensation Scheme Ltd.* v. *West Bromwich Building Society*, *[1998] 1 WLR 896, 912–913. They are well-known and need not be repeated. It is agreed that the question is what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean [sic]. The House emphasised that 'we do not easily accept that people have made linguistic mistakes, particularly in formal documents' . . . but said that in some cases the context and background drove a court to the conclusion that 'something must have gone wrong with the language'. In such a case, the law did not require a court to attribute to the parties an intention which a reasonable person would not have understood them to have had*".

Again, in the *In Rainy Sky* v. *Kookmin Bank*,[142] Lord Clarke said the following:

> "*For the most part, the correct approach to construction of the Bonds, as in the case of any contract, was not in dispute. The principles have been discussed in many cases, notably of course,*[…] *by Lord Hoffmann in Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749, passim, in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, 912F–913G and in Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101, paras 21–26.* […]. *Those cases show that the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. As Lord Hoffmann made clear in the first of the principles he summarised in the Investors Compensation Scheme case at page 912H, the relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract* […].
>
> *The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court*

[141] [2009] 1 A.C. 1101 (U.K.).
[142] [2011] UKSC 50 (U.K.).

> *must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other*".

Such decisions are a good example of the uncertainties related to the act of interpretation. This trend in modern decisions has raised the issue of textual or literal interpretation as opposed to contextual interpretation.[143] Where CFTs are concerned, this tension is even more palpable when one comes to the interpretation of section 2 (a) (iii) of the ISDA master agreement.[144] This tension between the two proposed interpretations is also accentuated by the discussion of whether or not the intention and purposes of the original drafters of a particular provision should be taken into account, along with the intention of the parties, namely giving importance to the interpretation of such provisions given by market sponsors as ISDA. Such point of view was taken by the English Court of Appeal,[145] accepting the submissions made by ISDA, as intervener, regarding the meaning of Section 2(a)(iii), as well as other provisions. The English Court of Appeal also brought some clarity on conflicting decisions issued by the High State Court in relation to the ISDA art. 2(a)(iii).[146]

Some observations can be made on this purpose. The fact that a better level of decision (at least from the market point of view) was reached only on appeal might have affected markets' needs of certainty and predictability. If the same matter were brought before a specialized arbitral tribunal, the same issue would

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[143] *See* Ross, *supra* note 66, at 243.

[144] The issues covered by cases on such provision are discussed by Ross, *supra* note 66, at 248. Section 2 reads as follows:

(a) General Conditions

(i) Each party will make each payment or delivery specified in each Confirmation to be made by it, subject to the other provisions of this Agreement.

(ii) Payments under this Agreement will be made on the due date for value on that date in the place of the account specified in the relevant Confirmation or otherwise pursuant to this Agreement[…]

(iii) Each obligation of each party under Section 2(a)(i) is subject to (1) the condition precedent that no Event of Default or Potential Event of Default with respect to the other party has occurred and is continuing, (2) the condition precedent that no Early Termination Date in respect of the relevant transaction has occurred or been effectively designated and (3) each other applicable condition precedent specified in this Agreement.

[145] [2012] EWCA Civ 419 (U.K.).

[146] *See* Ross, *supra* note 67, at 249.

have been certainly decided getting to the same conclusion of the Court of Appeal but in less time. This shows how specialized experts are needed in the process of adjudicating complex financial transactions.

Mis-selling cases are another class to be considered. Claims of mis-selling of financial products in order to recover losses, made by sophisticated clients, have been very common after the financial crisis. Such claims have different basis. Usually the claimant alleges:

- The existence of an advisory relationship, hence implying a breach of an advisory and fiduciary duty;
- Negligent or fraudulent misstatement, deceit;
- Breach of an implied term, misrepresentation, making of an implied representation;
- Lack of sophistication;
- Misunderstanding in relation to the nature of the investment;
- Contractual terms, signed but neither read nor understood, unsuitability of the products sold, breach of regulatory or statutory duties; and
- Lack of capacity and authority.[147]

Defences are based on:

- The absence of an advisory relationship;
- On the mere sale of products, thus not acting as advisor; and
- On the grounds of estoppel because of applicable disclaimers and non-reliance clauses excluding advisory duties.

English courts have taken a pro-bank and pro-financial institution approach, looking at the realities of such transactions, the parties' conditions and considering factors like the exclusion of Bank responsibility for misrepresentation. When such duty has been excluded, in order to assess whether it was possible for the claimant to rely on misrepresentation, Courts had to investigate in detail the nature of the statements and by whom they were made. Mis-selling cases are hence fact-specific and many of them are based on evidence.[148]

From a P.R.I.M.E. Finance perspective, the fact that Courts, particularly in England, did not take a view favourable to bank customers and clients may push these subjects to skip the litigation in such venues towards a more neutral dispute settlement mechanism. However, this is a matter of strategy influenced

[147] *See* Ross, *supra* note 67, at 266.
[148] *See* Ross, *supra* note 67, at 268.

by a subjective perception of the Courts dealing with such cases. Moreover, this consideration may be affected by the fact that clients may be more or less favourable, on a cost benefits basis, to submit their disputes to arbitration or mediation.

IV. Conclusion

The Arbitral Institution we briefly described in this paper is relatively recent in its establishment. Some features of P.R.I.M.E. are noteworthy, namely the creation of an integrated dispute settlement body where specialists of dispute resolution and financial markets work side by side. This aspect will certainly have a positive impact on settling disputes in a reasonable amount of time and reaching substantially fair and uniform decisions. Moreover, the advisory function makes P.R.I.M.E. Finance a unique institution, maximizing the efficacy of its mandate. Good advisory opinions may have a palpable outcome in lowering the amount of disputes in relation to financial products, hence giving markets that stability they need. Last but not least, P.R.I.M.E. Finance pool of experts may help to bring certainty and clarity in Court Litigation, if the expert witness option is used. A weak point that can be underlined is that, in the geographical composition of the panel of 100 experts, there is a predominance of the Anglo-American pole. This fact may be perceived by emerging market players as an attempt of piloting, though the transformation from litigation to arbitration, the case law of those countries being more represented on P.R.I.M.E., thus making it wide spread. If it is true that these two legal systems have a bigger expertise on financial transactions, this issue may be heavily criticised, especially under the light of the recent financial crisis. It could also put under risk the main purpose of P.R.I.M.E., namely being an independent forum for financial dispute resolution. However, one may note that P.R.I.M.E. is still taking its first steps and that nothing prevents us from thinking that in the future its structure and the geographical composition of its panel will be different, both in collocation and numbers.