

Revamping of P.R.I.M.E. Finance Arbitration Rules Underway

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What makes disputes in banking and finance different? After all, like most commercial disputes, their determination often requires the interpretation of contracts, deciding whether a party is liable in contract or tort, and quantifying damages. Furthermore, financial institutions are, in many respects, no different from other commercial parties to disputes.

Yet, in practice banking and finance disputes require special expertise to resolve them. Amongst other things: banking and financial markets are strictly regulated sectors, and regulatory compliance may need to be taken into account when determining potential breaches of contract; perceived risks may trigger bank runs; statutory duties of secrecy may prevent financial institutions from disclosing customer information, affecting evidence-gathering; and minimum capital and asset ring-fencing on local bank branches may present challenges to enforcement.

As a result, courts in several countries have established specialist chambers to deal with complex banking disputes. These include the High Court of England and Wales' Financial List and the Singapore International Commercial Court. In arbitration, while institutions like the ICC, ICDR, SIAC, SCCA, and LCIA offer their general rules and administrative services for disputes across all sectors, others have sought to increase their attractiveness to the finance sector. For example, the CIETAC Financial Disputes Arbitration Rules are designed for financial disputes, and the HKIAC's Panel of Arbitrators for Financial Services Disputes offers a tailored panel of arbitrators with requisite expertise.

The number of banking and financial disputes reported by arbitral institutions is growing. In 2018, the ICDR-AAA reported a 78% increase (more than any other sector), and the LCIA reported that 29% of its cases were banking and finance disputes. While the ICC merges the finance and insurance sectors in its statistics, preventing a precise comparison, this author's first-hand knowledge of the ICC Court's docket confirms a similar increase in banking-related cases in recent years.

The case for arbitration as an alternative to litigation in the finance sector has been compellingly made in several recent studies. They include the ISDA Arbitration Guide of 2013 and the second edition of the guide published in 2018, the 2014 Report on Arbitration in Banking and Financial Matters by the French Arbitration Committee, the ICC Arbitration Commission's monumental 2016 Report on Financial Institutions and International Arbitration and its supplements, and the Legal High Committee for Financial Markets of Paris' 2020 Report on Arbitration in Banking and Financial Matters. All of these studies were conducted by working groups of bankers and arbitration practitioners and can be found on the website of the University of Cologne's Center for Transnational Law Institute for Banking Law. Other initiatives include Hong Kong's Financial Dispute Resolution Centre, established to resolve by mediation or arbitration disputes resulting from the demise of the local affiliate of Lehman Brothers and now enjoying comprehensive jurisdiction over disputes between customers and financial institutions, and the interbank dispute settlement mechanism *Servicio para dirimir incidencias entre Bancos* (DIRIBAN), established by the Spanish Banking Association. DIRIBAN boasts a 100% voluntary compliance rate by award debtors.

Among the competing fora in this field, P.R.I.M.E. Finance stands out. Based in The Hague, P.R.I.M.E. Finance is a specialist organisation for the resolution of banking and financial disputes, with users offered a panel of experts and arbitrators with the expertise to resolve complex financial disputes. Financial institutions have consistently ranked technical expertise in banking and finance of sitting arbitrators as key when considering an alternative dispute resolution mechanism. In addition, all cases referred for arbitration under the P.R.I.M.E. Finance Arbitration Rules are administered by the Permanent Court of Arbitration (PCA), the world's oldest arbitral institution. The combination of the subject-matter expertise of P.R.I.M.E. Finance's Panel and the PCA's efficiency in administering arbitral proceedings brings significant advantages for users. ISDA has listed P.R.I.M.E. Finance in both its 2013 Arbitration Guide and its 2018 Arbitration Guide as among the few arbitral

institutions recommended for financial arbitrations. The PCA administers disputes under the P.R.I.M.E. Finance Arbitration Rules regardless of the seat of arbitration and the nature of the dispute. Examples of disputes that may be submitted include those arising in relation to derivatives, sovereign lending, investment and advisory banking, financing (export, project, Islamic, trade, asset, and commodities), private equity, asset management, and smart contracts. Importantly, non-bank parties and financial institutions conducting ordinary business transactions, with no distinctive credit component, can choose to submit their treat or contract-based disputes to P.R.I.M.E. Finance.

In 2020, P.R.I.M.E. Finance launched an in-depth review of its arbitration rules. The first comprehensive draft has now been posted online for public comments. The draft rules aim to offer arbitrators and users a comprehensive and clear set of procedural rules for their arbitrations, and are the result of work undertaken by pre-eminent banking experts and dispute resolution practitioners representing the world's major legal systems. It is expected that specialist firms, financial institutions, and arbitrators from around the world will comment on the draft, ensuring the geographical and sectoral representativity that is essential to global rule-setting. The deadline for the submission of comments is 21 March 2021.

Features of particular interest include:

- **Transparency.** The drive for transparency is evident across the draft rules. By way of example, parties are required to disclose any third-party funding arrangement of any claim or defence, and the identity of that third party (Articles 5, 6, and 12). Another application of transparency in the draft rules flows from the fact that banking is a highly standardised sector, with syndicated lending generally following the template of the Loan Market Association (LMA) or the Loan Syndications and Trading Association (LSTA) and derivatives using the ISDA Master Agreement. The draft rules give the tribunal the power to invite or grant leave to an industry body to appear before it as *amicus curiae* and make submissions on any issues relevant for the proceedings (Article 29). In addition, unless the parties object, final awards will be published (redacted as appropriate) (Article 39.9), permitting the emergence of a body of jurisprudence similar to the case law of the courts in the major financial centres. This will increase predictability and transparency of the arbitral process.
- **The administering institution.** The PCA has a key role throughout the

arbitral process. It enjoys all the customary prerogatives of an administering institution (Article 4). Under the draft rules, in exceptional situations, the PCA is also granted the power to decline the confirmation of arbitrators nominated by the parties or a tribunal president nominated by co-arbitrators, such as when the agreed nominee and/or nomination process creates a risk of unfairness and endangers the enforceability of the award (Articles 11 and 15).

- **Complex arbitrations.** Complex banking transactions may involve hundreds of parties, sometimes with adverse interests, and multiple contracts. The draft rules deal with the treatment of complex situations such as these, for example with detailed joinder and consolidation provisions (Articles 31 and 32). Where separate arbitrations are not eligible for consolidation, the tribunal can also coordinate the proceedings after consulting with the parties. Such coordination ensures that common questions of fact or of law are determined consistently.
- **Emergency and expedited rules.** The draft rules contain provisions on emergency arbitration (Article 25), interim measures (Article 25) and, in response to financial institutions' requests for efficiency in the rendering of awards, expedition (Article 17); arbitrations with an amount in dispute of EUR 4 million or less are automatically subject to expedited arbitration rules, with a sole arbitrator expected to render the final award within 180 days of the constitution of the tribunal. The system under the proposed expedited rules still retains flexibility: at any juncture, the parties may opt for a three-member tribunal, and either the parties or the PCA may decide that proceedings initiated under the expedited rules will revert to the standard rules.
- **Efficiency.** The draft rules are built on efficiency. Tribunals are expected to convene a case management conference with the parties within 30 days from their constitution (Article 16). The convening of additional procedural conferences is encouraged throughout the proceedings. Tribunals are also given deadlines to ensure the rendering of final awards in a timely fashion. Tribunals with three or more members are required to render the final award within 90 days of the closing of the hearing (or the receipt of the last submissions authorised by the tribunal); for sole arbitrators, the time limit is 60 days (Article 39). Tribunals are also explicitly empowered to assist the parties in discussing a settlement when appropriate.

In addition, tribunals enjoy all powers necessary to manage the case. In particular, tribunals may decide, after consulting the parties, that any hearing will be conducted through means of communication that do not require physical presence (Article 18). The logistical experience of the PCA in organising remote hearings will be particularly helpful in this regard. In fact, the draft rules provide the option for the entire procedure to be paperless, under which even hard copies of awards with wet signatures are only required when the law of the seat or the place for enforcement explicitly requires them.

One concern raised by financial institutions is the need for tribunals' decisiveness in dismissing evidently unmeritorious claims or defences, without having to go through the full procedure on the merits. Thus, early determination is a power explicitly conferred upon tribunals in the draft rules (Article 35).

The emphasis on efficiency also includes cost-optimisation. The draft rules offer parties a choice between a time-based arbitral fee system and a system based on the value of the dispute (Article 49). Absent an agreement, the rules default to a time-based fee system.

The revised P.R.I.M.E. Finance draft arbitration rules are rules of their time. They draw on the drafters' vast experience accumulated over decades of litigating and arbitrating disputes, both specific to the banking and financial sector and in a plethora of other contexts. They achieve a delicate balance between empowering tribunals to rule on all the situations that may arise in the course of the proceedings, while requiring the transparent, fair, and equal treatment of the parties. It is now essential for the drafters' vision to be put to the test and allow users, be they arbitrators, counsel, or corporate officers, to consider whether these rules meet their expectations. At the end of this process, P.R.I.M.E. Finance will emerge with rules better fitted to offer a credible alternative dispute resolution mechanism to financial institutions, their customers, and counterparties. This will lead to greater and more secure business for all.

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