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

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1. What makes disputes in banking and finance stand out? After all, as is the case with most commercial disputes, their determination often requires the interpretation of contracts, deciding whether a party is liable in contract or in tort, and quantifying the damages. Furthermore, financial institutions are, in many respects, no different from other parties to disputes: they are generally incorporated as commercial companies; they invest and seek to divest like other investors; and, in doing so, may find themselves in shareholder and warranty breach disputes. They also sell and purchase services and equipment like other corporations in the ordinary course of their business. The ensuing disputes, it may be argued, are no different from disputes in other industries found on the docket of any commercial court or arbitral institution.

2. Yet, distinctive features make disputes in banking and finance unlike others and require special expertise to resolve them. To start with, banking and financial markets are strictly regulated; as such, regulatory compliance considerations may need be taken into account when determining a potential breach of contract. Perceived risks may trigger bank runs, lest we forget the images from the 1929 and the 2009 financial crises of long lines of depositors seeking



to withdraw their savings. Further, general theories from corporate law and conflict of laws are subject to special adaptations in international banking. For instance, in letters of credit, bank branches in different countries are deemed separate entities. Deposit accounts are another case in point. Albeit immaterial property, bank accounts are generally considered to be the centre of gravity in account-based transactions, and the most compelling connecting factor with the country where the bank branch holding the account is located. Statutory duties of secrecy may prevent financial institutions from disclosing customer information, affecting the evidence-gathering process. Regarding enforcement, bank supervisors may impose minimum capital and asset ring-fencing on local bank branches, which could prevent the consolidation of assets in a foreign insolvency proceeding or the satisfaction of an attachment ordered by a foreign court over a

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debtor's assets held with a foreign branch of the depository bank.

3. These features, among many others, have resulted in courts in a number of countries establishing 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 financial institutions by drafting special arbitration rules or offering a panel of specialist arbitrators for banking and financial disputes. For example, the [CIETAC Financial Disputes Arbitration Rules](#) are an example of rules drawn up for financial disputes, while the [HKIAC's Panel of Arbitrators for Financial Services Disputes](#) offers parties to such disputes a specially tailored panel of arbitrators with the requisite expertise. The staggering increase in the number of banking and financial disputes recently reported by arbitral institutions confirms the wisdom of providing dedicated dispute resolution services. Notably, in 2018, the [ICDR-AAA](#) reported a 78% increase in its financial services cases (more than any other sector), and the [LCIA](#) reported that same year that 29% of its cases were banking and finance disputes, an effective increase of 19%. While the ICC merges the finance and the insurance sectors in its statistics, preventing a precise comparison, the author's first-hand knowledge of the ICC Court's docket confirms a similar increase in banking-related cases in recent years.

4. The case for arbitration as an alternative to litigation in banking and finance disputes has been compellingly made in several international

studies released over the past decade. They include the [ISDA Arbitration Guide of 2013](#) and the [second edition](#) of the guide published in December 2018, the May 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 joint 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. They report interesting precedents where national bank associations and bank regulators set up arbitral systems which, while initially designed with a specific short-term aim in mind, became permanent even after they served their initial purpose. This includes [Hong Kong's Financial Dispute Resolution Centre](#), established in November 2011 jointly by the Hong Kong Monetary Authority and the HKIAC to resolve by mediation or arbitration disputes resulting from the demise of the local affiliate of Lehman Brothers. Ten years later, the FDRC enjoys comprehensive jurisdiction over disputes between customers and financial institutions in Hong Kong. Another example is the interbank dispute settlement mechanism [Servicio para dirimir incidencias entre Bancos](#) (DIRIBAN), established by the [Spanish Banking Association](#) with the support of Spain's central bank. Remarkably, DIRIBAN boasts a 100% voluntary compliance rate by award debtors.

5. Among the competing fora for an alternative dispute resolution system providing

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expert and neutral services to financial institutions and their counterparts, [P.R.I.M.E. Finance](#) stands out in many respects. Established in 2012 in The Hague, P.R.I.M.E. Finance offers a specialist forum for the resolution of banking and financial disputes, in which users are offered [a panel of experts and arbitrators](#) who have the requisite expertise for the resolution of complex financial disputes. This distinctive feature aims to reduce legal uncertainty and systemic risk and to foster both stability and confidence in, and a more settled and authoritative body of law for, global finance. Financial institutions have consistently ranked the technical expertise in banking and finance of sitting arbitrators as one of their foremost expectations when considering an alternative dispute resolution mechanism. Importantly, all cases referred for arbitration to P.R.I.M.E. Finance are administered exclusively by the Permanent Court of Arbitration (PCA), the world's oldest arbitral institution. The combination of the guaranteed subject-matter expertise provided by P.R.I.M.E. Finance's Panel Arbitrators and the PCA's efficiency in administering arbitral proceedings brings significant advantages for users in the banking and finance sectors. 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 administering financial arbitrations.

6. The PCA will administer disputes referred to P.R.I.M.E. Finance arbitration regardless of the seat of arbitration and regardless of the nature of the dispute, both for contract-based and treaty-based arbitrations. Examples of disputes that may be submitted to P.R.I.M.E. Finance arbitration 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, the scope of cases eligible for the P.R.I.M.E. Finance arbitration system is not limited purely to banks and their financial disputes: non-bank parties and financial institutions conducting ordinary business transactions, with no distinctive credit component, can also choose to submit their disputes to P.R.I.M.E. Finance.

7. In 2020, P.R.I.M.E. Finance launched an in-depth review and revision of its arbitration rules. The first comprehensive draft has now been [posted online](#) for public comments by 21 March 2021. This revision seeks to offer arbitrators and users a comprehensive, clear, and straightforward set of procedural rules for their arbitration. Each stakeholder has a clearly defined role in the arbitral process. Complex arbitrations involving multiple parties and contracts are the subject of clear, detailed rules, reflecting decades of arbitral experience and court decisions from around the world.

8. The released draft rules of arbitration are the result of work undertaken by banking experts and dispute resolution practitioners representing the world's legal systems. The rules have been drafted in a two-tiered structure: a drafting group and a consulting group, the latter providing guidance and strategic advice. Both groups bring together preeminent experts with a range of combined banking and arbitration expertise. It is expected that specialist firms, financial institutions, and arbitrators from around the world will contribute their comments on the draft rules of arbitration of P.R.I.M.E. Finance posted online, thus ensuring the geographical and sectoral

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representativity that is essential to global rule-setting.

9. In the remainder of this paper, selected features in the revised draft rules are presented with the aim of piquing the interest of readers to go online to discover the infinitely richer comprehensive draft rules and to submit their comments thereon. Five features are selected as follows:

10. **Transparency.** This is a key change in the arbitration rules of P.R.I.M.E. Finance. The drive towards transparency is visible at multiple levels in the proposed new rules. To start with, the parties have a standing obligation, beginning with the submission of the request for arbitration and the answer to the request, to disclose any third-party funding arrangement of any claim or defence, and the identity of that third party. This is particularly important, as it permits the arbitrators to satisfy their own standing duty to disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence.

11. Another application of transparency in the draft rules flows from the fact that banking is one of the most standardised sectors of the economy. Syndicated lending generally follows the template of the [Loan Market Association \(LMA\)](#) or that of the [Loan Syndications and Trading Association \(LSTA\)](#). Derivatives worldwide use the [ISDA Master Agreement](#). This standardisation aims to foster credit and operational risk and cost control in flow banking and in global bank networks. Disputes about standard terms in use in trillions of dollars' worth of transactions can be gravely disrupted if doubt were to be cast over age-old terms and practices. The revised P.R.I.M.E. Finance draft arbitration rules provide for two measures to meet industry

expectations in this respect. First, arbitral tribunals are conferred 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, subject to ensuring that such intervention does not disrupt the proceedings or prejudice the parties' position. Second, unless the parties object, final awards will be published (published awards will be redacted if so requested by the parties). Publication should permit the emergence of a body of jurisprudence similar to the case law of the courts in the major financial centres, which will increase predictability and transparency of the arbitral process, making arbitration a more attractive means of dispute settlement and a means of fostering standardisation in flow banking.

12. **The administering institution.** The PCA has a key role throughout the arbitral process. It enjoys all the customary prerogatives of an administering institution in terms of verifying the requirements for the registration of a request for arbitration, appointing the tribunal, issuing final rulings on challenges to arbitrators, replacing arbitrators, extending or abridging time limits, fundholding, and controlling fee and expense claims made by arbitrators. In exceptional situations, the PCA is granted the power to decline the confirmation of arbitrators nominated by the parties or a tribunal president nominated by co-arbitrators. It is expected that this power will only be used in exceptional circumstances, such as



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when the nomination process agreed between the parties creates a significant risk of unequal treatment or unfairness, thus potentially endangering the recognition and enforcement of the final award.

13. The administration of P.R.I.M.E. Finance arbitrations under the aegis of the PCA also offers the distinct advantage of bestowing immunity upon the arbitrators, counsel, and witnesses, whether the arbitration is seated in one of the four countries in which the PCA has offices or in any of the 14 countries with which the PCA has concluded [Host Country Agreements](#). P.R.I.M.E. Finance is the custodian of the list of specialist arbitrators which the parties, co-arbitrators, and the PCA will consult, when appropriate, for the purpose of nominations or appointments.

14. **Complex arbitrations.** Alongside simple, bilateral mortgage lending, more complex banking transactions may involve hundreds of parties, sometimes with adverse interests, and multiple contracts. One of the pitfalls in the arbitral process is that expediency often requires that all claimants, on the one hand, and all respondents, on the other, be treated alike, regardless of their claimed interest. Similar to the bundling of all shareholders in one class regardless of conflicting interests between majority and minority shareholders, the interests of lenders might conflict with those of derivatives issuers. Similarly, senior secured lenders may differ in their interest with that of subordinated creditors. The economic development-fostering objectives that govern project lending by multilateral financial institutions may clash with the strict credit risk control that characterise the approach to lending by commercial banks. Yet, all of those financial institutions may find themselves on the same side of the procedural equation, either

as the “claimants” or the “respondents.” The draft revised arbitration rules released by P.R.I.M.E. Finance go into extensive detail for the comprehensive treatment of complex situations such as these. In the new rules, the joinder of new parties is the subject of detailed provisions that differ according to whether the tribunal is, or is not yet, constituted at the time the application is submitted, whether the additional party is *prima facie* bound by the arbitration agreement, and whether the joinder is consensual or opposed by one or more of the parties already present.

15. Similarly, the consolidation of two or more pending arbitrations is the subject of a detailed set of rules. Strict conditions are set, including the requirement that the claims arise out of the same legal relationship in order to be eligible for consolidation. While the fact that the legal relationship might consist of several interrelated contracts with different parties is not a barrier to consolidation when the other required conditions are met, financial institutions frequently issue independent undertakings such as letters of credit and demand guarantees. While those undertakings are issued in consideration of the underlying transaction, they are considered to be separate from that transaction. As such, no consolidation of an arbitration under the letter of credit and one under the underlying contract should be permitted to occur, even if the two arbitration agreements are compatible.

16. To ensure equality between all parties, the PCA is empowered to revoke any appointment of an arbitrator already made before joinder or consolidation is ordered. Should the PCA make such a revocation, it is empowered to restart the appointment process.

17. Importantly, the draft revised rules permit the submission of claims arising out of or in

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connection with more than one contract in a single arbitration. Likewise, for situations in which an arbitral tribunal presides over separate arbitrations that are not eligible for consolidation, the tribunal can coordinate the proceedings, of course after consulting with the parties. Such coordination ensures that common questions of fact or of law are consistently determined.

18. **Emergency and expedited rules.** The revised rules comprehensively address emergency situations both before and after the tribunal is constituted. When a party applies for an urgent provisional measure that cannot await the constitution of the arbitral tribunal, the PCA will appoint an emergency arbitrator, who will render a decision in the form of an award or an order, unless the parties have opted out of the emergency arbitration rules. The tribunal, once constituted, shall not be bound by the emergency arbitrator's decision.

19. After its constitution, the tribunal may be petitioned to grant any interim measure of protection in any form it deems appropriate pending the issuance of the final award. This includes the power to maintain or restore the status quo, to preserve assets and evidence, and to order any action, or the injunction thereof, so as to prevent harm or disruption to the arbitral process.

20. In response to financial institutions' requests for efficiency in the rendering of awards, arbitrations under the P.R.I.M.E. Finance rules with an amount in dispute of EUR 4 million or less will automatically be subject to the expedited arbitration rules. The expedited rules may also be applied to disputes for which amounts are above this threshold upon the agreement of the parties. Under the expedited rules, a sole arbitrator is expected to render the final award within 180 days of the constitution of the tribunal. However, the

system under the proposed expedited rules 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.

21. **Efficiency.** To address efficiency concerns raised by financial institutions polled regarding alternative dispute resolution systems, the P.R.I.M.E. Finance rules build in the expectation that tribunals will act diligently to resolve disputes brought before them. From the inception of an arbitration, tribunals are expected to convene a case management conference with the parties within 30 days from their constitution. The convening of additional procedural conferences is encouraged throughout the proceedings. Experienced arbitrators and counsel will appreciate the impact of regular procedural meetings to discuss the use of cost and time-efficient procedural mechanisms, and to focus the pleadings on issues that the tribunal considers to be important for the determination of requests for relief.

22. 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.

23. Tribunals are also explicitly empowered to assist the parties in discussing a settlement when appropriate. In addition, tribunals enjoy the powers necessary to instruct the case, administer the evidence (and decide on the admissibility, relevance, materiality, and weight thereof), and order the provision of security for costs. Tribunals are empowered to decide on the holding of

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evidentiary hearings on their own initiative or upon the petition of any party. Particularly relevant for cost-efficiency and in times of travel restriction, tribunals may decide, after consulting the parties, that any hearing will be conducted through means of communication that do not require physical presence (such as telephone or videoconference). The logistical experience of the PCA in organising remote hearings will be particularly helpful, sparing hearing participants from regrettable technical glitches that sometimes still hamper the use of digital platforms. In fact, the revised 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.

24. One of the expectations consistently voiced by financial institutions in relation to arbitration is the need for tribunals decisively to dismiss manifestly unmeritorious claims or defences, without having to go through the full procedure on the merits. Early determination is a power explicitly conferred upon tribunals in the revised rules, even though such power is broadly considered to be part of the tribunal's inherent powers. Applications for early determinations must be submitted within 30 days of the raising of the relevant claim or defence and must be decided within 30 days from the application.

25. Finally, the P.R.I.M.E. Finance rules' emphasis on efficiency also includes cost-efficiency. P.R.I.M.E. Finance has decided to transcend the divide between those arbitral institutions that promote a time-based arbitral fee system and those that fix fees proportional to the value of the dispute. Much has been written about the pros and cons of each system, and hybrid systems have been proposed from time to time but

have not yet gained traction. The draft revised P.R.I.M.E. Finance rules now propose the two systems in parallel, leaving the choice to the parties. Absent an agreement, the rules default to a time-based fee system.

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26. The revised P.R.I.M.E. Finance draft rules of arbitration 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 and avoiding disruptive guerrilla tactics, 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.

Georges Affaki chairs the revision of the P.R.I.M.E. Finance Arbitration Rules. A summary version of this *Insight* has appeared in the Kluwer Arbitration Blog, January 20 2021, <http://arbitrationblog.kluwerarbitration.com/?p=35922>.

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