ARBITRATION OF BANKING AND FINANCIAL DISPUTES

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Recent years have seen growth in the use of arbitration in the finance sector. This practice note offers guidance to banks and other financial institutions, and their advisers, in tailoring their arbitration agreements and their approach in any future arbitration to suit the particular characteristics of finance transactions and the disputes to which they give rise.

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SCOPE OF THIS NOTE

This practice note first looks at the rise of arbitration in the finance sector and the factors to take into account when considering whether to choose arbitration for financial disputes. It goes on to consider techniques for drafting the arbitration agreement and framing the arbitral procedure to the advantage of parties in finance-related cases. Finally, it reviews a number of recent initiatives aimed at further promoting the use of arbitration in the finance sector for both consumer and industry disputes.

This practice note does not discuss aspects of arbitration procedure, drafting points or features of arbitral rules which arise in arbitrations generally. However, links to other resources are provided where relevant.

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THE RISE OF ARBITRATION IN THE FINANCE SECTOR

Historical reasons why arbitration has been less popular than litigation with banks and other financial institutions

Arbitration is sometimes seen as better suited to resolving disputes in some industry sectors than in others. While it has long been used in shipping, insurance and construction, it has traditionally been less popular with banks and other financial institutions. Reasons for this include:

- The absence of a binding system of precedent in arbitration, which is thought to lead to inconsistent decision-making, in contrast to the judgments delivered by courts in leading jurisdictions, such as England and New York.
- A perception that tribunals of three arbitrators have a tendency to render compromise decisions which offer something to both parties, whereas it is perceived that the courts of leading jurisdictions are more likely to take a more robust approach to enforcing legal (and especially contractual) rights and obligations.
- A belief that arbitration does not offer any expedited processes, such as summary judgment, by which simple debt claims can be dealt with quickly.

While there remains some validity in these distinctions, they can be both overstated and mitigated against. See further *Potential limits on the use of arbitration in the finance sector*, below.

Reasons for growth in the use of arbitration in the finance sector

Since the late 2000s, there has been significant growth in the use of arbitration in the finance sector. This is principally the result of the expansion of financial institutions into the emerging markets and the greater ease of enforcing an arbitral award in those jurisdictions as opposed to a court judgment.

For many finance parties, litigation remains their preference if it is an acceptable choice from an enforcement perspective. However, arbitration benefits from the application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). In theory, at least, the national courts of each of the 157 contracting states must recognise an arbitral award as binding and enforce it, subject only to a limited number of exceptions. Although the practice of enforcement is not always as easy as it looks on paper, no comparable regime exists globally for court judgments. While the 2001 Brussels Regulation (*Regulation 44/2001*) and, subsequently, the Recast Brussels Regulation (*Regulation 1215/2012*), have enabled court judgments within the EU to be enforced with relative ease, enforcing a court judgment in another state (even in the US) becomes considerably harder outside Europe. The New York Convention gives arbitration an advantage over litigation because it can substantially reduce the enforcement risk associated with transactions involving parties in emerging markets.

Other reasons why it might make sense to choose arbitration in the finance sector include:

- Arbitration offers a neutral forum for disputes to be heard, where the alternative could be unreliable local courts in emerging markets or litigating against a state (or state-owned enterprise) before that state's own courts.
- Arbitration offers the possibility of appointing expert decision-makers to the arbitral tribunal, rather than submitting disputes to a national court with limited understanding of financial markets or contracting practices.
- Arbitration agreements and procedures can be tailored to suit the circumstances of the specific transaction or business (for example, the provisions for highly expedited arbitration in some clearing house rules).
- Arbitral proceedings tend to be confidential (or can be made so by agreement or by an order of the tribunal), which can be attractive to (for example) the private wealth sector and for some M&A transactions.
- An arbitral award is a final decision that can usually be challenged only on very limited grounds, such as irregularities affecting the proceedings or lack of jurisdiction on the part of the tribunal. (Of course, this finality can be unattractive to an unsuccessful party.)

The future of arbitration in the finance sector

In November 2016, after a two-year study into the perceptions and experience of financial institutions in international arbitration, the ICC Commission published its *Report on Financial Institutions and International Arbitration.*

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The Report examined the use of arbitration in a wide range of business lines, including derivatives, sovereign lending, regulatory matters, international financing, trade finance, Islamic finance disputes, advisory matters, asset management and interbank disputes. It concluded that there remained a lack of awareness of arbitration's potential benefits, as well as a number of misconceptions about the process.

As a result, the Report offered recommendations for tailoring the arbitration procedure to suit the needs of the banking sector (see *Legal update, ICC report on financial institutions and international arbitration*). These included case management techniques on the production of documents, bifurcation, summary disposition and interim relief.

Arguably, the structures are already in place for further growth for arbitration in the finance sector, since a number of these techniques are already incorporated in the rules of the leading arbitral institutions. They are discussed in *Tailoring arbitration for financial disputes*, below. Further growth is more likely to depend on arbitration practitioners convincing the finance sector that arbitration meets their expectations for dispute resolution. At that point, arbitration may feature more prominently in the dispute resolution policies of businesses in the finance sector.

TAILORING ARBITRATION FOR FINANCIAL DISPUTES

An advantage of arbitration is that the parties have considerable scope to tailor their arbitration agreements to suit the needs of their particular transaction or business. This section discusses the various choices open to parties to a financial transaction in their arbitration clause, from basic matters such as the choice of seat and institutional rules, to more customised matters such as controls on disclosure or provisions for expedited determinations. Some of these options address the deficiencies of arbitration perceived by financial institutions.

Many of the matters discussed below can be agreed when a dispute arises and arbitration commences, but for obvious reasons the majority are better dealt with when drafting the arbitration clause.

Institutional or ad hoc arbitration?

Parties can either choose an institutional arbitration (in which they select an arbitral institution to administer the arbitration process and agree to abide by that institution's rules) or an ad hoc arbitration in which there is no institution to administer the process and the arbitration is conducted in accordance with a set of non-supervisory rules (such as the *UNCITRAL Arbitration Rules*) or rules framed by the parties themselves.

The advantages and disadvantages of ad hoc versus institutional arbitration are discussed further in *Practice note, Ad hoc arbitrations without institutional support*. For the main features of a selection of major arbitration institutions, see P*ractice note, Which institution and why: a comparison of major international arbitration institutions.*

The ICC Commission's Report on Financial Institutions and International Arbitration (discussed at *The future of arbitration in the finance sector,* above) suggests that a majority of financial institutions opt for institutional arbitration to benefit from the settled rules and available experience in administering complex, high-value disputes. The most frequently selected institutions were the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), Hong Kong International Arbitration Centre (HKIAC) and Singapore International Arbitration Centre (SIAC).

An alternative approach to using a "generalist" arbitration institution is to provide for arbitration under the rules of an institution with a specific focus on arbitration in the finance sector: the Panel of Recognised International Market Experts in Finance, or P.R.I.M.E. Finance. The premise of P.R.I.M.E. Finance is that complex financial disputes require specialist arbitrators. P.R.I.M.E. Finance maintains a list of experts vetted by it, from which it is proposed that arbitrators in P.R.I.M.E. Finance cases would be drawn. However, this innovative approach has not found much support to date. This is perhaps because the "generalist" arbitration institutions have proven increasingly capable of making suitable arbitral appointments for cases involving complex financial transactions.

Seat of arbitration

The seat of the arbitration determines the applicable procedural law, the courts with supervisory and supportive jurisdiction over the arbitration, and the "nationality" of the award for recognition and enforcement purposes

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under the New York Convention. The procedural law of the seat of the arbitration will fill any gaps in the arbitration agreement or the rules (either chosen or framed by the parties) in respect of the procedure before, and power of, the tribunal.

The significance of the seat and disputes about applicable laws in international arbitration are outside the scope of this note. Further information can be found in *Practice notes, How significant is the seat in international arbitration?* and Which laws apply in international arbitration?.

The ICC Commission's Report on Financial Institutions and International Arbitration (discussed at *The future of arbitration in the finance sector*, above) revealed that the seats selected most frequently for finance disputes were (in alphabetical order) Geneva, Hong Kong, London, New York, Paris and Singapore. Those seats, along with Zurich and The Hague, are all represented in the model arbitration clauses published in ISDA's 2013 Arbitration Guide (see *ISDA Arbitration Guide and optional model arbitration clauses*, below).

Unsurprisingly, seats in major financial centres like London, New York and Hong Kong have proven particularly popular for financial transactions. Moreover, financial institutions tend to favour seats where the courts have a reputation for being willing, in appropriate cases, to order robust interim relief (such as freezing injunctions and anti-suit injunctions) in support of an arbitration. See *Interim and conservatory measures*, below.

Selection of arbitrators

As noted above, financial institutions have tended to be concerned that arbitration is less likely than a national court to deliver a predictable outcome. They perceive that, rather than enforcing contractual terms on their face, arbitrators (especially on three-member tribunals) have a tendency to offer something to both sides in their awards – perhaps as a result of one member being appointed by the debtor party.

A more positive view of the constitution of arbitral tribunals is that (subject to the law of the seat and the terms of the arbitration agreement) the parties have substantial input into the profile and identity of their decision-makers, in a way that would never be available to them in a national court. If the right to nominate a party-appointed arbitrator is important to the parties, they should ensure that the arbitration agreement grants them this right. While the default position under some institutional rules is that parties have a right to nominate an arbitrator, that is not the position under the LCIA Rules, for example.

The parties may wish to control the profile of the arbitrators further by specifying in the arbitration clause particular characteristics that the arbitrators must display. For example, they may wish to provide that the arbitrators are qualified in the law governing the transaction or that they have experience of a particular financial market (such as derivative transactions).

However, caution should be exercised. Introducing too many restrictive criteria in the arbitration agreement can limit the pool of arbitrators ultimately available for selection. Moreover, it may not be apparent when the arbitration clause is drafted what profile the arbitrators should have for the particular dispute. For instance, not all disputes arising under a complex financial transaction necessarily require an understanding of the business line in question; some disputes may turn more on points of contract interpretation, which would require a different set of skills in an arbitrator.

For other general considerations in selecting an arbitrator, see *Practice note, Selection of party-nominated arbitrators*.

Consolidation and joinder

Finance transactions often involve a number of different agreements between multiple parties. For example, syndicated loans can comprise a facility agreement, an intercreditor agreement, security arrangements and a parent company guarantee. The likelihood of disputes arising under more than one of those agreements simultaneously is high; for instance, claims for non-payment are often brought against both the borrower (under the facility agreement) and the parent company (under the guarantee). While a court can order that any such parallel proceedings are consolidated into a single claim, two arbitrations generally cannot be consolidated in the same way, unless all the parties to those two arbitrations agree.

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Similar analysis applies to joinder. Generally, a court would have jurisdiction to join to an existing proceeding any party over which it had personal jurisdiction. An arbitral tribunal could not do so, unless the party to be joined, and the parties to the existing proceeding, consented.

If the parties do not agree to consolidation and joinder, they may be left exposed to the potential time and cost consequences of multiple proceedings, as well as the possibility of inconsistent decisions. Therefore, it is generally sensible to provide for consolidation and joinder in the arbitration clause.

One source of consent could be found in the institutional rules incorporated by the parties into their arbitration agreement. Historically, the major institutional rules contained no consolidation and joinder provisions, or only partial ones. Consequently, lengthy consolidation and joinder provisions had to be included in the arbitration clause. Now, most institutional rules contain at least some provision for joinder and consolidation. For example, see Article 10 of the ICC Rules 2017; Articles 22.1(ix) and (x) of the LCIA Rules 2014; Article 28 of the HKIAC Rules 2013; and Rule 8 of the SIAC Rules 2016.

However, some arbitration practitioners consider that the provisions in the ICC and LCIA Rules, at least, do not comprehensively address the way in which consolidation and joinder need to operate in complex multi-contract finance transactions, and that further drafting is required in the arbitration clause. The precise terms of that drafting depend on the set of institutional rules. However, in general terms the goal of the exercise is to ensure that all parties to all relevant agreements agree that an arbitral tribunal constituted in relation to a dispute under one agreement, may consolidate into that arbitration any other dispute arising under any relevant agreement, or join any party of any relevant agreement. They may also agree:

- Which arbitral tribunal(s) has the power of consolidation and joinder if more than one arbitration has been commenced (often, the tribunal in the arbitration commenced first).
- When that power may be exercised (often, no later than a specified point in the proceeding which is unlikely to be any later than the date of submission of the statement of defence, at the latest).
- Whether there are any consequences for the constitution of the tribunal of consolidation or joinder taking place.

The final point is relevant because, in some jurisdictions (such as France, where the classic case is *BKMI and Siemens v Dutco*), the parties must be treated equally in relation to the constitution of the arbitral tribunal as a matter of public policy. This means that, if arbitrators have been appointed already in at least one of the disputes, it may be necessary for an entirely new arbitral tribunal to be appointed in the event of consolidation. This is what the HKIAC Rules, for example, provide.

For additional information on consolidation, see *Practice notes, Multi-party and multi-contract issues in arbitration* and *Drafting multi-party and multi-contract arbitration clauses*.

Interim and conservatory measures

Interim and conservatory measures refer to relief given by an arbitral tribunal before its final determination. This could include, for example, measures aimed at preserving the status quo, preventing the dissipation of assets or evidence, anti-suit relief, or security for costs.

Many of the major arbitration rules contain provisions on interim relief. For more detailed information, see *Practice note, Interim, provisional and conservatory measures in international arbitration*.

The availability of interim relief tends to be valued by finance parties. This can have some impact on their choice of the seat of arbitration: one factor in their choice can be the willingness of courts at the seat to order potentially wide-ranging interim relief before an arbitral tribunal has been constituted. For example, the willingness of the English courts to order anti-suit relief, restraining a party from commencing proceedings in breach of the arbitration agreement, is one reason why London has been favoured as a seat by finance parties.

More recently, most arbitral rules provide for the appointment of an emergency arbitrator for the purpose of seeking urgent interim relief before the formation of the tribunal, as an alternative to seeking such relief from the

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courts. The key features of emergency arbitration, including the key provisions of the major institutional rules, are discussed in detail in *Practice note, Emergency arbitrators in international arbitration*.

Most arbitral rules seek to give users the choice of seeking interim relief at an early stage from either a national court or an emergency arbitrator. The latter may be preferable if the national court is inexperienced or has a poor track record in ordering urgent interim relief.

However, in England, the court has held that the availability of recourse to an emergency arbitrator (or a full arbitral tribunal appointed on an expedited basis, as is possible under the LCIA Rules) may preclude parties from applying to the courts for interim relief (*Gerald Metals v Timis [2016] EWHC 2327 (Ch)*, discussed in *Legal update, LCIA emergency arbitrator provisions limit court's power to grant freezing injunction in support of arbitration (English Commercial Court)*). In Gerald Metals, the High Court held that the availability of mechanisms in the LCIA Rules 2014 for the appointment of an emergency arbitrator (and for the appointment of a tribunal on an expedited basis) precluded a party from obtaining urgent interim relief from the English court under section 44(3) of the Arbitration Act 1996. The decision was based on section 44(5) of the Arbitration Act 1996, which provides that the English court may only act if the tribunal has no power to act or is unable to do so. The court rejected the claimant's application for urgent interim relief because there had been sufficient time for it to obtain effective relief from an emergency arbitrator (which had considered and dismissed the application).

Accordingly, if the right of access to the courts is of high importance to the parties (as it often is for finance parties), when the chosen seat is London, the parties should consider whether to opt out of the emergency arbitrator provisions in the relevant arbitral rules when drafting the arbitration agreement.

Summary dismissal

Financial institutions value the ability of national courts to dispose swiftly of claims that have little merit or prospect of success, or that are uncontested debt claims, through comparatively quick and inexpensive processes such as summary or default judgment. Historically, this has been one of the main reasons for financial institutions to prefer litigation to arbitration. Whether this perception is fair is a moot point.

On the one hand, summary judgment may not represent a clear advantage of litigation: applications in the courts for summary judgment are commonly averted by defendants who raise defences and counterclaims based on fact-intensive allegations (for example, mis-selling) that can only be resolved at trial.

On the other hand, it has always been arguable that arbitral tribunals have had a power to exercise various forms of summary disposal under their general powers of case management (although admittedly there is no equivalent in arbitration of default judgment, that is, judgment in default of an appearance by a party in the proceedings.) This power could be inferred from the tribunal's broad procedural discretion in many of the major arbitral rules to adopt such procedural measures as it considers appropriate. Certainly, nothing in the major arbitral rules expressly prevents this.

However, tribunals are often cautious. They have been concerned that a summary process might be regarded as not giving a party a proper opportunity to present its case. This in turn could lead to their awards being challenged (a party being unable to present its case is a ground for annulment under the UNCITRAL Model Law, and an equivalent standard exists in most modern arbitration statutes) or enforcement of their awards being resisted.

It is true that a party may have certain specific procedural rights. For example, Article 25(6) of the ICC Rules gives each party a right to request a hearing on the merits. Subject to specific provisions like this, the reality is that the number of cases in which an award has been challenged successfully on the basis that a summary determination amounts to a failure to observe due process is vanishingly small. Indeed, there is now an emerging body of case law that a summary process need not infringe a party's due process rights.

For example, in the English case of *Travis Coal Restructured Holdings LLC v Essar Global Fund Ltd [2014] EWHC 2510 (Comm)*, Blair J in the Commercial Court disagreed with the proposition that a summary procedure would amount to a denial of due process. A tribunal seated in New York had adopted a summary process, and Blair J held that an attempt to resist enforcement in England had no realistic prospect of success.

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Notably, however, the arbitration agreement in *Travis Coal* expressly authorised the arbitral tribunal to hear any issue or issues said to be "dispositive of any claim" in such manner as was considered appropriate. Therefore, *Travis Coal* establishes only that a summary process need not amount to a denial of due process where the tribunal has contractual authority to take a summary approach. Accordingly, a prudent approach is for parties, where they consider it appropriate, to include in the arbitration agreement a power for the tribunal to dismiss a claim summarily in an appropriate case. Some finance parties have been adopting such provisions in their arbitration clauses.

Reflecting the growing adoption by parties (in appropriate cases) of summary processes in the arbitration clause, some of the major arbitral institutions have updated their rules to provide for a summary process. The first was SIAC, whose 2016 Rules (in force from 1 August 2016) provide for summary disposal where claims and defences are "manifestly without legal merit" or "manifestly outside the jurisdiction of the tribunal" (Rule 29, SIAC Rules 2016).

Similarly, Article 39 of the SCC Arbitration Rules 2017 (in force from 1 January 2017) allows tribunals to decide by way of summary procedure not only claims and defences as a whole, but also individual issues of facts or law, and without the high bar ("manifestly without legal merit") set by the SIAC Rules.

Although the ICC Rules do not contain an express provision on summary determination, the ICC's Note to Parties and Arbitral Tribunals now makes clear that Article 22 of the ICC Rules 2017 may be used as a basis for an application for the "expeditious determination" of manifestly unmeritorious claims or defences (see *Legal update, ICC Court revises note to include expedited determination of unmeritorious claims or defences*). (Article 22 imposes a duty on the arbitral tribunal and the parties to make every effort to conduct the arbitration in an expeditious and cost-effective manner, and gives the tribunal power to adopt whatever procedural measures it considers appropriate (after consultation with the parties)).

Other rules, such as those of the HKIAC and LCIA, currently contain no equivalent provision.

Expedited procedure

A summary procedure can be regarded as a "short cut", avoiding a full examination of all potentially relevant issues on the basis that a final determination can be made based only on certain dispositive issues. An alternative way to an accelerated decision is to provide for an expedited timetable for the arbitration.

A number of major arbitral rules provide for a form of expedited procedure if certain conditions are met, usually where the amount in dispute is limited to a certain figure and the parties agree (for example, Article 41 of the HKIAC Rules 2013; Rule 5 of the SIAC Rules 2016; and Article 30 of the ICC Rules 2017).

The form of an expedited procedure varies between one set of rules and the next. However, each of the rules above allows for the appointment of a sole arbitrator, empowers the arbitrator to decide the case on the basis of documentary evidence only, and results in an award being rendered within six months.

The LCIA Rules 2014 take a different approach to addressing the same issue. Article 9A allows a party to apply to the LCIA Court in the case of exceptional urgency for the expedited formation of the tribunal.

For detailed discussion about expedited procedures, see *Practice note, Expedited procedures in international arbitration.*

If an expedited process is desirable in circumstances where the conditions set by the relevant rules are not met, one way forward is to rely on the tribunal's discretion with regard to the arbitral timetable. As noted above, this discretion is broad. In principle, an arbitral tribunal has the power to set an accelerated timetable which leads to a swiftly rendered award, subject to mandatory procedural steps such as the Terms of Reference in an ICC case.

In practice, tribunals rarely take this approach, whether as a result of inertia, a reluctance to impose an abbreviated timetable on an unwilling party, a concern that a resulting award may be vulnerable to challenge, or simply because the tribunal does not consider that it knows enough about the case to impose a particular approach. Therefore, for there to be a realistic prospect of a fast-track process, a provision is sometimes included in

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financial transactions expressly authorising the tribunal to determine the case, or certain issues, on an expedited basis.

Occasionally, an arbitration agreement will go a step further by setting a deadline for an award to be rendered (for example, within six months of the constitution of the arbitral tribunal), or even setting a timetable for the arbitration. Such provisions can be sensible if the parties are certain when the arbitration agreement is concluded that speed will be of the essence. For example, it might be vital to reach a decision on disputed cash flows if those cash flows are critical for the functioning of a project. However, these provisions should be approached with caution. A dispute may arise that cannot sensibly be concluded within the stipulated time frame. Therefore, the parties should at least make provision for the arbitral tribunal to have the power to amend the timetable. Otherwise there is a risk that, if the deadline passes, the tribunal may become functus officio without having rendered an award.

Power to bifurcate proceedings and/or make partial awards on discrete issues

Another way to accelerate arbitration proceedings is to identify an important issue (or issues) that can be determined at an early stage, without all other issues being decided at the same time. This possibility should be taken into account in arbitrations arising from financial transactions as much as in other cases.

In the context of finance disputes, appropriate circumstances for bifurcation of the claim might include:

- Where the determination of a particular issue (such as the law applicable to the substantive issues in the case) at an early stage will save time or costs.
- Where the determination of a particular issue (for example, a respondent's alleged lack of capacity in response to claims for Early Termination Amounts under an ISDA Master Agreement) is likely to be decisive of the whole or a significant part of the dispute.
- Where at least part of the sum owed (for example, a simple debt claim) appears not to be seriously contested.
- Where the claimant's losses are on-going and it is sensible to render an award in respect of those losses to date.
- Where the proceedings are so complex that the only sensible way to manage the proceedings is to divide the issues into stages.

The ICC Rules 2017 specifically envisage the parties adopting bifurcation as a case management technique to control time and cost (*Article 24(1) and Appendix IV*). Splitting the dispute in this way is highlighted as being particularly important in cases of low complexity and value, but only where it may genuinely be expected to result in a more efficient (and proportionate) resolution of the case.

If the institutional rules selected by the parties do not contain such express terms, they are likely to be able to rely on the tribunal's ability to make separate awards on different issues at different times (as under Article 26.1 of the LCIA Rules 2014) or the tribunal's discretion, subject to the parties' agreement, to conduct the arbitration in an appropriate manner (for example, Article 17 of the UNCITRAL Rules 2013). Alternatively, the parties can give the tribunal the appropriate express power in the arbitration agreement itself.

Before exercising this power, the risk of lengthening the proceedings should be considered. For example, if issues of jurisdiction are decided at a preliminary stage and the arbitral tribunal determines that it has jurisdiction, the merits will likely be determined later than they would have been if jurisdictional issues had not been decided separately.

Case management techniques for reducing time and cost

Aside from specific instances when summary dismissal, expedited procedure or bifurcation are most appropriate, the tribunal (once constituted) can use numerous case management techniques to ensure the arbitration is conducted in a time and cost effective manner.

The ICC's guide, "Effective Management of Arbitration: A Guide for In-House Counsel and Other Party Representatives", provides a practical toolkit for the conduct of an expeditious arbitration. Suggestions include

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limiting the number of rounds of written submissions and controlling the extent of document production. Appendix IV of the ICC's 2017 Rules further refers to (among other things):

- •Identifying issues that can be resolved by agreement between the parties or their experts.
- •Identifying issues to be decided solely on the basis of documents rather than through oral evidence or legal argument at a hearing.
- •Avoiding requests for document production, when appropriate.
- •Limiting the length and scope of written submissions so as to avoid repetition and maintain a focus on key issues.
- •Using telephone or video conferencing for procedural and other hearings where attendance in person is not essential.

Further techniques are contained in the ICC's report on Controlling Time and Costs in Arbitration.

The LCIA Rules 2014 are less prescriptive, but provide that the conduct of the arbitration should be consistent with the general duties of the tribunal, which include a duty to avoid unnecessary delay and expense so as to provide a fair, efficient and expeditious means for the final resolution of the dispute (Article 14).

In most cases, these matters are better taken into account once an arbitration is under way, when the procedure is being set. However, in appropriate cases it is worth considering whether provision should be made for at least some of them in the arbitration agreement. For example, the parties may find it attractive to exclude or limit document production through the arbitration clause. Cost may be a factor; document production is often one of the most expensive procedural phases, even bearing in mind that disclosure in an arbitration will usually be more limited than in common-law courts. Excluding or limiting document production is quite common in (for example) joint venture disputes, when both parties may be reluctant to share documents with their joint venture partner, perhaps because of the risk that they may contain business secrets. However, this is less commonly done in financial cases. Financial institutions sometimes value disclosure. When defending a mis-selling claim, for example, disclosure can uncover evidence relevant to whether the claimant can establish (as it must under English law) that it relied on representations made by the financial institution.

Confidentiality

Arbitration is commonly thought to be a confidential process, and it often is. This is sometimes because the arbitration agreement stipulates that the arbitration is confidential by virtue of the procedural rules incorporated by the parties. For example, Article 30.1 of the LCIA Rules provides that the parties must keep confidential "all awards in the arbitration, together with all materials in the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain", subject to standard exceptions. Sometimes, arbitration is instead (or also) confidential as a result of the law of the seat. For instance, English law has long recognised an implied duty of confidentiality in English-seated arbitrations (subject to standard exceptions) (see further Practice note, Confidentiality in English arbitration law).

However, neither all arbitral rules nor all arbitral laws impose an express duty of confidentiality on the parties. For example, an ICC arbitration seated in Australia would not be confidential because neither the ICC Rules nor Australian arbitration law provide for a duty of confidentiality.

Confidentiality is valued in some lines of financial business. Private wealth is a notable example. In these cases, parties may wish to consider providing expressly for the parties to keep all matters relating to the arbitration confidential, to the extent permitted by applicable law.

Alternatively, if the arbitration clause does not impose a duty of confidentiality, in most cases an alternative approach is to ask the arbitral tribunal to make an order with regard to confidentiality. For example, Article 22.3 of the ICC Rules 2017 entitles the tribunal to make orders concerning the confidentiality of the arbitration proceedings and matters in connection with it, and to take measures to protect trade secrets and confidential information. Where the arbitral rules are silent, an arbitral tribunal is likely to consider that it has the power to make such an order in any event, pursuant to its general case management powers (for example, as contemplated by Article 3.13 of the *IBA Rules on the Taking of Evidence in International Arbitration*).

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Appeal

In most key arbitration jurisdictions, challenges to international arbitral awards are limited to seeking to question the tribunal's substantive jurisdiction over the dispute; alleging irregularities affecting the tribunal, the proceedings or the award (that is, procedural fairness); and challenges based on public policy. Those rights tend to be mandatory provisions of the procedural law and the parties cannot contract out of them. The threshold for bringing successful appeals on these grounds is high, meaning arbitral awards are challenged less frequently than judgments of the national courts.

Under English law, a party may also challenge an award on a point of law (section 69 of the Arbitration Act 1996). This is a particular feature of arbitrating in England and is not mirrored in the UNCITRAL Model Law or the arbitration laws of most other key jurisdictions. Even in England, the right of appeal on a point of law is only available where the parties agree or where the court gives permission. The circumstances in which the court may grant permission under section 69 are so narrow that in effect an appeal on a point of law is usually only available under English law where the parties agree.

Arbitration practitioners have tended to regard it as desirable that arbitral awards are likely to be final on the merits, in view of the lack of (or very limited) availability of appeal. (The rationale is that commercial parties desire certainty in a timely fashion.) However, some finance parties have taken the opposite approach (as have other industries, such as shipping), sometimes expressing a preference for litigation on the basis that it offers a right to appeal against an erroneous judgment. It is rarely considered that a similar right is available in relation to an award rendered in England.

If the right of appeal is sought, two provisions must be included in the arbitration clause. First, the seat must be London because only in England (among major arbitration jurisdictions) is such a right available. Secondly, the parties should expressly provide for a right of appeal on a point of law. (This second provision is also needed to reverse the exclusion of rights of appeal in most of the major arbitral rules.)

POTENTIAL LIMITS ON THE USE OF ARBITRATION IN THE FINANCE SECTOR

Although the use of arbitration in the finance sector continues to grow, there remain sound reasons why arbitration is used less frequently in certain types of financial disputes. The formalities required for a valid arbitration agreement, issues of arbitrability (that is, whether the subject matter of a dispute is capable of being submitted to arbitration), and rights that need to be enforced quickly, are all reasons why arbitration can be less suited to financial disputes.

Potential difficulties with satisfying the formalities for an arbitration agreement

The law governing the arbitration agreement will typically impose certain formality requirements for the arbitration agreement to be valid. So too will the law of any place where enforcement of an award is sought. Those requirements may differ depending on the laws of the relevant jurisdictions.

However, the New York Convention imposes a maximum formality standard for a valid arbitration agreement. Specifically, it requires the national courts of contracting states to give effect to an *"agreement in writing"* (*Article II(1)*). This *"shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams"* (*Article II(2)*). While the interpretation of this definition is controversial and varies among contracting states, on its face Article II(2) only requires effect to be given to an arbitration agreement if it is signed by all parties (unless the agreement is contained in an exchange of letters or telegrams).

Contracting states may (and many major commercial jurisdictions do) give effect to arbitration agreements that meet a lesser standard (for example, England, Hong Kong, Switzerland and France). However, Article II(2) gives rise to a risk that contracts in finance transactions that are not typically signed by all parties may, in less established national courts, be regarded as unenforceable.

For example, the relationship between bondholders and other parties such as the security trustee, the manager and other classes of bondholder may not be subject to a signed arbitration agreement (although, for example, the relationship between the security trustee and the issuer may be). A similar difficulty would arise if an arbitration clause was contained in a deed poll.

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If the transaction structure does not allow for all parties to sign the contractual documentation, the parties may decide not to opt for arbitration so as to avoid any dispute over the validity of the arbitration agreement.

Arbitrability issues

Under national law, certain types of dispute are deemed suitable for resolution by national courts alone. Typically these include criminal and family law, intellectual property and employment matters. These disputes are incapable of being validly submitted to arbitration (that is, they are not "arbitrable"), and any tribunal constituted will lack the jurisdiction to hear them. The policy behind the arbitrability doctrine is that matters of public concern should not be submitted to a private means of dispute resolution.

In major commercial jurisdictions, the categories of dispute that are not arbitrable have become narrower over time – consistent with their private rather than public nature. However, there are three categories of financial dispute where the issue of arbitrability may arise: securities trading; consumer finance; and insolvency. In these cases, the relevant applicable law should be considered to determine whether (and if so, to what extent) jurisdiction has been reserved for the national courts. Nevertheless, some potential issues are identified below.

Securities trading

Securities disputes are usually regarded as arbitrable (in spite of the increased public interest in the regulation of securities markets since 2008). For example, in the US, the arbitrability of international securities transactions was recognised by the Supreme Court as early as 1974 (*Scherk v Alberto-Culver Co, 417 US*).

Until recently, in India there was some uncertainty over whether the Indian Debt Recovery Tribunal had mandatory jurisdiction over claims by a bank for the recovery of more than INR1 million, regardless of the existence of an arbitration agreement (*Kohinoor Creations v Syndicate Bank, ILR 2004 II New Delhi 69*). However, in August 2012, the Delhi High Court found that, where there is a valid arbitration agreement between the parties, any arbitrable dispute should be referred to an arbitral tribunal (*HDFC Bank v Satpal Singh Bakshi 193 (2012) DLT 203*). The court confirmed that the exclusive jurisdiction of the Indian Debt Recovery Tribunal exists only with the civil courts, and does not override the parties' agreement to arbitrate.

By contrast, Germany places some limits on the ability of consumers to agree to arbitration as a means of settling securities disputes. Under the German Securities Trading Act, a German consumer is only capable of agreeing to arbitrate a securities dispute if the arbitration agreement is entered into after the dispute has arisen (*sections 9 and 37h*).

Consumer finance

Submitting consumer disputes to arbitration tends to favour financial institutions rather than their customers. Advantages include:

- The confidential nature of the proceedings, reducing the risk of "copy-cat" claims.
- The absence of a system of precedent, reducing the risk of the financial institution being bound by one adverse decision in favour of a single consumer.
- The existence of arbitration rules designed specifically for the resolution of consumer disputes, which can assist in the delivery of rapid, cost-effective and final decisions.

Nevertheless, arbitration can be prohibitively expensive for consumers. This is probably the main reason why the arbitration of consumer disputes is regulated in some jurisdictions. For example, in the EU, the Unfair Terms in Consumer Contracts Directive states that an arbitration clause in a consumer contract agreed before a dispute arises *"requiring the consumer to take disputes exclusively to arbitration not covered by legal provision"*, is unfair and thus invalid (*EU Directive 93/13/EC, Annex 1(q)*). This obscure language plainly imposes some restriction on the extent to which consumer claims can be submitted to arbitration in the EU. However, the precise wording of the Directive has left the scope of the restriction open to interpretation. Accordingly, different conclusions have been drawn in different jurisdictions:

- The Swedish Arbitration Act provides that no consumer claims can be submitted to arbitration (section 6).

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- Under the German Zivilprozessordnung, consumer claims are arbitrable. However, the arbitration agreement must principally be contained in a document bearing the parties' personal signature. Moreover, this document may not contain agreements other than those making reference to the arbitration proceedings (unless the overall agreement is recorded by a notary) (*section 1031(5)*).
- Only consumer claims above a certain value are capable of being arbitrated under the English Arbitration Act 1996 (*section 91*).

Insolvency

It is a question of national law as to whether insolvency matters and disputes involving an insolvent party are arbitrable. In general, "core" insolvency matters are not arbitrable on the basis that they are public functions. Thus, the commencement and administration of winding-up proceedings, the rescheduling of the debtor's liabilities, the verification of creditors' claims and the distribution of the debtor's assets are typically reserved for the national court of the debtor's home jurisdiction. Otherwise, the contractual commitment to private arbitration is (as far as possible) respected.

However, although this broad conceptual distinction is a useful starting point, national laws take different approaches to the effect insolvency has on disputes:

- At one end of the spectrum, in the Netherlands, claims against insolvent parties are in effect non-arbitrable as they must be resolved in special bankruptcy proceedings.
- Conversely, in Switzerland, the entry of one party into insolvency proceedings does not render a dispute non-arbitrable.
- In England, a middle way is taken. The trustee in bankruptcy may choose whether or not to adopt the contract containing the arbitration provision. If it does, then the arbitration agreement is enforceable by and against the trustee. If it does not and a dispute subsequently arises under the contract and in relation to the bankruptcy proceedings, it is for the court to determine whether or not the matter should be referred to arbitration (see section 349A of the Insolvency Act 1986).
- In the US, upon the filing of a petition under the Bankruptcy Code (except under Chapter 15 for recognition of foreign proceedings), an automatic stay of all proceedings (including arbitration) against a party occurs by statute. If the insolvency in question is foreign, it is necessary to have it recognised under Chapter 15 to obtain an automatic stay. This stay can be lifted by application to the Bankruptcy Court, and arbitrations are generally allowed to continue on causes of action that arise outside the Bankruptcy Code, unless such a continuance is deemed too disruptive to a party's reorganisation.

It is worth noting that complex questions of choice of law can arise as to which national law applies in a given case. The conflicting decisions arising out of the arbitration between Vivendi and the insolvent Elektrim SA illustrates this: see *Legal updates, Court of Appeal confirms the consequences of foreign insolvency on pending LCIA arbitration*, *Landmark decision of the Swiss Supreme Court on the effect of a foreign insolvency on arbitration proceedings in Switzerland* and *Ongoing international arbitration discontinued vis-a-vis insolvent co-respondent*. See also *Blog post, Arbitrating insolvency disputes: an imperfect solution?*.

Security documents

Limits on the use of arbitration in the finance sector can also arise from practical concerns, as opposed to legal restrictions. For example, arbitration clauses are less commonly found in security documents. Enforcing a security interest often has to be done through a national court. It may be quicker to enforce a security interest through a court even where it is not a legal requirement. Accordingly, while arbitration provisions are often incorporated into a suite of contracts in complex financial transactions, security documents are frequently carved out. However, there is a risk in carving out security documents in this way, since debtors have been known to commence litigation proceedings under the security documents in a local court, and thereby seek to have all issues (not just those arising under the security documents) resolved in litigation rather than arbitration. Such initiatives should be unsuccessful, but will at least cause unwelcome complexity and cost.

UNILATERAL OPTION CLAUSES

An optional arbitration clause provides one or both parties with an option to litigate instead of arbitrating under the arbitration agreement, or to arbitrate instead of litigating. The option is often exercisable by one of the parties

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only, in which case it may be known as a unilateral optional arbitration clause (although no standard terminology exists). For detailed discussion about unilateral option clauses, see *Practice note, Hybrid, multi-tiered and carve-out dispute resolution clauses* and, for an overview of the validity of such clauses in various jurisdictions, *Article, Unilateral option clauses in arbitration: an international overview*.

Unilateral option clauses have been popular with finance parties partly for historical reasons. Banks have long incorporated so-called "asymmetric" jurisdiction clauses in their loan agreements. Under these clauses, proceedings can be commenced against the lender only in a single jurisdiction, while the lender can pursue the borrower in any court of competent jurisdiction. However, the popularity of these clauses has been tempered by doubts over their enforceability in France in particular (see *Articles, The validity of one-way jurisdiction clauses put at risk by the French Supreme Court* and *Scope and validity of asymmetric jurisdiction clauses in France*).

Unilateral option clauses are a logical extension of asymmetric jurisdiction clauses, because they offer to the lender the further optional forum of arbitration. They can be very attractive to finance parties (especially in loan markets, where they are most used) because, on the face of it, they offer the best of both worlds. The option to litigate allows recourse to the courts if, as the case develops, there appears likely to be a need for (say) a swift summary or default judgment procedure (for example, where the claim is for recovery of a debt). Conversely, the option to arbitrate may be preferable because it provides (for example) the safeguard of increased enforceability. In essence, the option holder can postpone the strategic choice between litigation or arbitration until the dispute has arisen, which enables a more informed choice to be made.

Unilateral option clauses are often included in loan documentation as a market standard. However, this type of clause comes with a substantial health warning, namely that it is known to be unenforceable in some notable jurisdictions, while its legal status is simply not clear in numerous other jurisdictions (see *Article, Unilateral option clauses in arbitration: an international overview*). As such, before incorporating these clauses into their agreements, parties should consider carefully their validity in all potentially relevant jurisdictions, including the seat of arbitration, likely places of enforcement, and any other jurisdiction where the courts may accept jurisdiction over a claim commenced by the counterparty.

Even when a unilateral option clause is included, care should be taken when drafting the agreement to ensure the clause is sufficiently clearly worded and to clarify the circumstances in which the option can be exercised.

FINANCE SECTOR-SPECIFIC INITIATIVES

We discuss below some initiatives that focus on promoting the use of arbitration in the finance sector for both consumer and industry disputes.

FINRA

FINRA (the Financial Industry Regulatory Authority) has exercised comprehensive oversight over all securities firms that do business with the public in the US since 2007. As part of this remit, FINRA administers nearly all securities-related arbitration by providing a forum for disputes between customers and members/associated persons (customer disputes) and disputes involving members/associated persons only (industry disputes).

FINRA-administered arbitration is held out as being a cheaper, quicker and less-complex means of resolving securities disputes than proceeding through the courts. Key differences with litigation include FINRA's more limited discovery process, flexible approach to rules of evidence, subject matter expertise (over 4,000 arbitrators with securities experience) and greater leeway to recognise claims (see further, *Article, The Uncertain State of FINRA Arbitration* and *FINRA: What to Expect: FINRA's Dispute Resolution Process*).

Since 1973, customers with claims under federal securities laws have had a unilateral right (but not an obligation) to compel public securities businesses to submit their disputes to arbitration (see section 12 of the NASD Code and FINRA Rule 12200). Brokerage firms did not gain a similar right until 1987, when the US Supreme Court confirmed that pre-dispute arbitration agreements (PDAAs) in securities account contracts are legally binding (*Shearson/American Express Inc. v. McMahon 482 U.S. 220 (1987)*). Further to that decision, virtually all securities firms have required their customers to execute PDAAs.

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The 2008 global financial crisis, which led to a renewed focus on investor protections, prompted Congress and the US government to call for further studies of securities arbitration. A key question was whether investors were being deprived of their right to use the court system. New powers were granted to the SEC to prohibit, or to impose conditions or limitations on the use of, PDAAs, to the extent it was in the public interest to do so. However, those powers have not yet been exercised.

Other criticisms levied at FINRA include the qualifications, training and incentivisation of its panel of arbitrators; the lack of transparency resulting from confidential proceedings and the paucity of explained awards; the blanket approach taken to different investors with different needs; the apparent conflict of interest generated by the fact that it is regulated by the same Wall Street firms that it governs; and its inability to ensure that arbitral awards in favour of the investor are paid (by underfunded and often uninsured brokerage firms).

In June 2014, FINRA initiated a review of its dispute resolution forum (see *FINRA Dispute Resolution Task Force*) and by January 2017 a number of actions had been taken to implement the recommendations of its task force (*Final Report and Recommendations of the FINRA Dispute Resolution Task Force* and *Status Report on FINRA Dispute Resolution Task Force Recommendations*). Notably, the question of mandatory arbitration was found to be a policy issue beyond the remit of the task force.

For further detail on FINRA's dispute resolution processes, see *Practice notes, FINRA Customer Arbitration: A Step-by-Step Guide*, *FINRA Industry Arbitration: A Step-by-Step Guide, Conducting a FINRA Arbitration: The Arbitrator's Perspective* and *FINRA Arbitration Toolkit*.

Hong Kong's Financial Dispute Resolution Scheme (FDRS) and Centre (FDRC)

The FDRC was set up on 18 November 2011 in the wake of the 2008 global financial crisis, which saw over 20,000 retail investors in Hong Kong suffer losses from investments in structured products. Aiming to strengthen small investor confidence in the financial industry, the FDRC provides mediation and arbitration services to financial institutions and their individual customers in Hong Kong.

Where an individual files a claim for HKD500,000 (approximately GBP50,000) or less, related to any contract or any services provided by an FDRC member, the dispute must be resolved through the FDRC by mediation followed (if unsuccessful) by arbitration. All financial institutions that are authorised by the Hong Kong Monetary Authority (HKMA) or licensed by/registered with the Securities and Futures Commission (SFC) (except those providing credit rating services) are required to become a member of the FDRS.

Arbitrations, which are confidential, are administered by the FDRC in accordance with the *FDRS Mediation and Arbitration Rules*. The Rules provide that the place of arbitration will be Hong Kong, a sole arbitrator will be appointed from the FDRC's trained List of Arbitrators and, except in exceptional circumstances, the arbitration will be "documents only", with no formal pleadings, voluminous disclosure, advocacy or legal representation. The award rendered by the arbitrator is final and binding on both parties and is subject to appeal only on a point of law. Further details about the power, functions and processes of the FDRC can be found on its *website*.

At the time of its *2016 annual report*, the FDRC had registered 4,270 complaints, 142 applications for mediation, but only 14 arbitrations since 2011. In a bid to expand its offering, it opened a consultation process in late 2016 in which it proposed to raise the maximum monetary amount of a claim to HKD3,000,000 (approximately GBP300,000), to accept claims from small enterprises (annual turnover/revenue of HKD50,000,000 or less) and to offer an arbitration-only option.

Any changes to the FDRS as a result of the consultation are yet to be announced.

P.R.I.M.E. Finance

P.R.I.M.E. Finance was launched in January 2012 to facilitate dispute resolution in the global financial markets (see *Legal update, PRIME Finance opens* and *Article, Arbitration in international banking and finance: recent developments*). Its sales pitch was that complex financial disputes, such as those spawned by the global financial crisis, required resolution by financial market experts. P.R.I.M.E. Finance offered a list of such experts, who would be available to resolve those disputes by way of arbitration under the P.R.I.M.E. Finance Arbitration Rules (in

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essence, a modified version of the UNCITRAL Arbitration Rules), to be administered (from December 2015) by the Permanent Court of Arbitration.

Initially, there was substantial interest in P.R.I.M.E. Finance, since its launch coincided with substantial growth in the number of financial sector disputes in the aftermath of the financial crisis. However, experience suggests that P.R.I.M.E. Finance arbitration has been adopted in relatively few arbitration clauses. This may be partly because finance parties have become satisfied with arbitration under the auspices of more general arbitral institutions like the LCIA, and perhaps also because (similar to criticisms of FINRA) counterparties perceive P.R.I.M.E. Finance to be an institution developed by banks. There is not yet any known example of a PCA-administered arbitration under the P.R.I.M.E. Finance Rules.

ISDA Arbitration Guide and optional model arbitration clauses

The ISDA Master Agreement historically provided only for the jurisdiction of the English or New York courts. This was well suited to transactions involving developed economies, where judgments from the English and New York courts tend to be enforceable relatively easily. However, particularly with the expansion of financial institutions into emerging markets, interest developed in the use of arbitration for derivatives disputes. ISDA found that its users were relatively unaware of how arbitration works and how to draft a valid and effective arbitration clause – especially one which operated effectively in conjunction with the ISDA Master Agreement. For example, a common error was to include an arbitration clause in the Schedule but not to disapply the jurisdiction clause in section 13(b) of the Master Agreement. In principle, this approach resulted in parallel litigation and arbitration clauses with, at the very least, resultant uncertainty.

Further to a series of consultations with its members in 2011 and 2012, ISDA published its Arbitration Guide in 2013 (see *Legal updates, ISDA consults on use of arbitration under ISDA Master Agreement*; *ISDA examines options for arbitration clause in Master Agreement*; *ISDA continues consultation on use of arbitration*; *ISDA releases draft arbitration clauses for consultation*; and *2013 ISDA Arbitration Guide is published*).

The ISDA Arbitration Guide contains a range of model arbitration clauses to be included in the Schedule to an ISDA Master Agreement. These clauses are effective because they expressly disapply the jurisdiction clause in section 13(b) of the Master Agreement and then include in its place a valid arbitration clause. Each clause provides for a combination of arbitral rules and seat, based on preferences expressed by ISDA members in the consultation process. The clauses are "plain vanilla" arbitration clauses and can be tailored further to meet the needs of the specific transaction. Since the Guide was originally published in 2013, other arbitral institutions have published their own clauses that conform with the ISDA Arbitration Guide (for example, see *Legal update, DIS model arbitration clause now available for use in ISDA Master Agreement*).

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