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Hot Topics Affecting the Financial Services Industry

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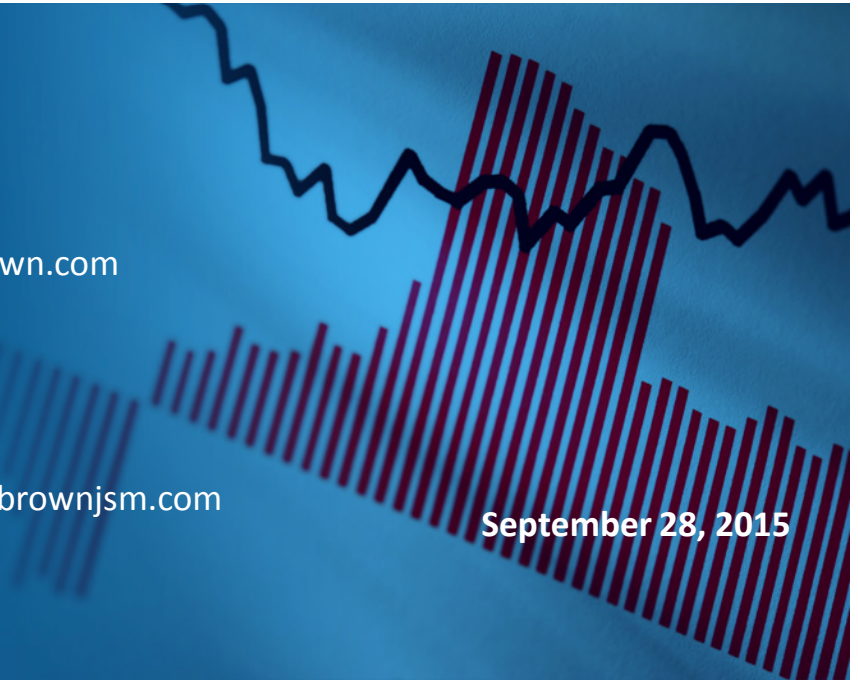

September 28, 2015

Today's Speakers

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London

Mark Hanchet
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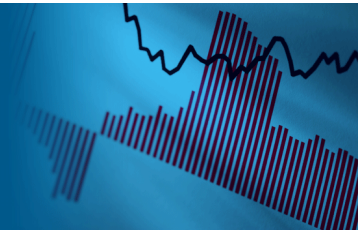
B. Ted Howes
New York

Vincent Law
Hong Kong

Topics To Be Covered

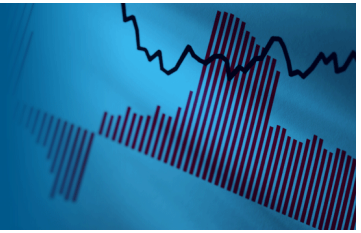


- Arbitration or Litigation?
- New Developments in International Arbitration and Financial Disputes
- International Arbitration ‘Seats’ for Financial Disputes
- International Arbitration Institutions for Financial Disputes
- The Future of International Arbitration for Financial Disputes

Hot Topics Affecting The Financial Services Industry

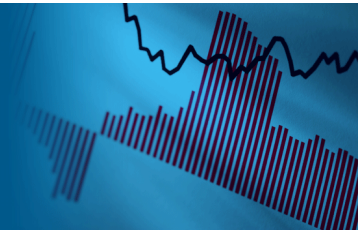
ARBITRATION OR LITIGATION?

The Growth of Arbitration as a Mode of Financial Dispute Resolution



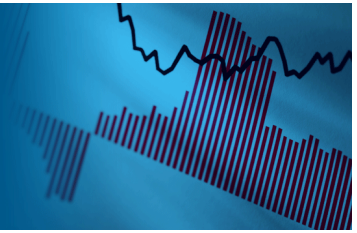
- Historical antipathy of banks (and other financial institutions) towards arbitration:
  - Traditional reliance on the courts of New York and London, which have experience in resolving derivate transaction disputes
  - Larger amounts in dispute → greater need for right of review and fear of the unknown
- Times are changing (somewhat):
  - Increase in *international* financial transactions, particularly emerging jurisdictions
  - Financial products more complex → greater need for specialized decision makers

The Growth of Arbitration as a Mode of Financial Dispute Resolution



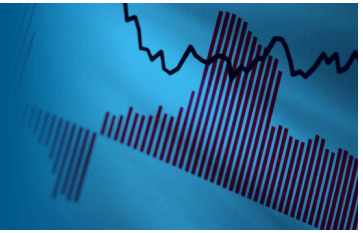
- Evidence that the financial services industry is increasingly embracing international arbitration:
  - 2013 Queen Mary University Law School/PwC Survey: 69% of GCs in the banking/finance industry support arbitration (with 25% declaring arbitration their "most preferred option")
  - International arbitration rapidly growing in general (e.g., LCIA – 448% increase in arbitration request between 1995 and 2011)

Advantages of Arbitration Over Litigation in International Commercial Disputes



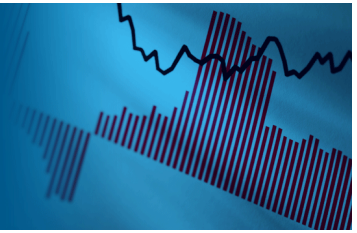
- Speed/Cost
- Less Discovery (especially for defendants)
- Privacy/Confidentiality
- Expertise/Quality of the Decision Makers
- Neutrality
  - Neutral Playing Field
  - Neutral Decision Maker
- Enforceability
  - 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
  - No comparable treaty for the enforcement of court judgments abroad

Financial Institutions Traditionally Have Favored Litigation Over Arbitration



- Reasons for this bias?
  - Litigation provides a robust right of review
  - Rule of law considerations
  - Sophisticated adjudicators in key jurisdictions (New York, London)
  - Arbitration advantages are often less relevant to financial institution disputes

Litigation Offers a Robust Right of Review



- FAA § 10 provides four grounds for arbitral review:
  - Where award was procured by corruption, fraud, or undue means
  - Evident partiality or corruption in the arbitrators
  - Arbitrator misconduct
  - Arbitrators exceeded or imperfectly executed their powers
- Vacating an arbitration award is a steep uphill battle
- Appellate Court apparatus can correct mistakes

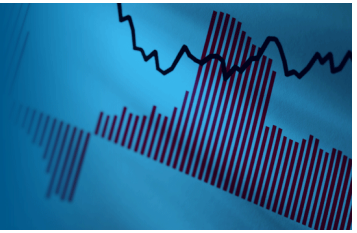
The Rule of Law in Litigation

- *Stare decisis* promotes *predictability*
  - Reported cases
  - Reasoned decisions
- Well-developed legal regime – Federal Rules
  - Rules of evidence
  - Rules of discovery
- Reduced risk of "baby-splitting"

Sophisticated Adjudicators in Key Jurisdictions

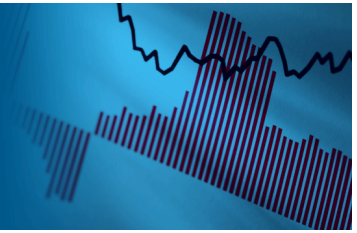
- Financial institutions often control venue/choice of law
- Sophisticated judges have expertise in financial litigation
  - US District Court for the Southern District of New York – almost 50 judges
  - New York County Supreme (Commercial Division) – 9 judges
  - London Commercial Court
- Speed/efficiency
- Interim relief/injunctive relief available

Some Arbitration Drivers are Less Relevant in Financial Institution Litigation



- Confidentiality
- Flexibility means less predictability
- Costs and speed are often on par with arbitration
- Ongoing/continuing relations between the parties
- Large scale discovery can be desirable

Should Financial Institutions Embrace Arbitration?

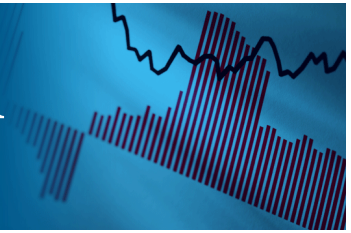


- It depends . . . circumstances may call for arbitration
  - No agreed venue/International disputes
  - Confidentiality favored (bank v. bank)
  - Enforceability risks
  - Finality (vs. protracted proceedings)
  - Exotic financial products
- Current experience - Mandatory FINRA arbitration
  - Mixed results/expertise/panel selection
  - Suitable for some disputes/not others

Hot Topics Affecting The Financial Services Industry

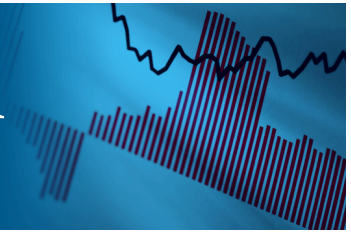
NEW DEVELOPMENTS IN INTERNATIONAL ARBITRATION AND FINANCIAL DISPUTES

New Developments in International Arbitration and Financial Disputes



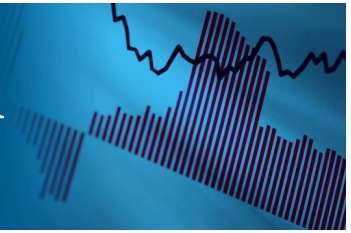
- 2013 ISDA Arbitration Guide
  - Derivatives disputes
  - Model arbitration clauses for 1992/2002 Master Agreements
  - Amendments to reflect arbitration for New York/London litigation
- Reasons for Development
  - Expertise
  - Enforcement
  - Emerging markets

New Developments in International Arbitration and Financial Disputes



- P.R.I.M.E. Finance, a Dutch not-for-profit foundation, officially opened for business in January 2012
- "P.R.I.M.E" = Panel of Recognized International Market Experts in Finance
- Mission: "to foster a more stable global economy and financial marketplace by reducing legal uncertainty and systemic risk, and, especially in emerging markets, promoting the rule of law" (*http://primefinancedisputes.org/about-us/*)
- Recognition that:
  - International financial transactions without arbitration are subject to legal risk
  - The financial services industry too reliant on the courts

New Developments in International Arbitration and Financial Disputes

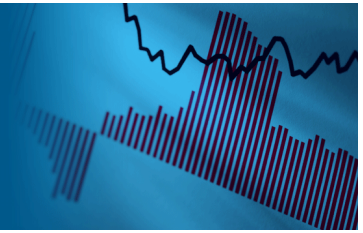


- How does P.R.I.M.E. fulfill its mission?
  - Developed the P.R.I.M.E. Finance Arbitration Rules, geared specifically to financial disputes
  - Arbitrator panel consists of retired and sitting judges, central bankers, regulators, representatives from private practice and derivative market participants (both dealer and buy side)
  - Offers specialized derivatives and arbitration programs to the judiciary
  - Expert witness services: over 100 recognized legal and financial experts with collectively 3,000+ years of experience
  - Compilation of a central database of international precedents and source materials

Hot Topics Affecting The Financial Services Industry

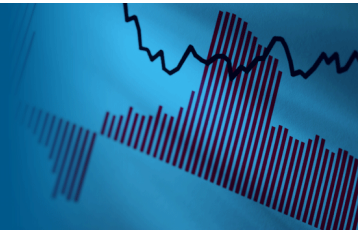
INTERNATIONAL ARBITRATION 'SEATS' AND INSTITUTIONS FOR FINANCIAL DISPUTES

International Arbitration 'Seats'



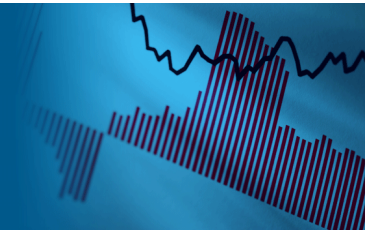
- London
  - English Arbitration Act 1996
  - "Arbitration-friendly" judiciary
  - Increasing body of case-law on arbitration-related issues
- Paris
  - New arbitration law in 2011 – enshrined in the Code Civil
  - Very "arbitration friendly" jurisdiction
- New York
  - Governed by both federal and state law
  - Significant body of state law on arbitration, both through the common law and statutory modification
  - "Arbitration friendly" jurisdiction

International Arbitration 'Seats'



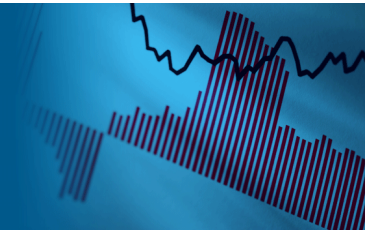
- Hong Kong
  - Former British colony practicing common law system
  - Since 2013, no difference between international and domestic arbitration, but a single regime under the UNCITRAL Model Law
  - Courts in Hong Kong recognize awards made in Non New York Convention states
  - Separate enforcement arrangement between Hong Kong and China
- Singapore
  - Former British colony practicing common law system
  - Two different types of arbitration – international and domestic
  - Singapore judgments uniquely enforceable in India

International Arbitration Institutions



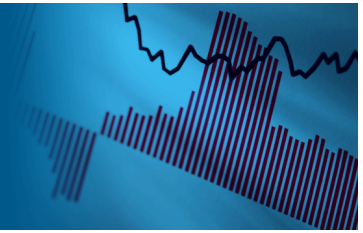
- European HQ
  - London Court of International Arbitration (**LCIA**)
  - International Court of Arbitration, International Chamber of Commerce (**ICC**)
- New York
  - International Centre for Dispute Resolution (**ICDR**)
- Asia
  - Hong Kong International Arbitration Centre (**HKIAC**)
  - Singapore International Arbitration Seminar (**SIAC**)

International Arbitration Institutions



- Financial disputes represent a growing percentage of the growing caseload at international arbitration institutions:
  - LCIA – up to 17.5% in 2012
  - ICC – over 5% in 2014 related to the finance and insurance sectors
- Arbitration is used more frequently in emerging market transactions
  - Where the balance of power tends to favour the lenders
  - Where there may be increased uncertainty about the enforceability of foreign law judgments
- Some development banks are also now starting to increase their use of arbitration

The Suitability of Different Institutions for Financial Disputes



- Despite increased use, the Queen Mary University Law School/PwC Survey highlighted that financial organizations still preferred to use litigation over arbitration for the following reasons:
  - The need for binding precedent in the construction of the terms in finance documents
  - Many disputes arising out of defaults under loan agreements are "simple debt collection" cases that are well suited to the courts rather than a flexible and potentially costly dispute resolution mechanism such as arbitration
- There is also doubt about the enforceability of unilateral arbitration clauses outside of the US and UK (for example in France and Russia)

International Arbitration Institutions: ICC

- Founded in 1919; Court established in 1923
- Headquarters in Paris with regional bases in New York and Hong Kong
- **ICC International Court of Arbitration:** members appointed by ICC World Council on the proposal of national committees and groups
- **Secretariat of the Court:** headed by the Secretary General, it assists the Court in performing its function and other functions of its own
- **ICC Arbitration Rules 2012** - updated the previous 1998 Rules

ICC INTERNATIONAL CHAMBER OF COMMERCE

President of the ICC Court:
Alexis Mourre

Secretary General:
Andrea Carlevaris

International Arbitration Institutions: LCIA

- Inaugurated in 1892
- Headquarters in London with regional centres in India, Dubai and Mauritius
- **LCIA Court:** up to 35 members, plus representatives of associated institutions and former Presidents
- **Secretariat :** headed by the Registrar, is responsible for day-to-day administration of disputes referred to LCIA

LCIA
Arbitration and ADR worldwide

President of the LCIA Court: Professor William W ("Rusty") Park

Judith Gill to succeed Prof. Park as President

Registrar: Sarah Lancaster

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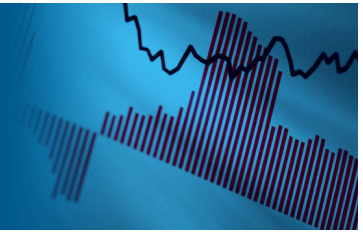
International Arbitration Institutions: Comparison of LCIA and ICC Rules



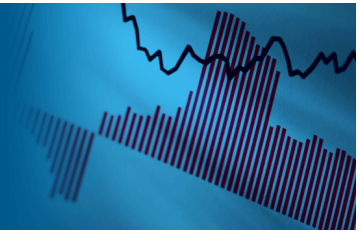
	LCIA	ICC
HQ	London	Paris
Currency	£	US$
Commencement of arbitration	Upon payment	Upon receipt
Filing	Can be electronically only	Must have hard copies (can also have electronic copies)
Response / Answer	Tight deadline and sanction for noncompliance	Longer deadline, less strict penalties for non-compliance
AT (absent agreement)	Selected by LCIA	Parties have opportunity to select
Joinder / consolidation / multi-party /multi-contract	Conservative approach	Wide / flexible approach
TOR / CMC	No requirement	Required
Pleadings	Default timetable	No default timetable
Seat (absent agreement)	London	Fixed by ICC Court
Applicable law (absent agreement)	Same as seat	Determined by AT
Award	No formal scrutiny	Scrutinised by ICC
Costs	Potentially cheaper for small disputes	Potentially cheaper for larger / more complex disputes

International Arbitration Institutions: ICDR

INTERNATIONAL CENTRE
FOR DISPUTE RESOLUTION®

- Established in 1996 by the American Arbitration Association ("AAA"), which, in turn, was founded in 1926
- Administers international arbitration proceedings initiated under the institution's rules.
- New arbitration rules in 2013

International Arbitration Institutions: HKIAC and SIAC



- Hong Kong Arbitration Centre (HKIAC)
  - Established in 1985
  - In 2014, HKIAC handled 252 new cases
  - Up-to-date Arbitration Rules, which include provisions on consolidation and joinder
- Singapore Arbitration Centre (SIAC)
  - Established in 1991
  - In 2014 SIAC administered 197 new cases
  - Up-to-date Arbitration Rules, which provide for joinder

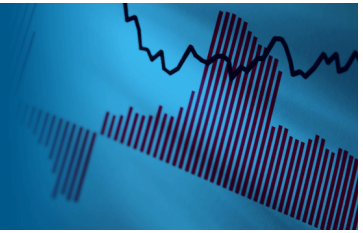
International Arbitration Institutions: P.R.I.M.E. Finance Arbitration Rules

- Already touched on above in 'new developments' – now a new option to consider
- P.R.I.M.E.'s rules, for the most part, mirror the UNCITRAL Arbitration Rules, though there are some notable exceptions:
  - Requirement for the arbitrator be appointed from the P.R.I.M.E. Finance expert list
  - Encourage parties to expedite their arbitral proceedings, by allowing parties to shorten the time limits in the Rules
  - P.R.I.M.E. may publish excerpts of awards in any event, or the whole award if no party objects (both in anonymised form)

Hot Topics Affecting The Financial Services Industry

THE FUTURE OF INTERNATIONAL ARBITRATION FOR FINANCIAL DISPUTES

Four Key Questions



- Will financial institutions in emerging jurisdictions accept the New York/London litigation paradigm?
- Will the courts in emerging jurisdictions enforce the judgments of the NY/London courts?
- Will international arbitrators resist the temptation of "splitting the baby"?
- Will banks and financial institutions accept the resolution of large dollar disputes without the "security" of known judges, known precedent and the right to appeal?

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Questions?

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