

# **P.R.I.M.E. Finance**

## **Panel of Recognized International Market Experts in Finance**

### **NIAS: From Monastery to Beehive**



Prof. Cally Jordan

**P.R.I.M.E. Finance Annual Conference 2018**  
**22 & 23 January, Peace Palace, The Hague**

# "From Monastery to Beehive": NIAS

- "...[O]riginally, most of the fellows were older (white ) men who individually came to NIAS for a complete year to sit in their office and write their book (image of monastery), whereas I wanted there to be more diversity (in age, gender, length of stay and otherwise) and more interaction among fellows, and between fellows and the Dutch academic community and also with other institutions,etc. (image of the beehive...)".
  - (Aafke Hulk, former Rector, NIAS)



# NIAS

- Monastic model – simple cells in a tranquil setting with communal meals
- Multinational: 50% Dutch/50%international
- Musicians, novelists, art historians, economists, linguists, urban planners, anthropologists – and one legal academic
- Lunch was mandatory (but no vow of silence)
- 5 minute research presentation plus optional hour and a half seminar



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# The Starting Point

## The 5 Minute Presentation



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# DISPUTE RESOLUTION IN THE FINANCIAL SECTOR: THE INTERPRETATION AND OPERATION OF A RBITRATION CLAUSES IN FINANCIAL AGREEMENTS

- Cally Jordan
- NIAS, Wassenaar
- April 24, 2013



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# 26 Mad Chileans



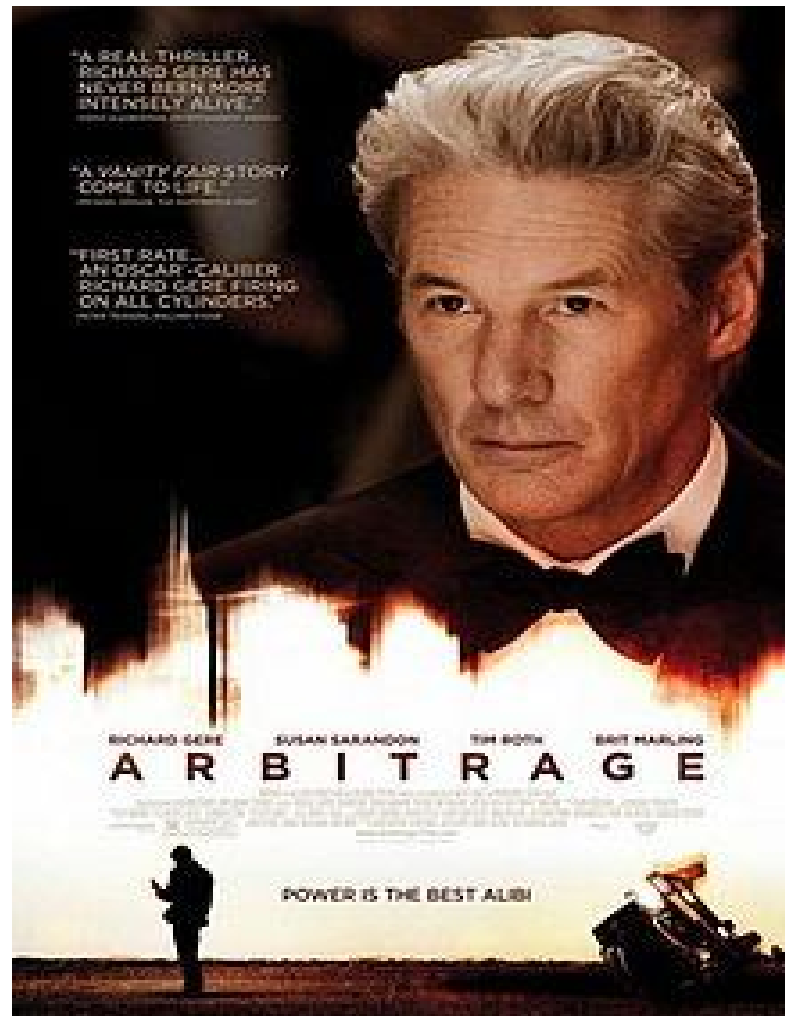
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Madoff (pronounced MAYdoff)  
as in “made off with the money”



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# Hollywood Version



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# The Ponzi Scheme

- A **Ponzi scheme** is a fraudulent investment operation that pays returns to its investors from their own money or the money paid by subsequent investors, rather than from profit earned by the individual or organization running the operation. The Ponzi scheme usually entices new investors by offering higher returns than other investments, in the form of short-term returns that are either abnormally high or unusually consistent. Perpetuation of the high returns requires an ever-increasing flow of money from new investors to keep the scheme going.



# Fairfield Sentry Ltd.

## USD 3X Leveraged Version

Factsheet – November 17th, 2008



### Certificate

### Strategy

### Liquidity

### Security

### Performance Fairfield Sentry Ltd.

NPB New Private Bank Ltd. offers together with the Issuer, Nomura Bank International plc., a leveraged Certificate (3x) with exposure to the well-established Fairfield Sentry Ltd. Fund. Fairfield Sentry Ltd. has a track record of over 15 years with an annual return of 4.6% averaged above the 1-month USD-LIBOR, and a maximum drawdown of -0.64% on a monthly basis. The goal of the Certificate is a significant yield improvement despite a slightly extended volatility.

Primarily split-strike conversion strategy: Fairfield Sentry Ltd. invests in shares of the S&P100 Index which are hedged by put options. Additionally, the Investment Manager sells call options on the relevant index.

The Certificate offers daily liquidity.

- Fairfield Sentry Ltd. has a low volatility of 2.58%
- Over 92% positive months (only 13 losing months)
- Widely hedged risk of the equity exposure in the Fund
- 15-year track record of the Fund (11.04% p.a. in USD)
- Low correlation to equities, bonds, hedge funds and other asset classes

	Fairfield Sentry Ltd.												Certificate*	
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Year	Year
1990													2.77%	2.77%
1991	3.01%	1.40%	0.52%	1.32%	1.82%	0.30%	1.98%	1.00%	0.73%	2.75%	0.01%	1.50%	17.64%	38.52%
1992	0.42%	2.72%	0.94%	2.79%	-0.27%	1.22%	-0.09%	0.86%	0.33%	1.33%	1.36%	1.36%	13.72%	30.39%
1993	-0.09%	1.86%	1.79%	-0.01%	1.65%	0.79%	0.02%	1.71%	0.28%	1.71%	0.19%	0.39%	10.76%	21.96%
1994	2.11%	-0.44%	1.45%	1.75%	0.44%	0.23%	1.71%	0.35%	0.75%	1.81%	-0.64%	0.60%	10.87%	18.05%
1995	0.85%	0.69%	0.78%	1.62%	1.65%	0.43%	1.02%	-0.24%	1.63%	1.53%	0.44%	1.03%	12.04%	19.67%
1996	1.42%	0.66%	1.16%	0.57%	1.34%	0.15%	1.86%	0.20%	1.16%	1.03%	1.51%	0.41%	12.08%	21.09%
1997	2.38%	0.87%	0.80%	1.10%	0.57%	1.28%	0.68%	0.28%	2.32%	0.48%	1.49%	0.36%	13.10%	23.83%
1998	0.85%	1.23%	1.68%	0.36%	1.69%	1.22%	0.78%	0.21%	0.98%	1.88%	0.78%	0.26%	12.62%	22.32%
1999	1.99%	0.11%	2.22%	0.29%	1.45%	1.70%	0.36%	0.87%	0.66%	1.05%	1.54%	0.32%	13.29%	26.27%
2000	2.14%	0.13%	1.77%	0.27%	1.30%	0.73%	0.58%	1.26%	0.18%	0.86%	0.62%	0.36%	10.67%	14.28%
2001	2.14%	0.08%	1.07%	1.26%	0.26%	0.17%	0.38%	0.94%	0.66%	1.22%	1.14%	0.12%	9.82%	17.79%
2002	-0.04%	0.53%	0.39%	1.09%	2.05%	0.19%	3.29%	-0.14%	0.06%	0.66%	0.10%	0.00%	8.43%	17.74%
2003	-0.35%	-0.05%	1.85%	0.03%	0.90%	0.93%	1.37%	0.16%	0.86%	1.26%	-0.14%	0.25%	7.27%	16.48%
2004	0.88%	0.44%	-0.01%	0.37%	0.59%	1.21%	0.02%	1.26%	0.46%	0.03%	0.79%	0.24%	6.44%	12.29%
2005	0.51%	0.37%	0.85%	0.14%	0.63%	0.46%	0.13%	0.16%	0.89%	1.81%	0.75%	0.54%	7.26%	10.50%
2006	0.70%	-0.20%	1.31%	0.94%	-0.70%	0.51%	1.06%	-0.77%	0.68%	0.42%	0.86%	0.86%	9.38%	13.59%
2007	0.29%	-0.11%	1.64%	0.98%	0.81%	0.34%	0.17%	0.31%	0.97%	0.46%	1.04%	0.23%	7.34%	7.68%
2008	0.63%	0.06%	0.18%	0.93%	0.81%	-0.06%	0.72%	0.71%	0.50%	-0.06%			4.60%	6.40%

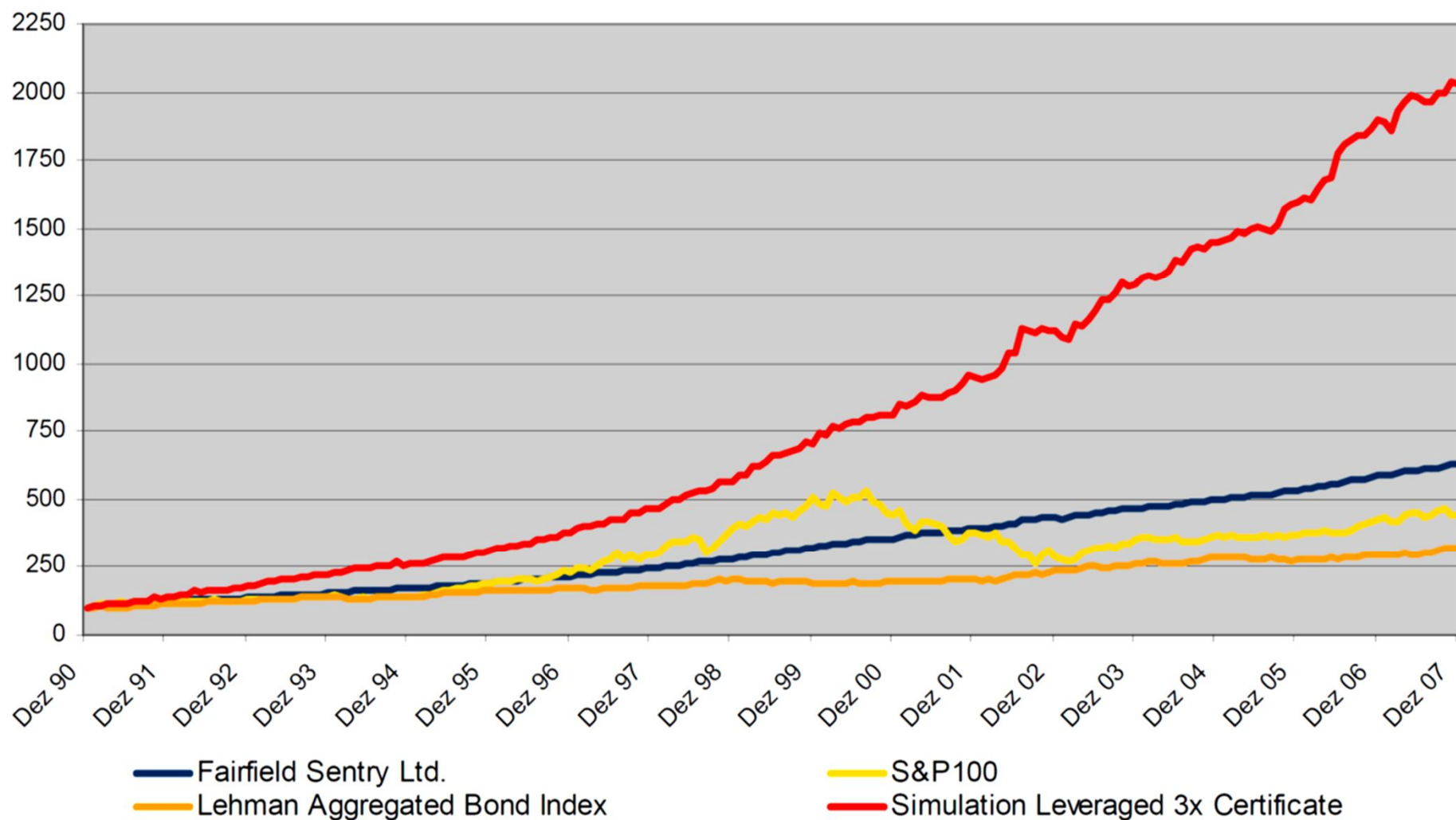
### Trading and further information:

NPB New Private Bank Ltd.  
Limmatquai 122  
8022 Zürich / Switzerland  
Tel. +41 44 265 11 76  
info@npb-bank.ch



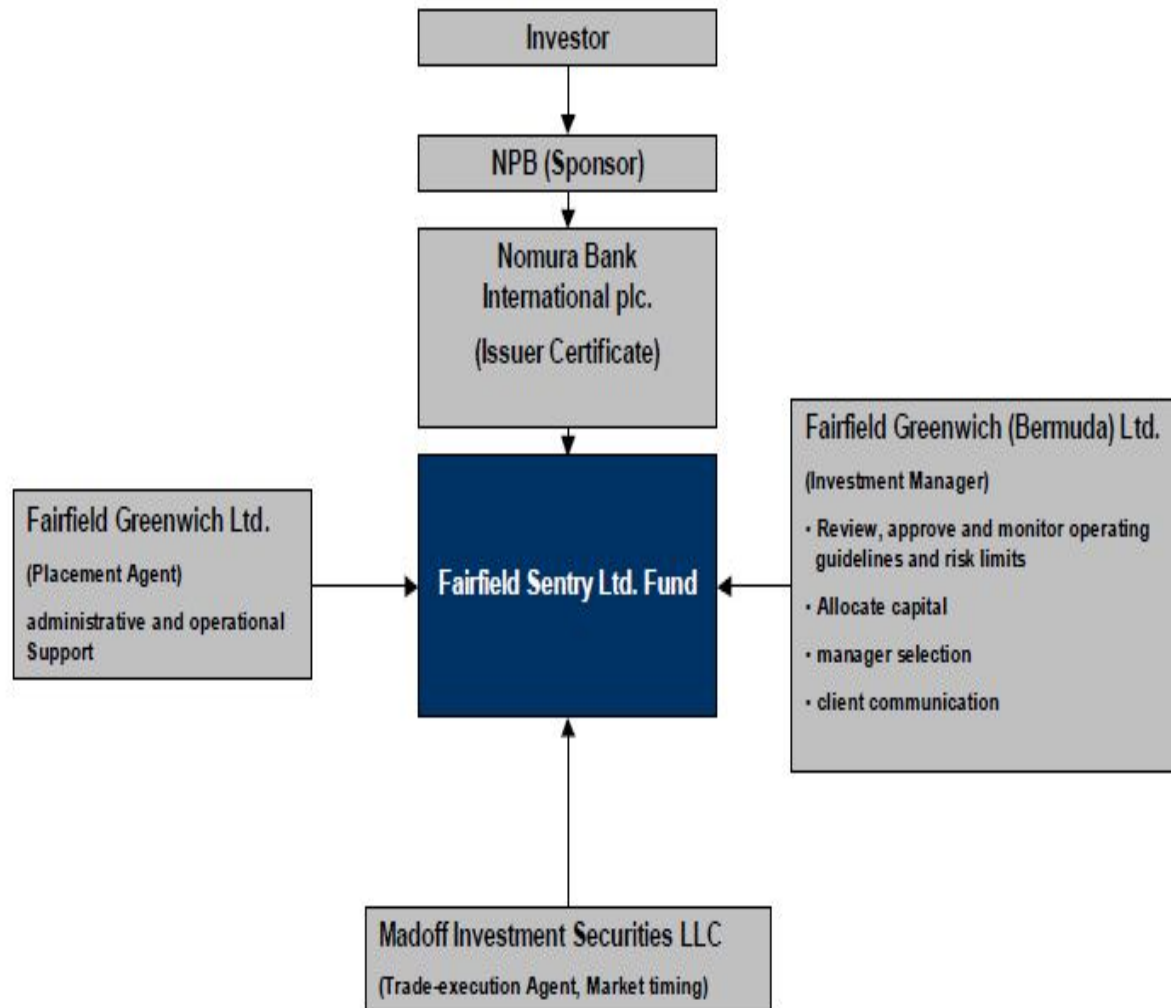
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# Comparison with other asset classes (USD)



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## Structure



# The Fight

- 26 Chilean investors vs Standard Chartered Bank – ICDR - NYC
- Arbitration
  - By contract – mutual agreement
  - Industry specific expertise
  - Confidential
  - Flexible
  - Faster and cheaper than the courts
- In theory



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# The Problem with contract

- Standard form contract (contrat d'adhésion)
  - Individual and large corporation
  - Take it or leave it – no negotiation
  - One-sided clauses (SCB could UNILATERALLY amend the contract, in whole or in part, at any time)



# The Narrow Issues (1)

- Unilateral,retroactive amendment of the contract
  - November 2008 –investors try to get their money out
  - December 2008 – Madoff arrested
  - January 2009 – SCB takes over AMEX Miami
  - March 2009 SCB unilaterally amends contracts retroactive to November 2008



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# The Narrow Issues (2)

- Can 26 mad Chilean investors get together and hire the same law firm to contest their claims, together, against SCB
- They each had a separate contract with SCB
- Nothing in the contract SPECIFICALLY permitted an individual to get together with other clients to pursue individual claims together



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# Views of the US courts

- Ideologically divided Supreme Court
  - Arbitration is a creature of contract and agreement
  - Contract must specifically state that claimants can get together to pursue claims
  - Otherwise they can't, if the other party objects
- Other US courts
  - Contract formed by agreement and parties can agree to unilateral amendment



# The Bigger Issues

- The private world of finance
  - Arbitration vs the courts
- Protecting investors
  - What investors and why?
  - Who protects and where?
  - Is regulation possible?



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# Farewell to NIAS

The Seminar



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# How International Financial Markets Really Work

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Melbourne Law School

Netherlands Institute for Advanced Studies

June 20, 2013



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# How International Financial Markets Really Work

International capital markets supported by a large body of their own *lex mercatoria* - a “*lex financeria*”

(Subsequently published (2013) 7 Law and Financial Markets Review 256



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# *The Romance of the Law Merchant*

- What is lex mercatoria
- “...first stage concerns an ancient lex mercatoria in the Middle Ages, a transnational set of norms and procedural principles. established by and for commerce in (relative) autonomy from states.”
- (Michaels, 2007)



# WHAT IS LEX MERCATORIA (cont'd)

“The second stage describes the renaissance of the idea as a ‘new lex mercatoria’ in the 20<sup>th</sup> century, an informal and flexible net of rules and arbitrators establishing a private international commercial law.” (Michaels, 2007)



# WHAT IS LEX MERCATORIA (cont'd)

“Finally, a third stage has been described as a ‘new new lex mercatoria’, which moves from an amorphous and flexible soft law to an established system of law with codified legal rules (first and foremost the UNIDROIT Principles of International and Commercial Law) and strongly institutionalized court-like international arbitration”. (Michaels, 2007)



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# International Capital Markets and the Lex Mercatoria

- Continuity and persistence over centuries
  - Legacy of autonomy and self-regulation
  - The power of oral contracts



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# Autonomy and Self-Regulation

- The City of London (600 acres)

“...it was made an express provision of the Magna Charta [1215] itself, that the City of London should have all its ancient liberties and customs...”

“It is laid down...that the City customs are of such force that they shall prevail against a general Act of Parliament”

*(The City of London Corporation Inquiry, 1854)*



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# The Power of the Oral Contract

- Oral contracts recognized among “merchants” (including those “merchant bankers”) – Expediency, generalized illiteracy
- *Dictum meum pactum* (my word is my bond) – motto of the London Stock Exchange (1801)
- “...morality and mutual trust” characteristic of “international business which turns the contractual promise into a categorical imperative”

(Berger)



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# The Power of the Oral Contract

“Computers and Bloomberg terminals dominate trading floors, but the human element remains a crucial feature of transacting across derivatives and other parts of the global financial system. This is no better illustrated than by the presence of so-called “voice brokers” who act as middle men for banks trading swaps and other fixed income securities in financial centres that link Asia, Europe and the US”

(Financial Times, Feb.16, 2012)



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# Implications of a lex financeria

- Was the GFC triggered, in part, by a breakdown in the operation of a lex mercatoria of finance
  - Cultural and institutional rupture with past
  - Homogenous, culturally distinct enclaves of finance breached
  - Unspoken assumptions and understandings confused
  - Long term and intergenerational reputational pressures dissipated



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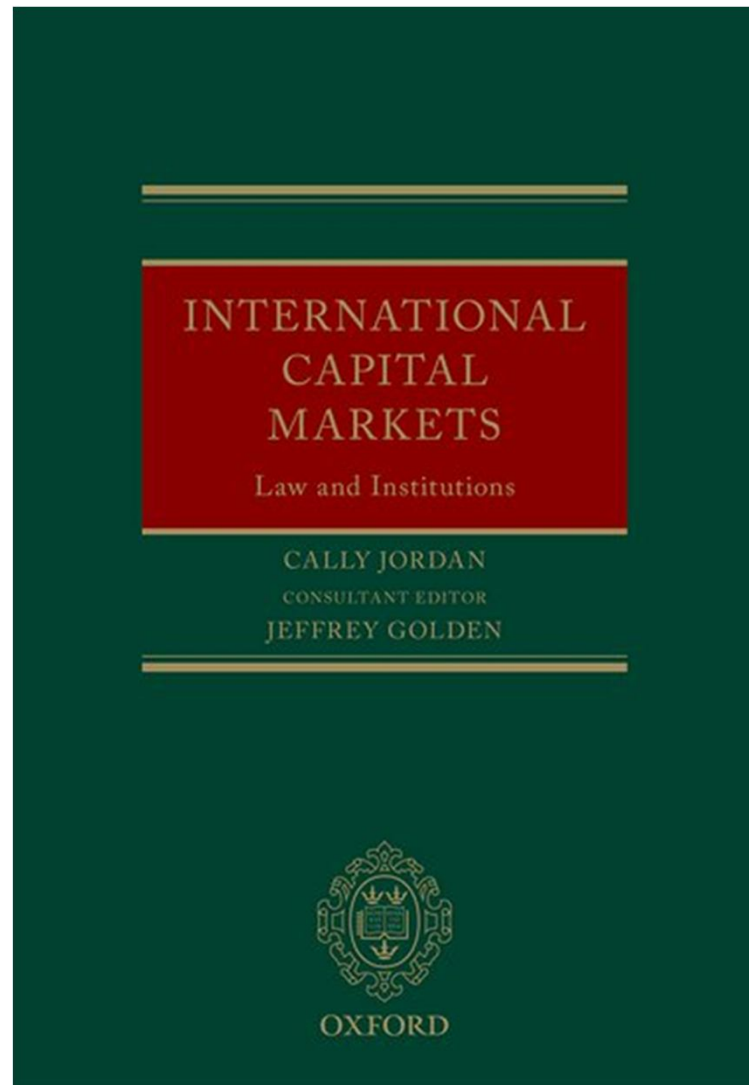
# Implications of a lex financeria

- Are international financial standards an attempt to create a new lex mercatoria?
- Will waves of re-regulation drive the lex mercatoria temporarily into hiding?
- On the contrary, will regulatory disarray give rise to new, opportunistic, forms of lex mercatoria?



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# Publication



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# P.R.I.M.E Finance: Research

- P.R.I.M.E Finance
  - An interface between practitioners and academics
- Open issues
  - Focus of P.R.I.M.E. Finance Research
  - Institutional Framework for the Woolf Fellowship



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# “From Monastery to Beehive”: NIAS

- Cally Jordan
- University of Melbourne; C.D. Howe Institute;  
CIGI



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