

**P.R.I.M.E. Finance New York Conference 2018**  
White & Case Conference Center, 1221 Avenue of the Americas  
October 4, 2018

# **Arbitration, Mediation and Specialized Rules for Complex Financial Disputes**



**P.R.I.M.E. FINANCE**  
Panel of Recognised International Market Experts in Finance



Moderated by: Robert G. Pickel  
Matthew N. Drossos  
Hon. Judge Elizabeth S. Stong  
John Williams

# Panel Summary

- Mediation: A Judge's Perspective – Hon. Judge Elizabeth Stong
- Arbitration: A Practitioner's Perspective – Matthew N. Drossos
- Industry Solutions: An Advisor's Perspective – John Williams
- The Role of P.R.I.M.E. Finance
- Proliferation of Commercial Courts



# Mediation: A Judge's Perspective

Hon. Judge Elizabeth Stong

- The role of mediation in a problem-solving court
- Special issues in a specialized court
- Mediation versus judicial settlement conference
- When does a judicial mediator make sense?
- The role of experts



# Advantages of Arbitration over Litigation in Financial Disputes

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**Matthew N. Drossos**

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# Growth of International Arbitration

Arbitral Institution	Int'l Cases Registered in 2000	Int'l Cases Registered in 2017	Total Change	Percent Change
ICSID	12	53	41	342%
ICC	541	810	269	50%
ICDR	510	1026	516	101%
Stockholm Chamber	56 (2005)	200	144	257%
Swiss Chamber	54 (2005)	105 (2015)	51	94%
London Court of Int'l Arbitration	87	285	198	228%
Singapore Int'l Arb Centre	90 (2006)	343 (2016)	253	281%

# International Commercial Arbitration

- Private party v. private party (or State acting as a private party)
- Consent to arbitrator's jurisdiction, usually via an arbitration clause in the contract
- Selection of applicable substantive law
- Selection of procedural law
  - Seat of arbitration
  - Arbitral institutions rules (ICC, LCIA, SCC, SIAC, etc.)

# Investor-State Arbitration

- Jurisdiction is often based on offer of consent in treaties (BITs, NAFTA, ECT, etc.)
- Applicable law may involve:
  - Public international law
    - ICSID Convention
    - Bilateral and multilateral investment treaties
  - Private international law
    - To resolve applicable law and conflict of laws issues
  - National law
    - Law of the host State
    - Other legal systems via *renvoi*

# Advantages of International Arbitration

Carolyn B. Lamm & Eckhard R. Hellbeck, *When to Arbitrate Rather Than Litigate*, in *International Litigation Strategies and Practice* 197-213 (B. Legum, T. Edelman & E. Berghoff, eds., 2<sup>nd</sup> ed. 2014)

- Party control and flexibility
  - Arbitration is a creature of contract, parties can tailor the process by agreement
- Arbitrator selection: parties can select experts in the field
- Neutral forum
  - No “home court” advantage
- Confidentiality
- Finality and broader enforcement

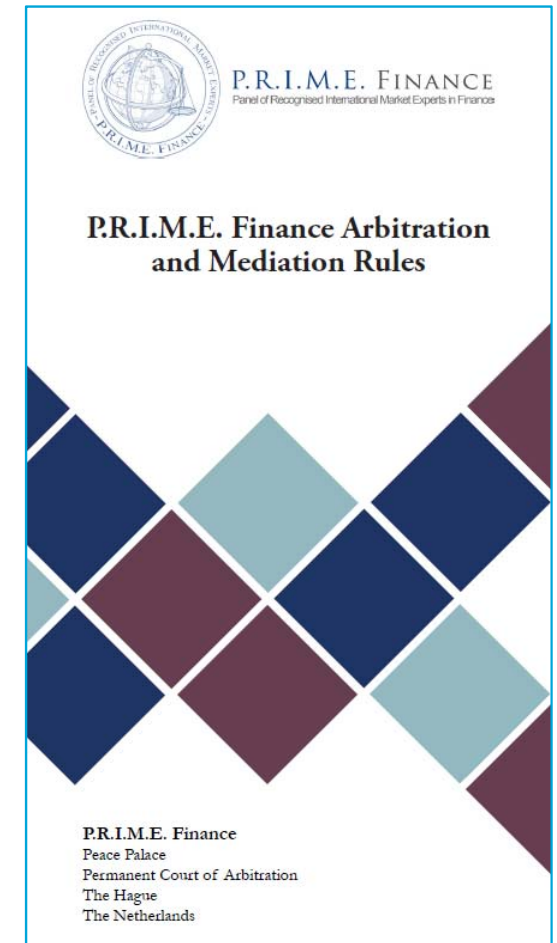


# Disadvantages of International Arbitration

- Consent required, no general jurisdiction
- Non-arbitrable topics
  - Issues of consent
- Arbitral Tribunals' limited powers
  - to grant preventative measures (no penal sanctions)
  - to compel third-party witnesses

# P.R.I.M.E. Finance Arbitration and Mediation Rules

- Current version – February 9, 2016
- Based on the UNCITRAL Arbitration Rules (2010)
- PCA administers cases under the P.R.I.M.E. Rules
- Parties, arbitrators or the appointing authority may also appoint arbitrators not included on P.R.I.M.E. Finance List of Experts
- Tribunal may, at the request of a party or on its own initiative, invite or grant leave to *amicus curiae*
- Articles 38-39 of the P.R.I.M.E. Finance Arbitration Rules provide for the regulation of the currency of the award and interest calculation
- Under Article 40 the arbitral tribunal may, after consulting the parties, take into consideration for any of the parties any tax consequences of the amounts payable under the award



# P.R.I.M.E. Finance Arbitration Rules Promote Efficiency

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- **Institutional support by P.R.I.M.E. Finance as administrator**
  - PCA Secretary-General as appointing authority
- **Emergency arbitral proceedings (Art. 26a and Annex C)**
  - For urgent provisional measures prior to appointment of main arbitral tribunal
  - Available unless excluded (opt-out)
- **Expedited proceedings (Art. 2a)**
  - Parties may agree shorter time limits
- **Referee arbitral proceedings (Art. 26b and Annex D)**
  - Fast track procedure for urgent provisional measures
  - Enforceable award under Dutch law within 30-60 days
  - Only available if:
    - Parties have agreed (opt-in) and
    - Place of arbitration is in the Netherlands

# Emergency Arbitrator and Interim Measures in International Arbitration

- Gives opportunity to seek emergency / interim measures
- Proliferation among arbitral institutions
  - ICDR; Stockholm Chamber; SIAC; ICC; Hong Kong Center; LCIA; P.R.I.M.E.
- Application for emergency measures (ICC Article 29; Appendix V):
  - Name, description, contact details of the parties
  - Description of circumstances giving rise to application
  - Statement of emergency measure sought
  - Proof of exceptional urgency
  - Proof of payment
- Alternative – seek interim measures from court?

# Important Considerations in International Commercial Arbitration

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- Impact of *situs* selection / *lex arbitri*
  - Procedural law of the seat as gap-filler?
  - Substantive law of the seat as gap-filler?
  - Interaction with law chosen by parties
- Interplay with national arbitration laws
  - Arbitration-friendly, pro-enforcement jurisdictions (e.g., France, Switzerland, Netherlands, Sweden) – limited and narrowly circumscribed review of awards by domestic courts
- Other important considerations
  - Issue preclusion (*i.e.*, *res judicata* effect of prior arbitral awards) governed by parties' chosen law v. law of the seat? Or *sui generis* approach - parties' autonomy and expectation of finality
  - Choice of law – Model Law Art. 28: “Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.”

# Transparency vs. Confidentiality

Andrea J. Menaker & Eckhard R. Hellbeck, *Piercing the Veil of Confidentiality: The Recent Trend Towards Greater Public Participation and Transparency in Investor-State Arbitration*, in *Arbitration Under International Investment Agreements* (K. Yannaca-Small, ed., 2<sup>nd</sup> ed. 2018)

	International Commercial Arbitration	Investment Treaty Arbitration	National Court Litigation
<b>Public Access to Documents</b>	No	Trend toward publication of awards; Access to other documents only under certain treaties	Only in certain jurisdictions, (e.g., US: PACER)
<b>Third-Party Participation</b>	Only joinder & consolidation	<i>Amicus curiae</i> under ICSID Arb. Rules & certain investment treaties	Joinder & consolidation; <i>Amicus curiae</i> in certain jurisdictions
<b>Public Hearings</b>	No	Trend toward public broadcast	Generally Yes

# Enforcement

- **Judgments** - under bilateral and regional treaties
  - Otherwise: comity
- **ICSID awards** – obligation to enforce like final judgments
  - ICSID Convention, Art. 54(1)
  - No defenses
- **Non-ICSID awards** - globally under 1958 New York Convention
  - Presumption of enforcement
  - Limited due-process defenses

# Annulment vs. Appeal

- **Judgments** – generally full review on appeal
  - Subject to national law
  
- **Arbitral awards** – no appeal; limited review on fundamental due process grounds
  - ***ICSID awards***: self-contained annulment procedure before *ad hoc* committee exclusively under ICSID Convention
  - ***Non-ICSID awards***: set-aside by court of country of origin



# Grounds for Annulment Compared

## **ICSID Convention, Art. 52(1)**

*Power: Annul or not*

- ❑ Improper constitution of the tribunal
- ❑ Manifest excess of powers
- ❑ Arbitrator corruption
- ❑ Serious departure from a fundamental rule of procedure
- ❑ Failure of the award to state the reasons on which it is based

## **UNCITRAL Model Law, Art. 34(2)**

*Power: Annul or not*

- ❑ Incapacity of a party
- ❑ Invalidity of the arbitration agreement
- ❑ Lack of proper notice
- ❑ Inability of a party to present its case
- ❑ Award is *extra petita*
- ❑ Improper composition of the tribunal
- ❑ Improper arbitral procedure
- ❑ Lack of arbitrability of the subject-matter
- ❑ Award in conflict with the national public policy

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Thank you

# Industry Solutions: An Advisor's Perspective

John Williams

- Special challenges for widely traded instruments:
  - Speed
  - Predictability
  - Transparency
- Special challenge for derivatives:
  - Consistency of application,
    - which gives rise to the need for:
  - Centralization,
    - Which gives rise to issues of:
  - Governance



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# Industry Solutions: An Advisor's Perspective

- 2013 ISDA Arbitration Guide
  - ICC Rules (Rules of Arbitration of the International Chamber of Commerce)
  - LCIA Rules (Arbitration Rules of the London Court of International Arbitration)
  - AAA-ICDR Rules (International Arbitration Rules of the American Arbitration Association – International Centre for Dispute Resolution)
  - HKIAC Rules (Rules of the Hong Kong International Arbitration Centre)
  - SIAC Rules (Arbitration Rules of the Singapore International Arbitration Centre)
  - Swiss Rules of International Arbitration
  - P.R.I.M.E. Finance Rules



# Industry Solutions: An Advisor's Perspective

- Credit Derivatives Determinations Committee
  - Composed of representatives from 10 dealer banks and 5 buy-side firms
  - Advantages
    - Centralized outcomes
    - Rapid decisions
    - Consistent experts (leading to predictable results)
    - Results published same day
    - Reasoning (sometimes) published
  - Challenges
    - Conflicts of interest?
    - Not principles-based



# Industry Solutions: An Advisor's Perspective

- Hovnanian transaction
  - Intentional trigger
  - Manufactured discount obligations
- Industry response
  - ISDA and CFTC statements
  - ISDA Working Group on Narrowly Tailored Credit Events



# Proliferation of Commercial Courts

- Germany: Chamber of International Commercial Matters of the Regional Court of Frankfurt (*Kammer für internationale Handelssachen bei dem Landgericht Frankfurt am Main*)
- Kazakhstan: Astana International Financial Centre Court (AIF Court)
- France: International Chamber of the Court of Appeal of Paris (*Chambre Internationale De La Cour D'appel De Paris, CICAP*)
- China: The China International Commercial Court (CICC)
- The Netherlands: The Netherlands Commercial Court (NCC)
- Belgium: The Brussels International Business Court (BIBC)



# Proliferation of Commercial Courts

- Issues to consider:
  - Subject matter jurisdiction
  - Personal jurisdiction
  - Expertise
  - Enforceability





# Thank you for your attention

## Questions?



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