

The case for P.R.I.M.E. Finance: P.R.I.M.E. Finance cases

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Key points

- P.R.I.M.E. Finance has been established against an asserted background of legal uncertainty and conflicting decisions. Complex financial transactions, or CFTs, are often documented by way of standardized market agreements, understood by specialized market participants and their legal advisers. But the resolution of CFTs disputes is not standardized, or specialized. Few judges are familiar with CFTs, or confident in their ability to decide CFTs disputes. The CFTs world is subject to legal uncertainty and legal risk.
- This article accordingly considers the case for P.R.I.M.E. Finance by reference to a selection of recent jurisdiction, interpretation and mis-selling cases involving CFTs in the English courts, as well as by reference to a limited number of cases in courts in other jurisdictions. Those recent cases are a measure of the sorts of CFTs disputes that arise.
- The English courts, located as they are in one of the two leading capital markets of the world—the other being New York—are widely regarded as one of the two leading courts in the world when it comes to resolving CFTs disputes. The manner in which those courts have resolved those CFTs disputes sheds light on the role P.R.I.M.E. Finance can play on the CFTs dispute resolution stage. The English and New York courts have recently handed down conflicting decisions involving CFTs, creating further uncertainty in the market. The case for P.R.I.M.E. Finance is compelling but, since it has only recently been established, necessarily unproven.

1. The case for P.R.I.M.E. Finance¹

What is the case for P.R.I.M.E. Finance? P.R.I.M.E. Finance has been established in The Hague against an asserted background of legal uncertainty and conflicting decisions in the world of complex financial transactions (CFTs²). The conflicting decisions have been handed down both within and between jurisdictions. Few judges in state and national

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1 P.R.I.M.E. Finance stands for Panel of Recognized International Market Experts in Finance, a foundation or Stichting established under the law of The Netherlands.

2 CFTs is a convenient shorthand for a broad range of complex and structured transactions and products, including over-the-counter (OTC) derivatives (all manner of them, swaps, forwards and options), repos and stock lending transactions, securitization transactions, commercialized and residential mortgage-backed securities, collateralized debt obligations (CDOs), structured investment vehicles, and so on. CFTs are not just derivatives. While OTC derivatives are a key aspect of the CFTs the subject of this article, they are far from being the focus of this article.

courts are familiar with CFTs let alone confident in their knowledge and hence resolution of CFTs disputes. In broad terms, the case for P.R.I.M.E. Finance is a case for a specialized court or tribunal. While many jurisdictions have several specialized courts and tribunals, the case for P.R.I.M.E. Finance is at its heart a case for a specialized tribunal on an international basis.

What is the current state of affairs?

Legal uncertainty

The CFTs world is subject, it is said, to ‘an immense black hole of legal uncertainty’.³ Legal uncertainty, or legal risk, is hardly new: it ‘has hovered over the derivatives market since the first swap’.⁴ Legal uncertainty is partly a lack of case law, partly a concern about the quality of what case law there is, partly a concern about the ability of state and national courts to render decisions that can be relied upon with confidence by market participants in a complex world of increasingly connected markets and jurisdictions, and partly a consequence of the very complexity of many CFTs in the first place.

Standardized agreements . . .

A generation of market participants, largely sponsored by industry associations, has systematically developed internationally standardized agreements in a range of global markets. Many CFTs are documented by way of these standardized agreements. Most prominently, the International Swaps and Derivatives Association, Inc. (ISDA) has sponsored a wide range of documents for OTC derivatives, including various editions of its master agreements (the ISDA Master Agreement). The ISDA Master Agreement is ‘one of the most widely used forms of agreement in the world . . . [and] . . . probably the most important standard market agreement used in the financial world’.⁵ The ISDA Master Agreement is not the only such market standard agreement, of course.⁶ This has led to a form of global law ‘by’⁷ but not yet ‘of’ contract. It is the ‘of’ contract that P.R.I.M.E. Finance has in part been founded to help establish.

3 WD Baragwanath, ‘How should we resolve disputes in complex international financing transactions?’, paper delivered at the opening of P.R.I.M.E. Finance in the Peace Palace in The Hague on 16 January 2012.

4 SK Henderson, *Henderson on Derivatives* (2nd edn, LexisNexis 2010) at para 10.1.

5 *Lomas and others v JFB Firth Rixson, Inc and others* [2010] EWHC 3372 (Ch) at para 53.

6 Various market sponsor entities have sponsored and published several other forms of documentation for OTC derivatives—including the European Master Agreement by ISDA; local language ISDA master agreements by the French and German banking associations; in China, the NAFMII Master Agreement by the National Association of Financial Markets Institutional Investors; and, in Australia, the AFMA schedules and documentation by the Australian Financial Markets Association. In the case of foreign exchange transactions, the New York Federal Reserve, together with the British Bankers’ Association, the Canadian Foreign Exchange Committee and the Tokyo Foreign Exchange Markets Committee, has sponsored and published the International Foreign Exchange Markets Agreement, the International FX and Currency Option Agreement, the Foreign Exchange and Options Master Agreement and the International Currency Option Master Agreement. In the case of repos and stock lending transactions, the International Capital Market Association (ICMA) has drafted and sponsored various versions of its global master repurchase agreements (the GMRA), as has the Securities Industry Financial Markets Association; The International Securities Lending Association (ISLA) has drafted and sponsored various editions of its securities lending agreements; and The Futures and Options Association has sponsored and published its FOA master netting agreements. Many documents in the bond and credit or loan markets are similarly standardized. For example, the Loan Market Association has sponsored and published its Multicurrency Term and Revolving Facilities Agreement. A French translation of this agreement has also been published.

7 JB Golden, ‘The courts, the financial crisis and systemic risk’ (2009) *Capital Markets LJ* 4, S141–S149.

... **but not standardized dispute resolution**

The resolution of disputes arising out of these standardized agreements is neither standardized nor globalized. Market participants rely on state and national dispute resolution fora. Because so many CFTs agreements are entered into on standardized or at least market-understood terms, a ‘wrong’ decision in one state or national court may and likely will have systemic consequences.⁸

Some judicial decisions are uncertain, some are unpredictable, most are decentralized, many are not reached in a timely manner but instead only after a too-lengthy adjudication process, and many are too and needlessly costly in terms of resources, time and expense. What is more, experience tells us that parties typically and largely want straightforward, cost-effective and timely resolution of their disputes.⁹

Complexity of CFTs

Legal uncertainty is also partly a result of the complex nature of many CFTs, and partly of the innovation that is so much a feature of CFTs. It is not simply that there is such a range of CFTs, although it is certainly that. Experience also tells us that some CFTs are sufficiently complex and opaque that only a limited few in the bank or other financial institution that structured the CFT in the first place understand its how, why and wherefore.¹⁰ Experience also tells us that, when a dispute arises, those responsible for the structuring of many CFTs are no longer employed by, or available to, the bank or other financial institution; the background and in-house knowledge, the context and history, can be lost. Experience further tells us that cost pressures, and the desire for standardization and commoditization of the documentation of many CFTs, are such that those arranging or documenting those CFTs may not have fully or properly understood the financial structure or purpose of the CFT or the underlying legal and other issues.¹¹

8 *ibid* S143.

9 This is one of the reasons typically given for the increased popularity of alternative dispute resolution techniques, increasingly including, in a wide range of disputes not necessarily involving CFTs, mediation and arbitration.

10 A CDO ‘squared’ is often given as an example in this context. But it is not just the investors or counterparties who may not understand the how, why and wherefore. Many CDOs and other CFTs were marketed and sold to investors on the basis (principally, if not solely) of the credit rating or ratings assigned by a reputable and sophisticated international credit rating agency to securities issued in connection with that CFT. Hindsight tells us that some of those ratings were, for want of a better term, ill-judged. Hindsight also tells us that some within those rating agencies themselves did not fully understand what they were rating. See also the following footnote.

11 The tension between re-inventing the wheel in a transaction and completing it efficiently, in a timely manner and cost-effectively is writ large in the world of CFTs. It is thought inevitable that a considerable number of CFTs have been and will continue to be structured and documented by junior and poorly supervised lawyers who did not appreciate that the transaction involved more than filling in the blanks, more than doing only what was done previously. See, for example, *LB Re Financing No 3 (in administration) v Excalibur Funding No. 1 PLC and others* [2011] EWHC 2111 (Comm) and *Anthracite Rated Investments (Jersey) Limited and others v Lehman Brothers Finance SA in liquidation* [2011] EWHC 1822 (Ch), discussed below under the heading ‘Interpretation cases—ambiguities and nonsense’. Market standard documents and boilerplate provisions contribute to this problem, of course. Many senior lawyers often remark how their younger colleagues and successors do not understand the legal issues that they themselves were required to consider and resolve. Today, completion of many CFTs is, in the vernacular, thought only to be a matter of ‘execution’. It must be but a matter of luck, which is in practice probably no more than shorthand for the continued solvency of relevant parties, that many of these transactions never again see the light of (the legal) day. It is of course in part for this reason that industry-sponsored market standard agreements are so necessary and instrumental in the world of CFTs.

In these circumstances, it is thought likely that many customers and clients to whom CFTs are sold or for whom CFTs are structured and their lawyers and advisers, not to mention, importantly, their boards of directors and other governance bodies, do not fully understand them.¹² Of course, some of those people understand them only too well. Regardless, those customers and clients who have sought to escape what turns out to have been a poor financial or commercial bargain have generally elicited little judicial sympathy in the English courts when they have, *ex post*, made a claim of, for example, fraud, misrepresentation or mis-selling, or of lack of capacity.

Disputes have become more complex

Just as CFTs and markets have become more complex, so have CFTs disputes. CFTs disputes today raise a range of issues, such as the effect and consequence of complex financial and valuation models, not to mention the complexity of CFTs documentation and the consequent jargon. Although concern is often expressed that CFTs disputes take too long to come before the courts, the opposite can be true: some CFTs disputes are brought too quickly before a court because the parties think that the issues require urgent resolution. In these circumstances, the court is itself rushed into a decision on the likely basis of a less than full argument by counsel. In these cases, the issues are only properly aired on appeal, or in subsequent cases dealing with the same issue.¹³ This is hardly satisfactory.

CFTs disputes are global—multi-jurisdictional, common and civil law and language issues

The preponderance of CFT documentation is in English. Because English and New York law are frequently the governing law, many CFTs are subject to the common law. However, many parties to CFT documentation are domiciled in and carry on business in jurisdictions where English is not the *lingua franca* and where the common law is not the law of that jurisdiction. While many CFTs are governed by English or New York law, many others are not, even though some may be documented in English. Disputes under those CFTs may be heard before courts whose first language is not English.

Perception of local bias, and different interpretations

Some state and national courts are perceived to suffer from a local bias.¹⁴ Even if they do not in fact suffer from local bias, courts in different jurisdictions can be expected to prefer different interpretations of the same CFTs agreement, something which, it is said, has no

12 See, for example, the public resignation letter of Greg Smith, a Goldman Sachs' European equity derivatives business executive director, in *The New York Times* on 14 March 2012 ('Why I am leaving Goldman Sachs'). In this open letter, he said that '[o]ver the last 12 months I have seen five different managing directors refer to their own clients as "muppets" . . . '.

13 One can take this view of *Marine Trade SA v Pioneer Freight Futures Co Ltd* [2009] EWHC 2656 (Comm). The more subtle and sophisticated, or wider, 'commercial' context and arguments, as well as a more sophisticated analysis of the ISDA Master Agreement itself, considered in the ensuing S 2(a)(iii) ISDA Master Agreement cases, discussed below under the heading 'Conflicting cases within a jurisdiction—the S 2(a)(iii) ISDA Master Agreement cases', were not all put to Flaux J in the *Marine Trade* case. See S Firth, *Derivatives Law and Practice* (Sweet & Maxwell 2011 reprint) (Firth) at para 11–012.

14 The wealth of jurisdiction-based CFTs disputes, discussed below under the heading 'Jurisdiction cases', supports this perception.

place in a world of interconnected and interdependent markets. Disputes in these circumstances are not likely to lead to a settled, global, body of law.¹⁵

Wider market effects

In a global financial marketplace, therefore, the significance of disputes that arise beyond the traditional London/New York axis cannot be underestimated. Local and national disputes, courts and decisions beyond that axis cannot be ignored.¹⁶ The wider market has an interest in the outcome of many cases, possibly more so than the actual parties involved.¹⁷ Resolution of a dispute that has an international consequence or effect requires a judge to focus on more than his or her own narrow domestic focus.¹⁸ Standardization may be cost- and time-effective, but it carries its own systemic risks, including greater vulnerability to financial and market, as well as legal, shocks. A mistake in, or a mistaken judgment involving the interpretation of, a standardized agreement may have wider implications than those for the particular parties to the agreement in the first place.

Specialized market participants, but not specialized judges

Many participants in these markets and CFTs generally have become specialized. However, judges involved in the resolution of CFTs disputes are not specialized. To some extent, they must necessarily educate themselves while, as it were, on the case. Many judges cannot be expected to understand fully the CFT or the market involved.¹⁹ Anecdotal discussions with a number of senior retired as well as sitting judges in a range of jurisdictions support that expectation. This issue is considered to be particularly acute in emerging markets. In those markets, few judges with a commercial or financial background are appointed.

That said, the English and New York courts generally inspire a relative and, in some cases, an impressive, level of confidence in their ability to resolve CFTs disputes adequately, relative, that is, to the level of confidence in state and national courts in the wider world. This wider world does not have the benefit of the deeper experience of CFTs, and resources generally, in London and New York law firms. Many of those law firms have specialized CFTs lawyers and departments. Barristers and litigators in London

15 Golden (n 7) S147.

16 The European Central Bank has spoken of the 'huge universe of local jurisdictions', advising that some 70 per cent of European disputes are dealt with in forums other than London or New York (Baragwanath (n 3)). The economies of some countries in emerging markets are heavily dependent on a single export commodity, or a small range of export commodities. Those economies are dependent to a considerable extent on the hedging of commodity prices. They are as a result exposed to risk on those hedges and to disputes that are relevant to those hedges.

17 Golden (n 7).

18 Baragwanath (n 3) para 9.

19 See Golden (n 7) S143, where, at n 5, he makes the often-repeated comment of the judges in the *Hazell v Hammersmith and Fulham London Borough Council* [1992] AC 1 litigation that it was considered that 'one or more of... [them] lacked a fuller appreciation of the products or markets involved'. We should not be surprised at this. The nature of the judicial function is that judges in non-specialized courts are necessarily generalists, as are those courts. It is easy to be critical of judges in the often difficult circumstances they find themselves in when faced with a complex case beyond their experience. One needs to be careful not to be overly critical of judges who are faced with CFTs disputes.

and New York are similarly specialized.²⁰ Financial institutions and dealers, too, have considerable resources, expertise and experience, not all of which is present in many jurisdictions in which the more globally focused and based of those institutions and dealers carry on business.

Enforceability of judgments can be difficult

Parties also want ready enforceability of judgments and awards. Yet enforceability of foreign judgments in a range of jurisdictions remains difficult if not impossible.²¹ Anecdotal evidence suggests that increased arbitration of financial disputes is inevitable, as banks and financial institutions increasingly discover these enforcement difficulties.

Ad hoc arbitration

Ad hoc arbitration as a dispute resolution technique is well settled and growing in many jurisdictions, sectors and markets, particularly in emerging markets.²² Anecdotal evidence suggests that banks and financial institutions operating out of more developed countries and markets are likely to prefer arbitral to judicial proceedings in emerging countries and markets, not least for enforcement reasons; and also that parties in emerging countries and markets are disposed to prefer less costly and more timely arbitration to more costly and time-consuming litigation in the major markets of London and New York.

However, ad hoc arbitration in the financial markets, while growing,²³ is far from well settled. That may be a consequence of the fact that some markets disputes are little more than the collection of a debt. In such a case, the availability of summary proceedings in a state or national court can be effective and straightforward. That may also be a consequence of the fact that market participants do not take their CFTs disputes to arbitration because of a perception that there are few expert arbitrators, and fewer still who do not have a conflict of interest. It may be that there is no specialized arbitral institution. In short, therefore, it may be not that there is little interest in arbitrating CFTs disputes, but more that arbitrating them is often not an available option.

20 This specialism presents its own problems. Many of these specialized law firms and counsel have little apparent difficulty acting for and against large financial institution clients on a transaction-by-transaction informed consent basis, but either will not or cannot obtain consent to act against bank and financial institution clients in the CFTs litigation that ensues. There is at that point literally too much money at stake, not least future law firm revenue, to waive the conflict of interest. A consequence of this is that some parties, particularly the clients and customers of banks and financial institutions, are not adequately represented in court, even in the major CFTs jurisdictions of England and New York. Experience also tells us that, in some jurisdictions, a suitable expert witness can be hard to find, for the same broad conflict of interest reasons. See Golden (n 7) S145.

21 See, for example, 'The use of arbitration under an ISDA Master Agreement', a memorandum dated 19 January 2011 prepared by ISDA and addressed to the ISDA Financial Law Reform Committee and to members of ISDA (the ISDA January 2011 Arbitration Memorandum) at www.isda.org, at para 4.2:

Today, however, many parties to ... [CFTs] are based in emerging jurisdictions in which it is difficult to enforce a foreign judgment. Succeeding on the merits may prove to be a pyrrhic victory if it is not possible to enforce the resulting judgment.

See also the 'The use of arbitration under an ISDA Master Agreement; feedback to members and policy options', a memorandum dated 10 November 2011 prepared by ISDA and addressed to the ISDA Financial Law Reform Committee and to members of ISDA (the ISDA November 2011 Arbitration Memorandum).

22 See the memoranda referred to in the previous footnote.

23 See the ISDA January 2011 Arbitration Memorandum, at para 3.2. The Sharia-compliant ISDA/IIFM Ta'Hawwut Master Agreement and its use to document Sharia-compliant Islamic derivatives provides for arbitration under the International Court of Arbitration rules unless a different forum is chosen by the parties. ISDA took this approach because it reflected perceived market practice in the Islamic finance market (see the ISDA 2011 November Arbitration Memorandum, at para 2.1(c)).

What does P.R.I.M.E. Finance add to this state of affairs?

P.R.I.M.E. Finance seeks to fill the international void outlined in the previous paragraphs by providing market participants with a panel of neutral experts with market knowledge to resolve and arbitrate their CFTs disputes. At this early juncture, the best that can be said is that the proof of P.R.I.M.E. Finance in filling this void, or indeed in persuading market participants that there is a void, will very much be in the pudding.²⁴ Care also needs to be taken at this juncture not to make extravagant claims about what P.R.I.M.E. Finance is or should be able to do.

The broad proposition nevertheless advanced by the establishment of P.R.I.M.E. Finance is that it is well and best positioned to address many of the issues outlined in the preceding paragraphs. Put briefly, while state and national courts will always have an important place, P.R.I.M.E. Finance is nevertheless established to fill an international void, alongside those courts.

‘College of expertise’

P.R.I.M.E. Finance will be a permanently available, centralized, multi-linguistic and multi-cultural ‘college of expertise’. P.R.I.M.E. Finance has brought together a group of nearly a hundred ‘experts’ from a range of disciplines, backgrounds and cultures, comprising judges, arbitrators and mediators, specialized lawyers and academics, and market participants. P.R.I.M.E. Finance has drawn up two lists of experts, a list of finance experts and a list of dispute resolution experts.

The ‘college of expertise’ will arbitrate and mediate CFTs disputes. It will also provide expert valuation advice²⁵ and services in relation to CFTs; guidance where necessary to state and national courts hearing a CFTs dispute;²⁶ advisory opinions in relation to CFTs issues and disputes; and judicial training in relation to CFTs. In due course, the ‘college of

24 In the short-term, parties will bring their disputes to P.R.I.M.E. Finance by *ex post* agreement, since dispute resolution clauses drafted into agreements even today that provide for arbitration by P.R.I.M.E. Finance cannot be expected to be used for some years. Some market participants can be expected to adopt a ‘wait and see’ attitude to P.R.I.M.E. Finance. Other arbitral centres can be expected to seek to fill the asserted void that P.R.I.M.E. Finance seeks itself to fill. Those other arbitral centres, however, will have difficulty claiming that ‘their’ arbitrators are CFTs experts.

25 Today, more than ever, regulators need as much certainty and independence as is practically available about the valuation of assets and liabilities of the entities they regulate (eg net and gross exposures for regulatory capital purposes). These valuations often involve complex modelling and mathematics. Is it reasonable to expect that state and national courts, even with the benefit of expert evidence, are well suited to determine CFTs disputes that raise these kinds of valuation issues? P.R.I.M.E. Finance would say that its experts can, for example, readily review the application in particular circumstances of increased cost provisions, and the calculation methodology for financial covenants or margin fixing provisions, in loan agreements. In that loan agreement context also, for example, P.R.I.M.E. Finance would also say that its experts can give guidance to an agent bank in relation to the declaration of an event of default, for example, where the minority banks seek to block a waiver or an amendment.

26 In most jurisdictions, including England and New York, it is considered hard enough to find a judge familiar with and hence confident in his or her knowledge of CFTs, let alone one who is also familiar with and confident in insolvency laws. Nevertheless, insolvency issues present particular problems for P.R.I.M.E. Finance, involving as they often do public policy-based decisions rooted in local insolvency laws, jurisprudence and traditions. In a CFTs world of interrelated and interconnected markets and parties, multi-jurisdictional conflicts of laws issues and competing public policy dictates are common. In these circumstances, it is thought that P.R.I.M.E. Finance is better playing a useful and facilitative role assisting state and national courts. That role may include assisting in or approving the mediation of the dispute, perhaps under a court-mandated mediation procedure. Also, a position or view blessed or stamped beforehand by a P.R.I.M.E. Finance expert or experts is likely to carry weight with a state or national court. A good example of a case that involves deep-rooted insolvency policy matters is *Belmont Park Investments Pty Limited v BNY Corporate Trustee Services Limited and Lehman Brothers Special Financing Inc* [2011] UKSC 38, discussed further below under the heading ‘Conflicting cases between jurisdictions—the *Belmont Park* and the *Metavante* flip clause cases’ (the *Belmont Park* case involved, among other things, the application and relevance of the anti-deprivation rule in a modern commercial

expertise' will be somewhat larger than it was on the launch of P.R.I.M.E. Finance in January 2012.

A key advantage of the 'college of expertise' is its neutrality. Few P.R.I.M.E. Finance experts will be subject to conflicts of interest that currently affect many CFTs disputes in state and national courts. To some extent, therefore, P.R.I.M.E. Finance is likely to foster and develop a problem solving rather than an adversarial culture. Expectations are high that P.R.I.M.E. Finance will reach and promote sensible, market-oriented outcomes, and hence will be better able than some state and national courts to balance legal nicety with commercial reality. Expectations are also high that, as is the case with other specialized arbitral institutions, the specialisms of the P.R.I.M.E. Finance experts will result in efficient resolution of disputes before a P.R.I.M.E. Finance tribunal.

Arbitration of CFTs disputes

The P.R.I.M.E. Finance experts form a pool from which it is intended that parties who wish to bring their disputes for resolution to a P.R.I.M.E. Finance arbitration tribunal can choose as arbitrators of their dispute. P.R.I.M.E. Finance has promulgated its own arbitration and mediation rules. The arbitration rules are based closely on the tried and tested United Nations Commission on International Trade Law (UNCITRAL) arbitration rules, but with some important procedural differences.²⁷ A number of these differences are intended to enable P.R.I.M.E. Finance to act as an administering institution.

context). An irony of this case in this context is that all parties proceeded on the basis that the relevant Lehman Brothers entity was subject to insolvency proceedings in England, when in fact it was not.

27 Under the P.R.I.M.E. Finance arbitration rules:

- (a) potential arbitrators are required to state their impartiality, independence and availability (thus following the practice of other arbitration institutions, including the International Court of Arbitration and the London Court of International Arbitration);
- (b) a P.R.I.M.E. Finance tribunal comprises three arbitrators, unless the parties specify a sole arbitrator; if three arbitrators are to be appointed, each party appoints one and the two arbitrators thus appointed select the presiding arbitrator; sole arbitrators are appointed jointly by the parties or, if the parties cannot agree within 30 days and a party so requests, by the appointing authority following a list-procedure;
- (c) a P.R.I.M.E. Finance tribunal has express power to order interim measures if it finds that it has *prima facie* jurisdiction to decide the claim; these measures include ordering the preservation of assets out of which an award may be satisfied and the preservation of evidence;
- (d) joinder of third parties may be permitted at the request of any party, provided the third party is a party to the arbitration agreement; joinder may be refused if, after taking submissions, the tribunal finds that it would cause prejudice to any party;
- (e) the P.R.I.M.E. Finance rules contain provisions covering the appointment of a tribunal in cases with multiple claimants or defendants, but the rules do not expressly accommodate disputes arising out of multiple agreements;
- (f) the P.R.I.M.E. Finance rules contain provisions not included in the UNCITRAL arbitration rules that are intended to provide for the rapid settlement of urgent disputes, with the consent of the parties:
 - (i) rules providing for expedited proceedings which enable the parties to shorten the timelines set out in the rules themselves;
 - (ii) the appointment of an emergency arbitrator for use by a party in need of urgent provisional measures that cannot await the constitution of a tribunal; where the relevant fees and a deposit are paid, an emergency arbitrator will be appointed within 72 hours; and
 - (iii) for urgent matters, referee arbitral proceedings allowing for an enforceable award within 60 days, provided that the chosen place of arbitration is in The Netherlands; and
- (g) rules expressly permitting: the publication of excerpts from an award without the consent of the parties; the inclusion in P.R.I.M.E. Finance publications of excerpts in an anonymized form; and the publication of an award or an order in its entirety so long as one of the parties has not objected within one month of the receipt of the award.

Seat of arbitration

Also, the seat of the arbitration is intended to be The Hague. However, that is not an invariable rule. The parties are free to choose their own seat. Also, arbitration may of course be held in a place where witnesses and documents are conveniently located, even though the seat of the arbitration may be The Hague or elsewhere. In other words, parties have ready and convenient access to the ‘college of expertise’, wherever they choose to resolve their dispute.

Although The Hague is not a financial centre, it is an attractive centre for arbitration. Its attraction is in part because of its perceived neutrality, not least to parties who do not wish to bring their disputes before other parties’, or sometimes their own, courts. The Hague is increasingly positioning itself as, and is calling itself a, if not the, ‘world legal centre’. The Hague has a substantial legal infrastructure as a result of the various international criminal courts and tribunals, as well as the Permanent Court of Arbitration. P.R.I.M.E. Finance will work closely with the Permanent Court of Arbitration.²⁸ The legal infrastructure in The Hague includes easy access to multi-lingual capabilities and translation services.

Broad themes of competence, predictability and timeliness

The broad themes, therefore, behind the establishment of P.R.I.M.E. Finance are that awards made and opinions given and issued by its experts will lead to a more settled body of law and practice in a CFTs world that needs just that. P.R.I.M.E. Finance is, in broad terms, a form of specialized court, the awards and opinions of which are expected to be competent and predictable, and will be given and rendered in a timely manner.

Enforceability of P.R.I.M.E. Finance awards

The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) is considered to be one of the key advantages of international arbitration. The enforcement of a P.R.I.M.E. Finance arbitration award in a wide range of jurisdictions under the New York Convention is considered to be easier and more effective than is the case with a judgment of a state or national court.²⁹

28 For example, P.R.I.M.E. Finance has made arrangements with the Secretary-General of the Permanent Court of Arbitration, where an appointing authority is required, to provide for the Secretary-General to make appointments based on the P.R.I.M.E. Finance list of arbitrators.

29 *Dallah Real Estate & Tourism Co v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 is an interesting case in this context. This case raised the issue whether and when, in an international arbitration, the court or the tribunal has the power to decide whether the tribunal has jurisdiction, where jurisdiction is in dispute. In this case, Dallah entered into an agreement with a trust established by the Government of Pakistan to build accommodation. The agreement provided for international arbitration in Paris. The trust later ceased to exist. For that reason, Dallah commenced arbitration proceedings against the Government of Pakistan, the Government having promoted the accommodation project in the first place. The arbitral tribunal determined that it had jurisdiction over the Government of Pakistan even though the Government was not a party to the agreement. The tribunal did so on the basis that the Government of Pakistan was, to all intents and purposes, a party to the agreement with Dallah. Dallah sought to enforce the award in England. The New York Convention permits an arbitral award to be enforced more easily in countries that are party to the New York Convention than a court judgment. However, the New York Convention contains narrow exceptions that allow a court to refuse to enforce an award. These exceptions relate to fundamental principles in an arbitration: whether the tribunal has jurisdiction, whether the arbitration procedure accords with due process, whether there has been a breach of public policy and whether the arbitration agreement is invalid. It is settled that the tribunal has power to decide whether it has jurisdiction under the globally recognized doctrine called competence competence (ie the tribunal has competence to decide its own competence). The question in this case was how far the court should defer to the tribunal’s prior determination that it had

The wider case for arbitration, as opposed to litigation, is hardly new, at least in relation to disputes not involving CFTs. Both that wider case and the contrary are canvassed elsewhere.³⁰

Transparency of P.R.I.M.E Finance awards

It is often said that a key advantage of litigation in state and national courts over arbitration is the transparency of the dispute and the publication of the judgments, and hence the advantage of available precedent. In contrast, arbitration, as a more private party-to-party process, does not readily lend itself to transparency and precedent. P.R.I.M.E. Finance intends to deal with this by publishing awards and advisory opinions, where appropriate and where agreed with the relevant parties, if necessary on a suitably redacted basis.³¹ This is only a partial solution.³² Nevertheless, although the publication of awards is somewhat novel in international (and financial) arbitration, the publication of P.R.I.M.E. Finance awards is expected to be an important aspect of its broader appeal.

Information systems and library

Finally, P.R.I.M.E. Finance intends in due course to become a centre of information excellence in the CFTs world. P.R.I.M.E. Finance intends to establish a CFTs-driven dispute resolution specialist library and information centre that draws on databases from a range of legal and financial markets, and that contains reference works (books, periodicals, etc) that are relevant to P.R.I.M.E. Finance's business. P.R.I.M.E. Finance intends also in due course to develop its own database that analyses and contains articles and comment, etc., on a range of CFTs and finance and market cases and issues worldwide.

2. P.R.I.M.E. Finance cases

Against that background, what, then, are 'P.R.I.M.E. Finance cases', cases that raise disputes that a properly constituted P.R.I.M.E. Finance tribunal is suited to resolve? This article addresses that question in the context of a range of issues that have arisen recently and principally in the English courts. Those cases are a measure of the sort of CFTs disputes that arise. The manner in which those courts have resolved those disputes sheds

jurisdiction or whether it should conduct a full rehearing of the issue. The Supreme Court held that, when a party (here, the Government of Pakistan) disputes whether it is a party to an arbitration agreement at the enforcement stage, the final word on the issue lies with the court, and not with the arbitral tribunal. Moreover, the court must conduct a full rehearing of the tribunal's decision, and not a limited review.

30 In broad terms, the advantages of arbitration over local litigation are said to be: the neutrality and specialization of the tribunal; the relative speed of the arbitration process; the finality of the award and the limited grounds on which an award can be challenged; the enforceability of an award under the New York Convention; and the confidentiality of the arbitration proceedings and the award. See, for example, KP Berger, 'The Aftermath of the Financial Crisis: Why Arbitration Makes Sense for Banks And Financial Institutions' (2009) 3(1) *Law and Financial Markets Review* 54–63; and the ISDA January 2011 Arbitration Memorandum. See, also, PR Wood, *International Loans, Bonds and Securities Regulation* (Sweet & Maxwell 1995) at paras 5–57; G Kauffman-Kohler and V Frossard (eds), *Arbitration in Banking and Financial Matters* (Kluwer Law International 2003).

31 Anecdotal evidence suggests that some 90 per cent of OTC derivative transactions have a major international bank or financial institution as at least one party. Since many of the parties to these transactions are based in non-English-speaking jurisdictions, P.R.I.M.E. Finance will need to translate its experts' awards and opinions.

32 See paragraph (g) of n 27 above.

light on the role P.R.I.M.E. Finance can play on the CFTs dispute resolution stage. What follows is not intended to be an exhaustive review of recent case law.³³ Rather, the intention is to outline some themes that may be derived from some recent cases and to consider whether as a result the disputes that give rise to those cases are in principle disputes that a P.R.I.M.E. Finance tribunal may resolve.

Jurisdiction cases

A convenient starting point is what might be called the ‘jurisdiction cases’.³⁴

A feature of recent CFTs cases in the English courts is the number of them in which one of the parties has raised the preliminary question of which court has jurisdiction to hear the dispute.³⁵ On one estimate, some 16.4 per cent of decisions in the English Commercial Court in 2010 were ‘jurisdictional disputes of one form or another’.³⁶ One can reasonably expect that figure is somewhat higher, and possibly substantially higher, in the case of CFTs disputes. CFTs disputes are more likely than other Commercial Court cases to have a cross-border, and hence multi-jurisdictional, element. A recent report says that 81 per cent of all commercial cases in the English courts involve at least one foreign-domiciled party.³⁷ Indeed, most commercial disputes in London involve one or more foreign parties, or foreign laws, foreign assets, parallel foreign proceedings or acts or omissions abroad—often in combination.³⁸

Should we be surprised that the question of jurisdiction raises its head so frequently and that parties should seek to escape a bargained-for jurisdiction clause? Experience tells us that we should not. Yet those responsible for the drafting of the underlying contract that gives rise to the dispute would likely be surprised. They would be surprised because, in prospect, the question of jurisdiction is not typically one that is the subject of substantial negotiation, once the sometimes thorny issue of choice of law has been agreed. Contracts that give rise to CFTs disputes, such as the ISDA Master Agreement and similar

33 For example, cases involving valuations or expert evidence are not considered, for economy’s sake, although these cases are in principle P.R.I.M.E. Finance cases. See *Royal Bank of Scotland PLC v Highland Financial Partners LP and others* [2010] EWHC 3119 (Comm) (the bank, as mortgagee, sold loan assets pursuant to a sham auction process in breach of the bank’s equitable and contractual obligations; the judge, ‘doing the best I can’ (at para 61), provided guidance to the parties on how the valuation of the assets sold should have been made); and *WestLB AG v Nomura Bank International PLC and Nomura International PLC* [2010] EWHC 2863 (Comm) (the bank acted irrationally but not dishonestly in valuing an investment fund; however, the plaintiff did not prove that it had suffered loss). Both these valuation cases, to the extent that they raise issues in contract rather than equity, involve little or no reference to authority. (Both these cases also suggest a fruitful paper for another day that involves a review of cases in which bankers, as well as bank witnesses, have behaved badly.)

34 These jurisdiction cases are also interpretation or construction cases. See Collins LJ in *UBS AG v HSH Nordbank AG* [2009] EWCA Civ 585, at para 95: ‘Whether a jurisdiction clause applies to a dispute is a question of construction’.

35 In *Berliner Verkehrsbetriebe (BVG) Anstalt Des Öffentlichen Rechts v JP Morgan Chase Bank N.A. and JP Morgan Securities Ltd* [2010] EWCA Civ 390, Aikens LJ in the very first paragraph says the following: ‘Credit default swap arrangements are giving rise to litigation again. As is so often the case in commercial disputes, the first battle is over jurisdiction’.

36 Allen and Overy Litigation Review, 16 June 2011, ‘ECJ provides clarification on Article 22(2) Brussels Regulation’, discussing the European Court of Justice decision arising out of the jurisdiction dispute in the *BVG v JP Morgan* case referred to in the previous footnote.

37 *The Times*, 10 April 2012.

38 Fentiman, ‘Guest Editorial: Fentiman on “Private International Law and the Downturn”’, 11 May 2010, at <<http://conflictoflaws.net/2010/guest-editorial-fentiman-on-private-international-law-and-the-downturn/>> accessed 22 February 2012.

market standard agreements, typically contain familiar, and understood, choice of law³⁹ and irrevocable submission to exclusive, and sometimes non-exclusive, jurisdiction,⁴⁰ as well as related waiver, clauses that are widely regarded as boilerplate. Moreover, the submission to jurisdiction is mutual. Often, of course, neither party is domiciled or incorporated in the jurisdiction that is chosen.

What, then, is the difficulty with a freely bargained-for irrevocable submission to an exclusive jurisdiction clause? The short answer is that many counterparties have, with hindsight and, some might say, opportunistically, found difficulties with the bargain they have struck. They have raised a range of forum-shopping-type arguments as a result, the broad thrust of which tends to be to bring the dispute before their own state or national court on the likely but unstated basis that a more sympathetic hearing can be expected. They may also, of course, be gaming the other party or parties to their dispute or the court for a range of litigation-based and other reasons.

Unsurprisingly, in the face of a bargained-for irrevocable submission to an exclusive jurisdiction clause, the English courts have carefully avoided having anything to with those counterparties and those arguments. Those courts have been right to do so.

Ultra vires jurisdiction cases

Ever since the *Hazell v Hammersmith and Fulham London Borough Council*⁴¹ line of local authority swap cases, not to mention before,⁴² the ultra vires issue has been well telegraphed to and by banks, statutory or municipal entities, and their advisers. Steps

39 See, for example, s 13(a) of the 2002 ISDA Master Agreement: 'This Agreement will be governed by and construed in accordance with the law specified in the Schedule'. It is thought that the preponderance of ISDA Master Agreements worldwide are governed by English or New York law.

40 See, for example, s 13(b) of the 2002 ISDA Master Agreement, which many consider could hardly be more clear:

With respect to any suit, action or proceedings relating to any dispute arising out of or in connection with this Agreement ("Proceedings"), each party irrevocably:

- (i) submits:-
 - (1) if this Agreement is expressed to be governed by English law, to (A) the non-exclusive jurisdiction of the English courts if the Proceedings do not involve a Convention Court and (B) the exclusive jurisdiction of the English courts if the Proceedings do involve a Convention Court; or
 - (2) if this Agreement is expressed to be governed by the laws of the State of New York, to the non-exclusive jurisdiction of the courts of the State of New York and the United States District Court located in the Borough of Manhattan in New York City;
- (ii) waives any objection which it may have at any time to the laying of venue of any Proceedings brought in any such court, waives any claim that such Proceedings have been brought in an inconvenient forum and further waives the right to object, with respect to such Proceedings, that such court does not have jurisdiction over such party; and
- (iii) agrees, to the extent permitted by applicable law, that the bringing of Proceedings in any one or more jurisdictions will not preclude the bringing of Proceedings in any other jurisdiction.

41 [1992] 2 AC 1.

42 The 'before' here may be lost on a modern generation of derivatives and banking law specialists and market participants. An interesting subtext to these now 20-year-old local authority swap cases is that many of the banks at the time the swaps were first entered into are believed to have been advised of and received formal opinions on, as likely were and did the local authorities themselves, the ultra vires risk. On one view, the banks took a view of the ultra vires risk that in some cases sheeted home. On another view, the local authorities, knowing as some did that the banks were taking that risk and having perhaps themselves taken a view, took opportunistic advantage of the banks when their swaps became disadvantageous or out-of-the-money. Both views are likely correct. Quite another way of viewing the ultra vires issues that have recently arisen, of course, is that history is more than capable of repeating itself, as one generation moves on.

were taken in many jurisdictions in the mid- to late 1990s to legislate away the issue by enacting laws and promulgating regulations to the broad effect that the particular statutory or municipal entity has express power or capacity to enter into a wide range of derivatives and other transactions. That power or capacity is, in many cases, subject to certain restrictions such as, for example, that the transaction in question not be entered into for speculative purposes or that the transaction be duly authorized.

Put another way, ever since the early 1990s at the latest, best practice for a bank or financial institution entering into a CFT with a statutory or municipal entity has been to receive an appropriate capacity and authority, and hence enforceability, opinion from, if not also counsel to its statutory or municipal counterparty, then at least from its own local counsel. In many cases, both sides' local counsel address their opinion to the bank or financial institution. The ultra vires issue, and its background, is well and truly known and understood, at least in the major financial markets.⁴³

That being so, it might be hoped, if not expected, that the Commercial Court judges in England are only too well aware of the issue and its background.⁴⁴ That being so also, it is reasonable to suppose that those judges would be disposed not to allow what likely appears to be an opportunistic statutory or municipal entity to succeed on a jurisdiction-based argument that its national or state court is the proper forum to hear the dispute.⁴⁵

*Berliner Verkehrsbetriebe Anstalt Des Öffentlichen Rechts v JP Morgan Chase Bank N.A. and JP Securities Ltd*⁴⁶ is a typical example of the jurisdiction issue in the ultra vires

43 Well and truly known and understood the issue may be, but the capacity issue must still be accurately and correctly addressed. In *Haugesund Kommune and Narvik Kommune v Depfa ACS Bank* [2010] EWCA Civ 33, a bank proposed to enter into swap transactions with two Norwegian municipal counterparties (the Kommunes). The bank unsurprisingly asked a 'well-known and highly respected firm of lawyers in Norway' (at para 10) to render an opinion on the very question of the capacity of the municipalities to do so. This was the only question on which the bank sought Norwegian legal advice. The lawyers advised in unqualified terms that the municipalities had full capacity. The lawyers also advised the bank that, under Norwegian law, a claim against a Norwegian municipality cannot be enforced and that no execution, bankruptcy or debt proceedings may be initiated against it. The bank was prepared to take this enforcement risk, 'undoubtedly' taking the view that the municipalities were 'honourable, respectable and creditworthy counterparties' (at para 10). It was held that the municipalities lacked the 'substantive power' under Norwegian law to enter into the swaps. This lack of 'substantive power' was characterized in English legal terms as a lack of capacity. Hence, the swaps were void. (The bank was nevertheless entitled in restitution to the capital sums advanced together with interest. The municipalities were not entitled to rely on a defence of change of position.) It was also held that the Norwegian lawyers' advice was negligent and that they were liable to the bank for damages. One of the issues that therefore fell to be decided on appeal was the extent to which the lawyers were liable to the bank, without the bank necessarily looking first or otherwise to the municipalities, and whether the bank's loss was attributable to the invalidity of the swaps. It was held that the Norwegian lawyers were not responsible for the bank's loss: the lawyers were not responsible for the loss relating to the bank's enforcement and credit risks.

44 Whether or not those judges are aware of the issue and its background is not evident on the face of the cases discussed in the following paragraphs. Whether or not judges in many other jurisdictions are aware of the issue and its background is a matter of conjecture.

45 It is also reasonable to suppose that those judges would not be disposed to let that statutory or municipal entity escape its bargain where that bargain has, in the event, not been financially advantageous. Needless to say, bankers are opportunistic too. Notwithstanding a world in which legal compliance is a market byword for prudence and professionalism, it may be true that, in some cases, the bank or financial institution did at the outset take a view of the ultra vires risk. The truth probably lies at either end of the spectrum and at places in between. See also *Haugesund Kommune and Narvik Kommune v Depfa ACS Bank* [2010] EWCA Civ 33.

46 [2010] EWCA Civ 390 (CA). See to the same effect also *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2010] EWHC 2566 (Comm) (English proceedings for declarations regarding the validity and enforceability of a swap agreement and portfolio management agreements were not likely to be 'principally concerned with' the validity of the decisions of the organs of the defendant German company which would lead to the German courts, under art 22(2) of the Judgments Regulation, having exclusive jurisdiction); *Calyon v Wytwonia Sprzetu Komunikacyjnego PZL SA* [2009] EWHC 1914 (Comm) (the Polish corporate counterparty issued proceedings in Poland for recovery of sums paid to the bank under a foreign exchange derivatives transaction

context. In this case, in which the bank claimed some US\$112 million, BVG alleged that an English-law governed credit default swap to which it and JP Morgan were counterparties was ultra vires, or beyond power. BVG argued, based on Articles 22 and 25 of Council Regulation (EC) No 44/2001 (the Judgments Regulation), that the ultra vires issue fell to be determined under German law, that being the law of its incorporation. Article 22(2) provides that, if proceedings before a court have as their object the validity of decisions of the 'organs' of a company, then, notwithstanding a contractually agreed exclusive jurisdiction clause, the courts of the Member State where the company has its seat (BVG has its seat in Germany) have exclusive jurisdiction. Article 25 provides that, where a court (here, the English court) is seized of a claim that is 'principally concerned with' a matter over which the courts of another Member State (here, Germany) have exclusive jurisdiction, then that court must declare that it has no jurisdiction.

In the *BVG v JP Morgan* case, the Court of Appeal held that, while the ultra vires issue was important, because it might be dispositive of the proceedings, the proceedings were not 'principally concerned with' the ultra vires issue, this being the requisite test under Article 25. The ultra vires issue could not be isolated from the other issues. For example, BVG also alleged both mis-selling by JP Morgan and that JP Morgan had given it poor advice at the time. The Court of Appeal accordingly characterized the proceedings as being 'principally concerned with' the validity of the credit default swap and whether JP Morgan could enforce its rights under it. Ultra vires was not the focus of the proceedings as a whole. The correct interpretation of Article 22(2) required the court to make an overall judgment under Article 25 whether the proceedings were 'principally concerned with' one of the matters set out in Article 22(2). The claim was principally concerned with the non-payment of the swap. The ultra vires argument was but one possible defence to that claim.

BVG appealed to the Supreme Court. The Supreme Court referred the issue to the European Court of Justice. Independently of the English proceedings and subsequent to the filing of those proceedings, BVG had itself filed proceedings in Germany. The German proceedings, on appeal in Germany, were also referred to the European Court of Justice. In those latter proceedings, the European Court of Justice in effect agreed with the decision in the English Court of Appeal, saying that:⁴⁷

in a dispute of a contractual nature, questions relating to the contract's validity, interpretation or enforceability are at the heart of the dispute and form its subject-matter. Any question concerning the validity of the decision to conclude the contract, taken previously by the organs of one of the companies

on the ground that the person acting on its behalf had no authority to enter into an agreement subject to the ISDA Master Agreement; the course of dealing between the parties established that there had been fair and sufficient notice that a further transaction would also be subject to the jurisdiction of the English courts; the Judgments Regulation applied to confer exclusive jurisdiction on the English courts because the question of authority was only one of the questions that fell to be decided; and *Standard Chartered Bank v Ceylon Petroleum Corporation* [2011] EWHC 1785 (Comm) (defences raised by the defendant Sri Lankan state oil company, in English proceedings and in a non-jurisdictional context, of lack of capacity and authority to enter into allegedly speculative oil derivatives, and of illegality under Sri Lankan law of it making payments to the bank in the face of a direction from the Sri Lankan central bank, were dismissed).

⁴⁷ [2011] EUECJ C-144/10, 12 May 2011.

party to it, must be considered ancillary. While it may form part of the analysis required to be carried out in that regard, it nevertheless does not constitute the sole, or even the principal, subject of the analysis.⁴⁸

In other words, this was not a case about the validity of a ‘decision’ of an organ of a company, but rather a case about the validity of a ‘contract’. Article 22(2) did not catch that contract. While the European Court of Justice did not deal with the Supreme Court’s reference, BVG as a result of the European Court of Justice decision has not sought to continue its jurisdiction argument in the Supreme Court.

*Depfa Bank PLC v Province di Pisa; Dexia Crediop S.p.A. v Province di Pisa*⁴⁹ is a similar case. In this case, two banks sought declaratory relief against the Province of Pisa, an Italian local authority, under two interest rate swaps, including in particular that the swaps were valid and binding. The swaps were documented under the ISDA Master Agreement 1992, which contained the then-ISDA-standard English governing law and jurisdiction clauses. The Province of Pisa only challenged the swaps when it became apparent, in the case of the final payment, that it was out-of-the-money and hence would need to make a payment to the banks. As did BVG, the Province of Pisa challenged the jurisdiction of the English court on the ground that, because the swaps were allegedly ultra vires, the actions were, under Article 22(2) of the Judgments Regulation, ‘principally concerned with’ matters over which the Italian courts have exclusive jurisdiction. After the banks issued proceedings in England, the Province of Pisa subsequently issued executive (ie, governance-related) decisions that purported to revoke a number of decisions taken at the time that the swaps were entered into. Public law powers under Italian law purportedly entitled the Province of Pisa to exercise a right of self-redress. It issued proceedings in Italy accordingly.⁵⁰

The banks argued that the court should be alive to the risk of an applicant such as the Province of Pisa displaying only part of its hand in order to wrest jurisdiction away from the contractually chosen forum in favour of its home court. The Province of Pisa sought to characterize the Italian proceedings as only about ultra vires, but appeared in due course also to wish to allege non-disclosure and mis-selling. The Province of Pisa also alleged that the true cost of the swaps had not been disclosed to it at the time. While the judge accepted that the Province of Pisa had a good arguable case of ultra vires based on it exceeding its powers, he also accepted that the Province of Pisa’s case would include those wider issues. For that reason, the judge held that the proceedings were not likely to be ‘principally concerned with’ the validity of the decisions of the Province of Pisa and hence ultra vires. While that was an important issue, it was not of itself a decisive issue because of the wider issue of the validity and enforceability of the swaps. Moreover, there

48 Were this not the case, the European Court of Justice said that many, if not most, proceedings brought against a company would fall under the jurisdiction of the courts of the Member State in which the company has its seat.

49 [2010] EWHC 1148 (Comm).

50 The Italian court in due course upheld the banks’ argument that the English court had exclusive jurisdiction, by virtue of the bargained-for exclusive jurisdiction clause in the applicable ISDA Master Agreement (the 1992 version): Judgment No 6579 of 11 November 2010. Only the English court should be considered competent to assess questions of the contractual arrangements between the parties.

was an obvious difficulty in identifying, at an early stage in the proceedings, that with which the proceedings were principally concerned. The judge accordingly refused to decline English jurisdiction.

Non-ultra vires jurisdiction cases

To some extent, the ultra vires cases are straightforward. The ground on which jurisdiction is challenged (ultra vires) is relatively self-contained. But, in the CFTs world, the ultra vires line of cases is but the tip of a jurisdiction iceberg. That there should be such an iceberg is hardly surprising. We do not need a global financial crisis to tell us that parties to cross-border transactions, or to transactions governed by a law different from their own domicile, are disposed to raise the question of jurisdiction.

Many pairs of contractual parties enter into several contracts, including ISDA Master Agreements and other ISDA agreements, with different governing law and jurisdiction clauses. Some of the jurisdiction clauses are exclusive, some non-exclusive. Many transactions, particularly structured finance transactions, involve multiple agreements and multiple parties domiciled in different jurisdictions. A number of the transaction agreements are often governed by different laws. In those circumstances, a single transaction often involves agreements that contain submissions to the exclusive or non-exclusive jurisdiction of different courts. Some aspects of the parties' relationship are naturally governed by one law rather than another. This does not preclude them choosing exclusive jurisdiction clauses. Further, a bank may operate in different markets through one or more branches in those markets. As a result, a global customer of the bank, despite best intentions or documentation policies otherwise, can reasonably be expected to enter into different agreements, or even the same agreement, with different branches in different jurisdictions that contain different choice of law and jurisdiction clauses. A dispute between the two parties may, and often does, arise under more than one of these agreements.

Needless to say, therefore, multiple and parallel proceedings are not only possible, they are also likely. The risk of inconsistent decisions is writ large.⁵¹

Two recent cases illustrate how jurisdictional issues can arise in a non-ultra vires context. First, in *Deutsche Bank AG v Sebastian Holdings Inc*,⁵² the Court of Appeal,

51 See *Donoghue v Armco Inc and others* [2001] UKHL 64, where it was said that there could be a stay in the interests of justice, despite an exclusive jurisdiction clause, where there were 'strong reasons for not giving effect to' it (per Lord Bingham, at paras 36 and 24). Those strong reasons might include where the interests of the parties not bound by the jurisdiction clause might be involved or where there was a dispute arising outside the contract where there was a risk of 'parallel proceedings and inconsistent decisions' (per Lord Bingham, at para 27). Of course, the risk of inconsistent decisions is not always a multi-jurisdictional one: it can happen between judges in a particular court. See *Rawlinson & Hunter Trustees SA v Kaupthing Bank HF* [2011] EWHC 566 (Comm) and *Lornamead Acquisitions Limited v Kaupthing Bank HF* [2011] EWHC 2611 (Comm). Both of these cases raised the issue whether claims made in England against an Icelandic bank, Kaupthing Bank, should be decided in the English courts or in the Icelandic courts. Kaupthing Bank was subject to certain insolvency orders and proceedings in Iceland. Burton J in the *Rawlinson* case held that the English courts had jurisdiction, on the broad basis that the English proceedings had been commenced prior to the relevant Icelandic insolvency proceedings. Gloster J in the *Lornamead Acquisitions* case, faced with what was in effect the same jurisdictional issue, said (at para 56) that:

I have concluded that, in the interests of judicial comity, and deployment of judicial resources, the appropriate course is for me to say that, despite my doubts, I am not 'convinced' that Burton J was wrong and that, accordingly, I should follow his decision.

52 [2010] EWCA Civ 998.

following *Fiona Trust Holding Corp v Privalov*,⁵³ said that jurisdiction clauses must be construed broadly. Parties to multiple agreements do not expect their disputes to be litigated or determined by different tribunals. However, where there are multiple related agreements, the courts will look to the intention of the parties as revealed by the agreements against those general principles. It will be relevant, for example, that agreements may have been entered into not as part of one overall transaction (for example a CFT such as a CDO, which typically involves multiple agreements) but rather over a relatively long period. The Court of Appeal rejected the so-called ‘commercial centre’ approach.⁵⁴ In *Sebastian Holdings*,⁵⁵ it was clear that the parties contemplated different proceedings under their arrangements. However, where the agreements are closely related in time, the ‘commercial centre’ approach may apply.

Secondly, in *Deutsche Bank AG v Tongkah Harbour Public Co Ltd*,⁵⁶ similar issues arose in relation to a series of agreements that provided for optional arbitration and for litigation. In this case, the issue was whether Deutsche Bank, as a party to related agreements containing optional arbitration clauses, could choose to litigate under one agreement and simultaneously arbitrate under the other. Deutsche Bank argued that its different divisions (Amsterdam and London) involved in the relationship with its customer took different views of arbitrating or litigating. The court, following *Fiona Trust*,⁵⁷ said that Deutsche Bank was one contracting entity and the different divisions were irrelevant.

Jurisdiction and P.R.I.M.E. Finance

The preceding discussion of recent jurisdictional cases is some proof positive of the propensity for non-UK-domiciled parties to CFTs to seek refuge in proceedings in their own state or national courts. Saying that those parties do not have confidence in the English courts is to draw far too long a bow. Nevertheless, it appears, anecdotally, that there are many proceedings arising out of CFTs currently before foreign courts that have as their subject matter English law-governed agreements that contain submission to English law clauses.

Should this surprise us? In a CFTs dispute resolution world, where the sums at stake are large, where many of the claims made are debt or quantum claims and hence where delay can be a friend to the debtor, and where a party’s local court is likely or at least is

53 [2007] UKHL 40.

54 See *UBS AG and UBS Securities LLC v HSH Nordbank AG* [2009] EWCA Civ 585, a case arising out of an issue of securities under a CDO transaction. None of the contracts out of which the dispute arose contained a submission to the jurisdiction of the English courts. HSH accordingly argued that the English court had no jurisdiction under the Judgments Regulation. However, UBS argued that the dispute arose from or ‘in connection with’ contracts forming part of the overall transaction and that these contracts contained exclusive English jurisdiction clauses. In particular, UBS argued that an exclusive English jurisdiction clause in a dealer’s confirmation applied to the dispute. This confirmation related to bonds that HSH issued in return for its acquisition of the CDOs. Collins LJ, delivering the leading judgment, said that, where there are multiple agreements with competing jurisdiction clauses, the essential task is to construe the jurisdiction agreement in the light of the transaction as a whole. This requires looking at the intention of the parties as revealed by the separate agreements. Where the jurisdiction clauses overlap, the assumption is that the parties would not intend similar claims to fall within the scope of those inconsistent jurisdiction clauses. In a complex transaction, such as a CFT, it was said that the parties will have intended the jurisdiction clause in the agreement that is the ‘commercial centre’ of the transaction to apply to the dispute. This case can also be regarded as an interpretation or construction case.

55 [2010] EWCA Civ 998.

56 [2011] EWHC 2251 (QB).

57 [2007] UKHL 40.

thought to be likely to be sympathetic to that party's claim, it is not surprising that foreign parties should engage in gaming behaviour. It is also not surprising that the English courts should have little time for this behaviour. What is tolerably clear, however, is that, in the multi-party, multi-jurisdictional, cross-border world of CFTs, we can expect jurisdiction disputes to continue to be prominent. For this reason, P.R.I.M.E. Finance's arbitration rules contain provisions intended to provide for the better resolution of multi-party disputes.

What, then, can and should P.R.I.M.E. Finance do in these circumstances? It may be that a bank that potentially faces delaying litigation in a non-English (eg European) court, perhaps because in terms of the Judgments Regulation it is the forum first seized of the dispute, will be favourably disposed to a P.R.I.M.E. Finance tribunal resolving the dispute. Its counterparty may be likewise so disposed, since it runs the risk that its own court may decline jurisdiction. P.R.I.M.E. Finance offers the many parties to CFTs who are not based in London or New York the possibility of hearing their dispute in their own or a neutral jurisdiction, instead of having to litigate in London or New York. P.R.I.M.E. Finance also offers those parties the ability to appoint an expert tribunal as opposed to the more random judicial allocation process, over which the parties have no control. How substantial these advantages are only time will tell. Perhaps the most that can be said at this early juncture is that the question of jurisdiction is an ever-present one and that P.R.I.M.E. Finance should in principle be able to give CFTs parties considerable comfort that their disputes, including multi-party disputes, can be heard and resolved efficiently, cost-effectively and with certainty by arbitrators drawn from its 'college of expertise'.

P.R.I.M.E. Finance will not be required to resolve any dispute unless the parties to the dispute have agreed, either by way of a pre-existing arbitration clause in an applicable agreement between them, or *ex post*, that their dispute may or will be resolved by a P.R.I.M.E. Finance tribunal. It may be that a party that has raised a jurisdictional issue may be persuaded by the other party or parties to the dispute to drop that issue on the basis that the both or all parties submit to the jurisdiction of a P.R.I.M.E. Finance tribunal.

Interpretation cases

An unsurprising number of CFTs disputes raise issues of interpretation: of the CFT documentation itself, as well as of relevant statutes and regulations. Many of these disputes do not raise many or even any disputed facts. Several recent CFTs cases in the English courts were decided on the basis of agreed or assumed facts, under an expedited Part 8 procedure.

Why, then, is there such an apparent difficulty with what one might call 'interpretation' cases, and CFT interpretation cases in particular? Asked another way, if, as is often said, there is no dispute about the rules of interpretation, if CFTs are typically lightly negotiated, if at all, by specialists, and if CFTs are typically documented by way of standardized market agreements and boilerplate provisions, why is 'interpretation' an issue at all?

Part of the answer to that broad question lies in the fact that, while judges may and do say that ‘there is no dispute’⁵⁸ about the principles to be used in the interpretation of contracts or that those principles are ‘not controversial’,⁵⁹ the act of interpretation itself is disputed and can be controversial. Recent cases in the English courts, discussed in the following paragraphs, are good examples of these difficulties.

Part of the answer to that question also lies in market familiarity with and understanding of the documentation for, and structure of, many CFTs and hence in market expectations about what a particular CFT agreement or provision means. We should not be surprised that a broad market consensus and understanding about the meaning and intent of many CFTs agreements and provisions should spill over into a concern about that meaning or intent (a) in the face of a judicial decision that does not support that consensus or understanding, or (b) and worse, in the face of conflicting judicial decisions about that meaning or intent. Market confidence is a precious metal. Confidence in the ability and knowledge of state and national courts, when faced with a CFT dispute that has market implications, to interpret standardized market agreements clearly, certainly and predictably is also precious. This concern and this (lack of) confidence today in large measure explain the background to the establishment of P.R.I.M.E. Finance. One of the key aspects of the establishment of P.R.I.M.E. Finance is whether we have reached a point where we need a theory and a practice of contract interpretation, if not jurisprudence, that best suits the interpretation of market standard agreements, used as they are in markets and jurisdictions worldwide.

Part of the answer to that question further lies in the fact that, in the case of market standard agreements such as the ISDA Master Agreement, the tension between relative brevity and the need to draft an agreement that is effective or ‘works’ in a range of jurisdictions as well as under two governing laws, the laws of England and Wales and of the State of New York, means that compromise is inevitable. Where substantial sums are at stake, and in times of market stress, ambiguity may also be said to be inevitable. Parties may be expected to look for ambiguity in their contracts.

Finally, because CFTs agreements are complex and specialized, the risk that a non-specialist or a junior draftsman will make a drafting mistake is ever-present. This risk arises, for example, because the commercial terms of the actual transaction need to be drafted, because that transaction may be unusual or uncommon and because drafting elections need to be made. For this reason, it may be expected that a reasonable number of CFTs agreements are poorly if not wrongly drafted. When the harsh light of hindsight

58 See, for example, Lord Clarke in *Rainy Sky S.A. and others v Kookmin Bank* [2011] UKSC 50, at para 14: ‘For the most part, the correct approach to construction of the Bonds, as in the case of any contract, was not in dispute.’ See, also, Lord Hoffman in *Chartbrook Limited & another v Persimmon Homes Limited & another* [2009] 1 AC 1011 at para 14: ‘There is no dispute . . . [about] the principles on which a contract (or any other instrument or utterance) should be interpreted . . .’.

59 ‘The approach to the interpretation of commercial documents of this kind [the ISDA Master Agreement] is not controversial’: *Pioneer Freight Futures Company Limited (in liquidation) v TMT Asia Limited* [2011] EWHC 1888, at para 27 (Gloster J). Needless to say, and notwithstanding that the ‘approach to . . . interpretation . . . is not controversial’, she disagreed with an interpretation of S 2(a)(iii) of the ISDA Master Agreement by Flaux J in both *Marine Trade SA v Pioneer Freight Futures Co Ltd* [2009] EWHC 2656 (Comm) and *Pioneer Freight Futures Co Ltd v COSCO Bulk Carrier Co Ltd* [2011] EWHC 1692 (Comm).

is thrown on some of the provisions in these agreements, some sense needs to be made of the ambiguities, not to mention sometimes the nonsense.

Before outlining some of the interpretation cases that have recently arisen in the English courts, a digression by way of background into the market familiarity with and understanding of CFTs and into the interpretation of CFTs agreements is helpful.

Market familiarity with and understanding of CFTs

In a world in which many CFTs are documented by way of familiar market standard agreements, in which a large number of provisions are considered boilerplate, it is inevitable that a broad market understanding or consensus will build regarding the meaning or interpretation of these agreements and these provisions. This understanding or consensus is partly a result of repeated familiarity and usage in a large number of transactions and context. It is also partly a matter of drafting and refinement by many hands, over a considerable period of time. It is further in part a result of the spilling of a great deal of legal ink over that time on the legal effectiveness and enforceability of many provisions and types of transaction. Market standard agreements were developed and refined again and again over the past 25 years and more by way of a series of considered and careful, as well as impressive, steps. Documents and individual provisions were analysed in detail by specialist lawyers, leading counsel and market experts in many jurisdictions. But those documents and provisions have not been substantially tested in state or national courts, or at least those that have been tested are few and far between.

Market standard agreements are entered into day-in and day-out by parties in a wide range of jurisdictions and markets without substantial modification—or, more accurately, the boilerplate or non-financial or non-economic terms are not substantially modified. Many CFTs therefore require or are the subject of little negotiation and hence are documented on the same terms, with small variations here and there. In many cases, the documentation of CFTs involves a series of documentary building blocks—the final building that comprises the completed CFT is built substantially from familiar and relatively standardized agreements, provisions and documents. Agreements and provisions used in one CFT in one jurisdiction are commonly borrowed for use in another CFT in another jurisdiction. A suite of securitization agreements in New South Wales is not radically different from one in Hong Kong or New York. A bond issue made by an issuer in Europe is not radically different from one made by an issuer in California.

The practice of law, and the documentation of transactions and the resolution of underlying legal issues, in international financial markets has accordingly become increasingly uniform and standard. Many clients and lawyers practising in the international markets feel able to document or at least negotiate CFTs in a law other than their own domestic or local law, and often in a language—English—that is not their own. They also do not feel the need to instruct English or New York local counsel to document or even give an opinion on an English or New York law-governed market standard agreement. Much of the legal work is often done by teams of highly specialized lawyers working in-house at banks and financial institutions.

Moreover, many CFTs are entered into by parties who neither had nor sought to have any input into the drafting or negotiation of substantial and material parts of their market standard agreements. When a premium is placed on efficient, timely and cost-effective completion of transactions, and not just CFTs, those responsible for completing them naturally look to the nearest or latest legal precedent. Bankers may be responsible for considerable innovation in CFTs, but, by and large, with exceptions, lawyers reach for the familiar and the trusted. To some extent, it does not matter whether both or all parties are sophisticated or one of more of them is not. Sophisticated parties believe they understand CFTs and their documentation and hence do not consider it necessary to negotiate substantial modifications. It is not cost-effective to do so. Where one of the parties is unsophisticated, or does not, say, speak English—English being the language in which a large proportion of CFTs are documented worldwide—that asymmetry of sophistication and language often also means that there is no negotiation of any modifications.

Interpretation of CFTs agreements

A considerable amount of legal ink has been spilled on theories of the interpretation of contracts.⁶⁰ This article is not the place to enter into an extended discussion of those theories in different jurisdictions or even in one jurisdiction. However, some observations are necessary in view of the discussion that follows of conflicting CFTs cases both within a particular jurisdiction and between jurisdictions.

The heart of the problem lies not so much in the principles by which a contract is to be interpreted but in the nature and act of interpretation itself. It is not hard, for example, to find a judge who says something along the lines of the following:⁶¹

There is no dispute that the principles on which a contract (or any other instrument or utterance) should be interpreted are those summarised by the House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912–913. They are well-known and need not be repeated. It is agreed that the question is what a reasonable person having *all the background knowledge* which would have been available to the parties would have understood them to be using the language in the contract to mean [sic]. The House emphasised that ‘we do not easily accept that people have made linguistic mistakes, particularly in formal documents’ . . . but said that in some cases the context and background drove a court to the conclusion that ‘something must have gone wrong with the language’. In such a case, the law did not require a court to attribute to the parties an intention which a reasonable person would not have understood them to have had [emphasis added].

60 See, for example, J Steyn, ‘The Intractable Problem of the Interpretation of Legal Texts’ (2003) 25 Sydney LR 5; MD Kirby, ‘Towards a Grand Theory of Interpretation – the case of Statutes and Contract’ (2003) 24 Statute LR 95; A Barak, *Purposive Interpretation in Law* (Princeton University Press 2005); and SJ Choi and GM Gulati, ‘Contract as Statute’ (2006) 104 Michigan LR 1129. In the case of contracts, much of this ink has been spilled in the context of the interpretation of bilateral agreements specifically drafted for, and negotiated by, particular parties or for a particular transaction. Little ink has been spilled on the interpretation of market standard agreements such as the kinds of agreements that are the subject of this article. Choi and Gulati, *ibid.*, say at p 1130 that ‘[o]ur goal is to suggest that the interpretation of boilerplate contracts among sophisticated parties is a topic in need of attention’.

61 *Chartbrook Limited & another v Persimmon Homes Limited & another* [2009] 1 AC 1011, at para 14 (Lord Hoffman).

Even so, courts still refine and restate these ‘well known’ principles. In *Rainy Sky v Kookmin Bank*, Lord Clarke, speaking for a unanimous Supreme Court, said the following:⁶²

For the most part, the correct approach to construction of the Bonds, as in the case of any contract, was not in dispute. The principles have been discussed in many cases, notably of course, . . . by Lord Hoffmann in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, passim, in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912F–913G and in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, paras 21–26 . . . [T]hose cases show that the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. As Lord Hoffmann made clear in the first of the principles he summarised in the *Investors Compensation Scheme* case at page 912H, the relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in *the situation in which they were at the time of the contract* . . .

The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all *the background knowledge* which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to *all the relevant surrounding circumstances*. *If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other* [emphasis added].

It is, however, worth observing that, while there may be ‘no dispute . . . [about] the principles on which a contract . . . should be interpreted’, of the nine judges . . . who heard the *Chartbrook v Persimmon* case, five held in favour of Persimmon’s construction of its contract and four in favour of Chartbrook’s.⁶³ In the *Rainy Sky v Kookmin Bank* case, the score was 7–2, a unanimous Supreme Court restoring the order of the judge at first instance, and overturning a majority decision in the Court of Appeal. What is ‘background knowledge’ to one judge may not be to another, nor indeed may be the ‘relevant surrounding circumstances’. A ‘construction which is consistent with business common sense’ to one judge may also well not be to another. Yet further, ‘the situation in which . . . [the parties] were at the time of the contract’ may mean different things to different judges.

Regrettably, however (and perhaps therefore), it is not hard to find a commentator who says something along the lines of ‘interpretation is as much an art as it is a science’.⁶⁴

62 *Rainy Sky S.A. and others v Kookmin Bank* [2011] UKSC 50, at paras 14 and 21.

63 [2011] EWHC 1888, at para 27. See also Lord Hoffman in *Chartbrook v Persimmon*, at para 33:

In exceptional cases, as Lord Nicholls has forcibly argued, a rule that prior negotiations are always inadmissible will prevent the court from giving effect to what a reasonable man in the position of the parties would have taken them to have meant. Of course judges may disagree over whether in a particular case such evidence is helpful or not. In *Yoshimoto v Canterbury Golf International Ltd* [2001] 1 NZLR 523[,] Thomas J thought he had found gold in the negotiations but the Privy Council said it was only dirt. As I have said, *there is nothing unusual or surprising about such differences of opinion*. In principle, however, I would accept that previous negotiations may be relevant [emphasis added].

Compare another recent prior negotiations case in the New Zealand Supreme Court, *Vector Gas Limited v Bay of Plenty Energy Limited* [2010] NZSC 5, discussed at trenchant length by D McLauchlan, ‘Contract Interpretation in the Supreme Court – Easy Case, Hard Law?’ (2010) 16 New Zealand Business Law Quarterly 229.

64 KJ Keith, *Interpreting Treaties, Statutes and Contracts* (Occasional Paper No 19, New Zealand Centre for Public Law, Wellington 2009) at 14, the comment being made more particularly in the context of statutory interpretation. The author proceeds, also at p 14, to ‘raise the question whether statutory and other guidelines and directives would help introduce more science’. For a

None of this is comforting to parties, let alone markets, that seek ‘clarity, certainty and predictability’.⁶⁵ One author put the issue, in the context of the interpretation of treaties, in these terms: ‘the rules and principles [of interpretation] are elusive in the extreme. Certainly, the interpretation of treaties is an art rather than a science; though it is part of the art that it should have the appearance of a science’.⁶⁶ More recently, Gloster J in *Pioneer Freight Futures Company Limited (in liquidation) v TMT Asia Limited*,⁶⁷ put the issue, similarly, in these terms:⁶⁸

The problem about so many issues of contract interpretation is that the obvious pattern that one person sees in the tapestry of the carpet may be different from the theme which the next person clearly discerns.

What can be said, in the case of the English courts (and necessarily in other common law jurisdictions that look to English case law for authority), is that the last dozen or so years has seen a sequence of leading cases and judgments—Lord Hoffmann being responsible for many of these judgments in the House of Lords⁶⁹—the broad effect of which has been to restate and to some extent change the way in which courts in those jurisdictions approach contract interpretation.

A contract is a contract is a contract that appears now to be a saying from a previous time. One way of characterizing this today is to talk in terms of ‘text’ as opposed to ‘context’, of ‘textual’ as opposed to ‘contextual’ interpretation of commercial contracts.⁷⁰

trenchant article on one court’s conflicting judgments in a contract interpretation case, see McLauchlan (n 63). McLauchlan writes of the difficulties for those seeking to make some sense of this area, at p 230, in these terms:

the wide diversity of opinions concerning the core principles of the law of contract interpretation that one finds in the modern case law as well as academic literature is truly remarkable. For example, there are more than a few judges and lawyers who believe that, despite Lord Hoffman’s widely accepted and applied restatement of the fundamental principles of interpretation in *Investors Compensation Scheme Ltd v West Bromwich Building Society* . . . , words have meanings independent of their users and therefore that, where they have a perceived ordinary or plain meaning, effect must be given to that meaning in the absence of a successful claim for rectification or the application of certain limited exceptions to the ‘plain meaning rule’.

65 *Lomas and others v JFB Firth Rixson, Inc and others* [2010] EWHC 3372 (Ch) at para 53.

66 Jennings, *General Course on Principles of International Law* (1967) 121 Recueil des Cours 323, at 547–522 and 544 (quoted in Keith (n 64) 71).

67 [2011] EWHC 1888 (Comm) at para 48. The context in which these remarks were made is worth noting. Gloster J made her remarks in the process of disagreeing with an interpretation of S 2(a)(iii) of the ISDA Master Agreement by her colleague, Flaux J, in both *Marine Trade SA v Pioneer Freight Futures Co Ltd* [2009] EWHC 2656 (Comm) and *Pioneer Freight Futures Co Ltd v COSCO Bulk Carrier Co Ltd* [2011] EWHC 1692 (Comm). Flaux J’s interpretation in those cases was described in Henderson (n 4) 1074, variously as ‘remarkable’, ‘astonishing’ and ‘bizarre’: *Pioneer Freight Futures Co Ltd v COSCO Bulk Carrier Co Ltd* [2011] EWHC 1692, at para 95. Gloster J, while disagreeing with Flaux J, prefaced her remarks about the ‘tapestry of the carpet’ by saying, also at para 48, that ‘it seems to me that the analysis adopted by *Henderson on Derivatives* is correct, although I would not perhaps wish to share that publication’s hyperbolic use of adjectives in respect of the conclusion reached by Flaux J’ [emphasis added].

68 [2011] EWHC 1888 (Comm) at para 48. See also *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHC 38, at para 15, an excerpt of which appears at n 138.

69 See, for example, McKendrick, ‘The Interpretation of Contracts: Lord Hoffman’s Restatement’ in Worthington (ed.), *Commercial Law and Practice* (Hart 2003) and Keith (n 64) 17–19. See also *Magbury Pty Ltd v Haele Australia Pty Ltd* (2001) 210 CLR 181, at para 11 (HC), where Lord Hoffman’s five-point scheme for contractual interpretation in the *Investors Compensation Scheme* case is cited with approval.

70 For an Australian view, see, for example, and generally, ‘From Text to Context: Contemporary Contractual Interpretation’, address by the Honourable J J Spigelman AC, Chief Justice of New South Wales, Sydney, 21 March 2007 at <www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_spigelman210> accessed 12 January 2012. Spigelman, referring to Lord Hoffman’s five-point scheme for contractual interpretation in the *Investors Compensation Scheme* case, says the following:

Over the last two or three decades, the fashion in interpretation has changed from textualism to contextualism. Literal interpretation—a focus on plain or ordinary meaning of particular words—is no longer in vogue. Purposive interpretation is what we do now . . . In constitutional, statutory and contractual interpretation there does appear to have been a paradigm

A ‘textual’ or literal interpretation is a traditional or conservative interpretation. It is also likely in some cases to be a fallback or default position, one that is easy to take in the face of the time and other pressures faced by many judges and in the face of the complexity and lack of familiarity with CFTs generally and CFTs documentation. This tension between text and context is writ large in the recent Section 2(a)(iii) cases in the English High Court. Another way of characterizing this issue is to say that the interpretation of contracts today often requires evidence. Yet a further way of characterizing this issue is to say that Lord Hoffman’s formulations have a close similarity to the purposive approach to statutory interpretation.⁷¹

In the case of a CFT, the question of what Lord Clarke’s usages in the *Rainy Sky*⁷² case—‘background knowledge’ and ‘relevant surrounding circumstances’—encompass is not straightforward. In a number of cases and contexts, similar but different usages are used, for example, ‘matrix of fact’,⁷³ ‘relevant background’,⁷⁴ ‘audience to whom the instrument is addressed’⁷⁵ and ‘landscape’.⁷⁶

In the case of a ‘simple’ bilateral agreement, negotiated between two parties, all these usages can encompass matters quite different to those in the case of a bilateral market standard agreement. In the latter case, there is much to be said, for the reasons given

shift from text to context. In contractual discourse, the focus on the commercial purposes of a transaction is often referred to as commercial interpretation or commercial construction... [However, a] significant concern is whether the change in general style of contractual interpretation—from text to context—has undermined the desirable objective of ensuring commercial certainty.

Compare McLauchlan (n 63) 258–59, who identifies three competing approaches to interpretation: the ‘literal approach’ (ie only in exceptional circumstances will departure from the plain meaning be justified), the ‘qualified contextual approach’, sometimes called ‘commercial interpretation’ or ‘commonsense interpretation’ (ie the approach of Lord Hoffman in the *Investors Compensation Scheme* case) and the ‘liberal contextual approach’ (ie an approach that rejects artificial limits on the aids to interpretation available to a court). Both of the latter approaches ‘reject the existence of a plain meaning rule’, *ibid* at p 259.

71 See Spigelman (n 70).

72 [2011] UKSC 50, at para 21.

73 *Prenn v Simmonds* [1971] 1 WLR 1381 (HL) at pp 1383–84: ‘The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations’ (per Lord Wilberforce).

74 *Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 WLR 903 (HL) at pp 912–13, where Lord Hoffman said that the ‘relevant background’ ‘includes absolutely anything which could have affected the way in which the language of the document would have been understood by the reasonable man’. This ‘absolutely anything’ formulation is not without its critics, or its difficulties. A former English judge said that it is ‘hard to imagine a ruling more calculated to perpetuate the vast cost of commercial litigation’: Sir Christopher Staughton, ‘How Do Courts Interpret Commercial Contracts?’ (1999) 58 Cambridge LJ 303, 307. Lord Hoffman subsequently explained what he meant by ‘absolutely anything’, in *Bank of Credit Commerce International v Ali* [2001] UKHL 8, at para 39, as follows:

[W]hen... I said that the admissible background included ‘absolutely anything which would have affected the way in which the language of the document would have been understood by the reasonable man’, I did not think it necessary to emphasise that I meant anything which a reasonable man would have regarded as relevant. *I was merely saying that there is no conceptual limit to what can be regarded as background* [emphasis added].

75 *Anthracite Rated Investments (Jersey) Limited and others v Lehman Brothers Finance S.A. in liquidation* [2011] EWHC 1822 (Ch) at para 67 (Briggs J):

Generally, the court’s task is to ascertain the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed. In the case of a simple bilateral contract, the audience will simply be the parties to the contract. But this formulation is applicable to instruments generally, whether contracts, trust deeds, articles of association or even legislation...

76 *Pioneer Freight Futures Company Limited (in liquidation) v TMT Asia Limited* [2011] EWHC 1888 (Comm) at para 28, citing *In re Sigma Finance Corporation (in administrative receivership)* [2009] UKSC 2 and *Charter Reinsurance Co Ltd (in liquidation) v Fagan* [1997] AC 749: ‘I start my analysis by looking at the “landscape” of the instruments as a whole’.

above under the heading ‘Market familiarity with and understanding of CFTs’, that these usages all encompass or should encompass a wider aspect. For want of a better phrase, one might call this wider aspect a market view, or the intention not of the parties as such but of the framers of their contract. That is, those usages should not be limited to the particular parties to a CFT or to their particular bilateral contract.

In the case of a CFT and a market standard agreement, good policy reasons exist for saying that those usages should also encompass (eg as ‘relevant background’ or ‘the situation in which . . . [the parties] were at the time of the contract’) the intention or purpose of the original drafters or framers of, and hence their rationale or basis for, a particular provision in dispute.⁷⁷ Good policy reasons also exist for saying that ‘relevant background’ at least includes accepting or giving great weight to the interpretation put forward by the market sponsor entity responsible for the agreement in the first place where it intervenes in a particular case.⁷⁸ But a market sponsor entity such as ISDA cannot be expected to intervene, or be granted leave to intervene, in many and certainly not most cases. P.R.I.M.E. Finance would accordingly argue that the same policy reasons also exist for parties or courts accepting its neutral and independent experts’ views on relevant issues within the competence of those experts.⁷⁹

In the case of many CFTs agreements, therefore, it is arguably a short step to say that the ‘background knowledge’ of the parties (as well as the ‘surrounding circumstances’ and the other usages outlined in the preceding paragraphs) include a market view of, or the framers’ intention in relation to, the provision in dispute, or at least a market view or intention put forward by the applicable market sponsor entity.⁸⁰ The common law is sufficiently adaptable to take this short step. It does not appear from the reported judgments in the Section 2(a)(iii) ISDA Master Agreement cases discussed in the following pages whether this purposive-based argument was quite put in this way to the court. In the case of CFTs, or at least boilerplate provisions in CFTs, it will be interesting to see if courts

77 But see the extract from *Anthracite Rated Investments (Jersey) Limited and others v Lehman Brothers Finance S.A. in liquidation* [2011] EWHC 1822 (Ch) in n 75 above. The narrow formulation in that extract of ‘the audience to which the instrument is addressed’, namely and ‘simply the parties to the contract’ does not sit well with the wider formulation suggested in the text to which this n 77 refers.

78 As ISDA did in *Lomas and others v Firth Rixson and others* [2010] EWHC 3372 (Ch); [2012] EWCA Civ 419.

79 The neutrality and independence of the P.R.I.M.E. Finance experts suggests that they would not be subject to the criticisms and accusations directed at ISDA’s Determinations Committee over the issue whether the recent Greek debt restructure constituted a default under credit default swaps taken out on Greek debt. These criticisms and accusations are probably inevitable where market participants with vested interests are excluded from market decision making by other market participants.

80 See Choi and Gulati (n 60) 1131 and 1132, who suggest that:

courts should take a more statutory approach to interpreting boilerplate terms. Specifically, courts should look to the intent of the original drafters of the terms, much like courts look to legislative intent in interpreting statutes. In discerning this intent, the court may need to look to the overall history of a term, the process by which the term became a standard (or one of the standards) in the industry, and its context within the greater commercial environment . . . Referring to historical meaning and the intent of the original drafters is a form of contextual analysis.

See also Golden (n 7) S147. Choi and Gulati suggest, at p 1132, that a court interpreting, say, an ISDA Master Agreement should interpret that agreement in a manner ‘that best maximizes the interests of [other] contracting parties’ in the market. They further suggest, at p 1162, that parties to standardized agreements should have the ability to designate market sponsor entities or industry association groups, such as ISDA, to provide a definitive source of interpretive authority for the particular contract: ‘[s]uch a designation would require courts to adopt the interpretation of the designated standard setter . . . for terms that are part of contracts negotiated in the past’.

in England and in other jurisdictions feel able to decide that ‘background knowledge’ and ‘surrounding circumstances’ (as well as ‘relevant background’, ‘construction which is consistent with business common sense’ and ‘the situation in which . . . [the parties] were at the time of the contract’) allow a court to consider the intent or purpose of the original drafters of those terms.⁸¹

This approach is similar to a recommendation that parties use arbitration by experts to resolve a dispute over the meaning of a market standard agreement.⁸² Whether that form of arbitration allows parties to introduce less art and more science into the interpretation of their market standard agreements is of course one of the key questions that P.R.I.M.E. Finance faces.

Conflicting cases within a jurisdiction—the Section 2(a)(iii) ISDA Master Agreement cases

From a P.R.I.M.E. Finance perspective, the poster cases for conflicting decisions within a jurisdiction are the English cases that have considered the interpretation of Section 2(a)(iii) of the ISDA Master Agreement.⁸³ Section 2 reads as follows:

(a) *General Conditions*

- (i) Each party will make each payment or delivery specified in each Confirmation to be made by it, subject to the other provisions of this Agreement.

81 The Court of Appeal in *Lomas and others v Firth Rixson and others* [2012] EWCA Civ 419 comes close to taking this approach without quite saying that the intent of the original framers or drafters should be the touchstone in the case of a market standard agreement such as the ISDA Master Agreement. The Court of Appeal says, at para 53, that:

it cannot, in our judgment, have been the *intention of the framers* of the 1992 Agreement to introduce the concept of extinction of the payment obligation . . . If that had been their intention, they would have made that intention much more explicit . . . [emphasis added].

However, in the next paragraph, the Court of Appeal confuses the position by appearing to treat the parties’ intention as the touchstone, saying that the ‘*parties* have made no express provision for what is to happen to suspended obligations when the transaction matures . . .’ [emphasis added].

82 Choi and Gulati (n 60) 1166.

83 In sequential order, the cases are *Marine Trade SA v Pioneer Freight Futures Co Ltd* [2009] EWHC 2656 (Comm); *Lomas and others v Firth Rixson and others* [2010] EWHC 3372 (Ch); *Britannia Bulk plc v Pioneer Navigation Ltd* [2011] EWHC 692 (Comm); *Lehman Brothers Special Financing Inc v Carlton Communications Ltd* [2011] EWHC 718 (Ch); *TMT Asia Ltd v Marine Trade SA* [2011] EWHC 1327 (Comm); *Pioneer Freight Futures Co Ltd v COSCO Bulk Carrier Co Ltd* [2011] EWHC 1692 (Comm); and *Pioneer Freight Futures Co Ltd v TMT Asia Ltd* [2011] EWHC 1888 (Comm). See also EM Murray, ‘*Lomas v Firth Rixson: a curate’s egg?*’ (2012) 7(1) *Capital Markets* LJ5–17; and Firth (n 13) para 11–012 *passim*. Four of these cases were appealed and heard together in the Court of Appeal: *Lomas and others v Firth Rixson and others*; *Lehman Brothers Special Financing Inc v Carlton Communications Ltd*; *Pioneer Freight Futures Co Ltd v COSCO Bulk Carrier Co Ltd*; and *Britannia Bulk plc v Bulk Trading SA* [2012] EWCA Civ 419. ISDA intervened in the first two of these appeals.

Conflicting cases arise in other jurisdictions. To give one example, in 2010 two German courts, the Higher Regional Court of Frankfurt, 4 August 2010, file No 23 U 230/08 and the Higher Regional Court of Stuttgart, 27 October 2010, file No 9 U 148/08 rendered directly opposed decisions involving swap transactions. The Frankfurt court held that a bank had complied with its obligations to a corporate vehicle of a municipality customer, whereas the Stuttgart court held a bank liable for having breached its obligations to a corporate vehicle of a municipality customer. The parties’ arguments in both cases were similar. The courts, however, reached contrary conclusions. Interest rates moved against the two customers, which then sought to impugn the swaps on the basis that the banks had not sufficiently informed the customers of the risks. One major argument was that the swaps were incompatible with the municipalities’ public purposes. It was both an *ultra vires* case and a case that the banks breached a duty under a consultancy agreement to advise the banks of the statutory prohibitions and the provisions contained in their constitutions. The Frankfurt court found that there was no breach of duty, whereas the Stuttgart court did. Both courts overturned respective first instance decisions. The Federal Court of Justice would eventually have the final say. (The information in this footnote is taken from an Allen & Overy note of 16 March 2011.)

- (ii) Payments under this Agreement will be made on the due date for value on that date in the place of the account specified in the relevant Confirmation or otherwise pursuant to this Agreement, . . .
 - (iii) Each obligation of each party under Section 2(a)(i) is subject to (1) the condition precedent that no Event of Default or Potential Event of Default with respect to the other party has occurred and is continuing, (2) the condition precedent that no Early Termination Date in respect of the relevant transaction has occurred or been effectively designated and (3) each other applicable condition precedent specified in this Agreement.
- (b) . . .
- (c) *Netting*. If on any date amounts would otherwise be payable:-
- (i) in the same currency; and
 - (ii) in respect of the same Transaction,

by each party to the other, then, on such date, each party's obligation to make payment of any such amount will be automatically satisfied and discharged and, if the aggregate amount that would otherwise have been payable by one party exceeds the aggregate amount that would otherwise have been payable by the other party, replaced by an obligation upon the party by whom the larger aggregate amount would have been payable to pay to the other party the excess of the larger aggregate amount over the smaller aggregate amount.

Not only have different judges interpreted aspects of this provision differently, but also several of the parties to these cases have raised a series of conflicting and different, and, in the later cases, more sophisticated, arguments for various interpretations that they have put forward. What is more, those parties have raised a number of arguments (for example, whether Section 2(a)(iii) offends the doctrine of penalties or constitutes a forfeiture, or whether an extended set-off provision is enforceable) which CFTs specialists have long since considered settled, if not untenable.

High Court and Court of Appeal cases on Section 2(a)(iii) of ISDA Master Agreement: A convenient starting point is the 'axiomatic' statement of Briggs J at first instance in *Lomas and others v JFB Firth Rixson, Inc and others*:⁸⁴

English law is one of the two systems of law most commonly chosen for the interpretation of the [ISDA] Master Agreement, the other being New York law. It is axiomatic that it should, so far as possible, be interpreted in a way that serves the objectives of clarity, certainty and predictability, so that the very large number of parties using it should know where they stand.

Axiomatic though that may be, the English High Court cases on Section 2(a)(iii) show how difficult it can be for the 'very large number of parties using [the ISDA Master Agreement to] . . . know where they stand'. In these cases, the interpretation of the ISDA Master Agreement was not as standardized as the agreements and provisions themselves. While it may be expected that differences in interpretation of the same agreement or provision may arise as between courts in different jurisdictions or perhaps as between judges in some jurisdictions, it is not as expected as between judges or courts in a

84 *Lomas and others v JFB Firth Rixson, Inc and others* [2010] EWHC 3372 (Ch) at para 53.

jurisdiction such as England. Until the Court of Appeal decision, the position was that the ‘certainty, clarity and predictability’ that Briggs J said was axiomatic was on some issues anything but.

These High Court cases involved relatively simple or vanilla derivative transactions. The *Lomas v Firth Rixson* case, for example, involved parties who had only one interest rate swap outstanding with Lehman Brothers when the latter collapsed (and hence was the subject of an event of default under the ISDSA Master Agreement). The non-defaulting party invoked the conditional payment provision in Section 2(a)(iii) as a means not to make any further payments under the swap. The non-defaulting party was of course out-of-the-money. Put another way, where the parties have not elected automatic early termination under the ISDA Master Agreement, the non-defaulting party may elect not to designate an (optional) early termination date in terms of the ISDA Master Agreement. Instead, in the *Lomas v Firth Rixson* case (and the *Lehman Brothers Special Financing v Carlton Communications* case), the non-defaulting party sought instead to take advantage of the conditional payment provision in Section 2(a)(iii). Section 2(a)(iii) potentially allowed that party to obtain a windfall gain.

In the *Marine Trade v Pioneer Freight Futures*, *Britannia Bulk v Pioneer Navigation* and *Pioneer Freight Futures v TMT Asia* cases, on the other hand, the parties had elected automatic early termination under the ISDA Master Agreement. When an applicable event of default occurs in this circumstance, the ISDA Master Agreement provides for automatic termination and close-out (ie netting) of outstanding transactions. That is, one party would typically owe the net/net or close-out amount to the other. In these cases too, therefore, the non-defaulting party sought to rely on Section 2(a)(iii) to avoid making any payment to the defaulting party.

Finally, in the *Pioneer Freight Futures v COSCO Bulk Carrier* case, the parties had entered into a series of transactions some of which had expired before an event of default occurred, but in respect of which amounts remained due and payable, and some of which had not yet expired, and in respect of which amounts would in due course become due and payable. In this case, the non-defaulting party relied on Section 2(a)(iii) to avoid making any payments under those transactions that had expired by the time the early termination date automatically occurred. Here, the key issue was whether the expired transactions should be included in the calculation of the settlement amount payable under the ISDA Master Agreement.

The issues that arose in these cases are well covered at length elsewhere.⁸⁵ In summary, the issues, not all of which arose in each of the cases, were these.⁸⁶

(a) If Section 2(a)(iii) is triggered, does a debt continue to be owed?

⁸⁵ See, for example, Murray (n 83).

⁸⁶ The following ignores the issue whether S 2(a)(iii) offends the anti-deprivation principle. See the discussion below under the heading ‘Conflicting cases between jurisdictions – the *Belmont Park* and *Lehman Brothers Holdings* flip clause cases, and the *Metavante* case’.

- (b) If Section 2(a)(iii) is triggered, does it have the effect of extinguishing a payment obligation or merely suspending it (the so-called suspension versus extinction issue⁸⁷)?
- (c) If Section 2(a)(iii) is triggered and if the payment obligation is merely suspended, for how long is it suspended or does it revive at some point?
- (d) If Section 2(a)(iii) is triggered and if the payment obligation is merely suspended, is it extinguished on maturity of the relevant transaction?
- (e) Are transactions the agreed term of which has expired prior to the occurrence of automatic early termination subject to close-out netting?
- (f) If Section 2(a)(iii) is triggered, can the non-defaulting party enforce the defaulting party's obligations without giving credit for the suspended obligations (the so-called gross/net issue⁸⁸)?

In the High Court, conflicting decisions were reached on a number of these issues. However, the Court of Appeal decision has brought needed clarity, certainty and predictability. The history of these issues, and the position following the Court of Appeal decision, is this.

- (a) In relation to the issue whether a debt continues to be owed under Section 2(a) if Section 2(a)(iii) is triggered, the only High Court case to consider this was the *Pioneer Freight Futures Co v TMT Asia* case.⁸⁹ The Court of Appeal endorsed the approach of Gloster J at first instance, in which she drew a distinction between the incurring of a debt and the obligation to pay that debt. The proper analysis of Section 2(a), therefore, is that it relates only to the obligation to make payments (or deliveries).
- (b) In relation to the suspension versus extinction issue, two High Court cases (albeit involving the same judge) decided 'obiter' that the extinction construction was to be preferred,⁹⁰ and two cases held⁹¹ or expressed a preference

87 Namely, if the conditions precedent in S 2(a)(iii) are not satisfied (ie in effect, that there is no continuing event of default and that there has been no termination and close-out), are the contingent obligations of the non-defaulting party extinguished (and, if so, at what point, such as the maturity date of the transaction) or are they merely suspended until either the conditions in S 2(a)(iii) are satisfied or all outstanding transactions are closed out under the ISDA Master Agreement? See Firth (n 13) at para 11–12, where the ISDA Master Agreement is said to be 'unfortunately rather unclear about whether the condition [in S 2(a)(iii)] merely *suspends* a party's obligations... or whether those obligations simply never arise if the condition is not satisfied' (emphasis in original).

88 Namely, if the conditions precedent in S 2(a)(iii) remain unsatisfied (ie in effect, these conditions precedent are that there is no continuing event of default and that there has been no termination and close-out), can the non-defaulting party prove on a gross rather than a net basis [ie does the non-defaulting party have to give credit for obligations that it would have owed to the defaulting party but for S 2(a)(iii)]?

89 [2011] EWHC 1888 (Comm).

90 *Marine Trade SA v Pioneer Freight Futures Co Ltd* [2009] EWHC 2656 (Comm); and *Pioneer Freight Futures Co Ltd v COSCO Bulk Carrier Co Ltd* [2011] EWHC 1692 (Comm). In the *COSCO* case, Flaux J revisited his decision in the *Marine Trade* case in the light of the decision of Briggs J in the *Lomas* case, but still preferred the extinction construction. See also *Britannia Bulk plc v Pioneer Navigation Ltd* [2011] EWHC 692 (Comm).

91 *Lomas and others v Firth Rixson and others* [2010] EWHC 3372 (Ch), where the suspension construction was preferred 'on a fairly narrow balance' (at para 73). In *Lehman Brothers Special Financing Inc v Carlton Communications Ltd* [2011] EWHC 718 (Ch), the suspension v extinction issue arose but, in view of the fact that the same judge, Briggs J, had earlier decided the issue in the *Lomas* case, the parties accepted the suspensory construction while reserving the right to argue the point on appeal. See also the earlier Australian case, *Enron Australia v TXU Electricity* [2003] NSW SC 1169, which said, at para 12, that the suspensory

- ‘obiter’⁹² for the suspension construction. The Court of Appeal, having first drawn the distinction between the incurring of a debt and the obligation to pay that debt, said that, if Section 2(a)(iii) is triggered, the non-defaulting party still owes a debt to the defaulting party. As a result, the payment obligation is merely suspended. It is not extinguished.
- (c) In relation to the issue whether the suspended payment obligation remains suspended or revives at some point, the Court of Appeal agreed with Briggs J in the *Lomas v Firth Rixson* case that there was no basis in the ISDA Master Agreement either as a matter of construction or to imply a term that there comes a time when the obligation on the non-defaulting party to make a payment revives, in the absence of the satisfaction of the conditions precedent in Section 2(a)(iii).
 - (d) In relation to the issue whether the suspended payment obligation is extinguished on maturity, Briggs J in the *Lomas v Firth Rixson* case held that the true construction of Section 9(c) of the ISDA Master Agreement is that the suspension ends on maturity. ISDA, having sought and been granted permission to intervene, advanced an interpretation of the ISDA Master Agreement that supported the indefinite survival of the obligations suspended by Section 2(a)(iii). Briggs J rejected that interpretation. The Court of Appeal disagreed with Briggs J on this point, accepting the interpretation put forward again on appeal by ISDA. The Court of Appeal did so partly in reliance on the changes made to the 1992 ISDA Master Agreement in issue before the court from the earlier 1987 ISDA Master Agreement. The ISDA Master Agreement makes no provision for what is to happen to a suspended payment obligation when a transaction matures. The Court of Appeal refused to imply a term either that the payment obligation revives (see paragraph (c) above) or that it is extinguished.
 - (e) In relation to the question whether transactions the agreed term of which has expired prior to the occurrence of automatic early termination are subject to close-out netting, Flaux J in the *Pioneer Freight Futures v COSCO Bulk Carrier* case held that the close-out netting calculation under Section 6(e) of the ISDA Master Agreement excluded the suspended transactions that had already matured on the (automatic) early termination date. The Court of Appeal disagreed. There was no basis in the ISDA Master Agreement to say that those transactions expired by effluxion of time. The Court of Appeal also said that Flaux J’s approach was also not consistent with the single agreement provision in the ISDA Master Agreement.
 - (f) In relation to the gross/net issue, Flaux J held in the *Marine Trade v Pioneer Freight Futures* and the *Pioneer Freight Futures v COSCO Bulk Carrier* cases that the

construction was correct. The *Enron Australia* case was considered to be unremarkable—that is, correct—until the issue recently arose in the English cases.

92 *Pioneer Freight Futures Co Ltd v TMT Asia Ltd* [2011] EWHC 1888 (Comm).

non-defaulting party was not required, when proving in the administration of the insolvent defaulting party, to give credit to the latter for payments that would have become due to the latter but for the fact that the conditions precedent to those payments remained unmet in terms of Section 2(a)(iii) (ie for so long as Section 2(a)(iii) continued to operate). In other words, Flaux J held that payment netting under Section 2(a) is not available in these circumstances. These cases were criticized on this ground.⁹³ In the *Lomas v Firth Rixson* case at first instance, the parties avoided this issue by including it in the agreed list of issues.⁹⁴ That is, they agreed that the true construction was a net and not a gross one, contrary to the *Marine Trade* case. Briggs J suspected, correctly it is suggested, that this concession was made because it assisted his eventual conclusion that the anti-deprivation principle (discussed further below under the heading ‘Conflicting cases between jurisdictions—the *Belmont Park* and *Lehman Brothers Holdings* flip clause cases, and the *Metavante* case’) did not apply to Section 2(a)(iii).⁹⁵ In the *Pioneer Freight Futures Co v TMT Asia* case, Gloster J expressed a contrary view to that of Flaux J. In her view, the payment netting provision in Section 2(a) operates before the condition precedent in Section 2(a)(iii) can take effect. In essence, she took a view of the commercial purpose of the ISDA Master Agreement, namely that reciprocal obligations are to be netted automatically as they arise. The Court of Appeal agreed with Gloster J, pointing out that this only applied to reciprocal obligations due on the same date.

Some observations on section 2(a)(iii) cases: From a P.R.I.M.E. Finance perspective, a number of observations may be made about these Section 2(a)(iii) ISDA Master Agreement cases.

- (a) Although the contrary can be argued, the Court of Appeal judgment can be said to take a contextual approach to the interpretation of market standard agreements.⁹⁶ Except for the discussion in the Court of Appeal judgment on the anti-deprivation principle, the Court of Appeal rendered its judgment largely without reference to case law. This is not surprising. The questions put before the Court of Appeal are ones on which there is little or no case law. That said, the judgment makes no reference to

93 See Firth (n 13) para 11–12, *passim*.

94 The ‘Administrators were content to go along with the respondents’ eventually unanimous approach to this issue’, and ISDA as intervener submitted that the *Marine Trade* case ‘might be distinguishable’ (at para 63), presumably on the ground that the transactions in issue in the *Marine Trade* case were contracts for difference and not interest rate swaps.

95 At para 115. That said, Briggs J was disposed, at para 64, to agree with Flaux J on this point: ‘If the matter had been contentious, I might have found it difficult to regard Flaux J’s reasoning in *Marine Trade* as inapplicable to the same issue, under the same Master Agreement, in relation to interest rate swap transactions’. Another way of viewing this is to say that the respondent counterparties were gaming the court, and that, in a CFTs dispute, it is important that the judge or court is experienced enough to see, as well as see through, gaming behaviour. At a pre-trial stage of the *Lomas v Firth Rixson* case, at the time of delivery of the skeleton arguments, one of the respondent counterparties did not join in the submission by the other three respondents that the *Marine Trade* case was wrong on the gross/net issue. At ‘an early stage of the hearing’, however, the outlying respondent ‘came off the fence and aligned... [its position] with the position of the other respondents’ (at para 62).

96 See, drawing the same conclusion, the extract at n 60 from Choi and Gulati (n 60).

authority on the interpretation of contracts.⁹⁷ The Court of Appeal judgment makes no reference to first principles, or at least to the principles that should be applied to the interpretation of market standard agreements. The judgment is notable for its close and literal, or textual, analysis of the ISDA Master Agreement. The judgment can, therefore, be said by implication to reject a contextual analysis.⁹⁸ It can also be said that the judgment, by rejecting, for example, arguments seeking to imply certain terms into the ISDA Master Agreement, means that the ISDA Master Agreement should be construed strictly and literally in accordance with its terms.⁹⁹

However, it is suggested that this is too narrow a view of the Court of Appeal judgment. That is, it can also be argued that the judgment does take a contextual approach. For example, by accepting the submissions made by ISDA, as intervener, regarding the meaning of Section 2(a)(iii) and other provisions, the Court of Appeal accepted a market view, or context, put forward by the market sponsor entity.¹⁰⁰ Another way of putting this is to say—noting that the Court of Appeal did not put it this way—that the ISDA market (or framers’) view is part of the ‘relevant background’ or the ‘relevant surrounding circumstances’. Further, although the judgment appears scrupulously not to refer to case law on the interpretation of contracts of the kind discussed earlier in this article, it does refer in a limited number of places to the ‘intention of the parties’,¹⁰¹ the ‘intention of the framers’,¹⁰² and the ‘draftsman’.¹⁰³ Presumably, the ‘framers’ means those who drafted the ISDA Master Agreement in the first place (ie ISDA and its expert advisers, in effect) and not the particular parties to the agreements before the court. On that basis, the ‘framers’ are also part of the ‘relevant background’ or the ‘relevant surrounding circumstances’. The ‘intention of the parties’ and the ‘draftsman’ could also be read as equating to the ‘framers’ and not to the particular parties themselves. However, the contrary can also be read. Finally, the judgment also refers in a number of places to the ‘commercial purpose’ or the ‘commercial basis’—as well as like phrasing—of applicable provisions

97 This approach may be contrasted with that taken by judges in the High Court cases on appeal in the Court of Appeal. See, for example, Briggs J in *Lomas and others v Firth Rixson and others* [2010] EWHC 3372 (Ch) at para 53 (‘It is necessary to begin with some preliminary observations about the correct approach to construction’); and Gloster J in *Pioneer Freight Futures Company Ltd v TMT Asia Limited* [2011] EWHC 1888, at para 27 (‘The approach to the interpretation of commercial documents of this kind is not controversial. It was recently re-stated in . . .’). See also Briggs J in *Anthracite Rated Investments (Jersey) Ltd v Lehman Brothers Finance SA (in liquidation)* [2011] EWHC 1822 (Ch) at para 67 (‘I start by reminding myself of the principles applicable to the interpretation of contractual documentation of this type [the ISDA Master Agreement], my attention having been drawn to . . .’). Of more than passing interest is that these decisions do not refer to the same cases from which to derive the applicable approach or principles.

98 See, for example, ‘The ISDA Master Agreement and Implied Terms: Text over Context in the English Court of Appeal’, Canadian Appeals Monitor, published by McCarthy Tétrault LLP on 13 April 2012.

99 See, for example, ‘The ISDA Master Agreement: from here to eternity’, Clifford Chance Client Briefing, April 2012.

100 Compare in this context the observation of the Court of Appeal, in the face of the ‘unanimity of approach’ on one issue of the judges in the High Court cases, as well as ISDA’s counsel, in respect of which the Court of Appeal said that it ‘would hesitate long before reaching a contrary view’: [2012] EWCA Civ 419, at para 131.

101 [2012] EWCA Civ 419, at para 42.

102 *ibid* para 53.

103 *ibid* para 77.

the interpretation of which was an issue.¹⁰⁴ All of these matters, it might be said, are contextual. Perhaps the best that can be said is that it is not easy to discern from the Court of Appeal judgment a consistent, authoritative or principled basis on which a market standard agreement is to be interpreted.

- (b) A CFTs agreement that raises an interpretation issue is a P.R.I.M.E. Finance case. From a P.R.I.M.E. Finance perspective, the Court of Appeal judgment is helpful since it supports a market view of the interpretation of a market standard agreement.¹⁰⁵ P.R.I.M.E. Finance would say that its experts would have reached a similar decision to that of the Court of Appeal without such a lengthy and costly trial and appellate process. Not every party can afford the cost and time taken up in these Section 2(a)(iii) cases.

P.R.I.M.E. Finance would also say that the different decisions reached at trial level in the Section 2(a)(iii) cases show how an expert tribunal on these technical issues matters is the more necessary. Without the Court of Appeal judgment, the position in relation to at least Section 2(a)(iii) of the ISDA Master Agreement would have been uncertain as well as regarded as being at odds with market practice and understanding. It might have been hoped that the Court of Appeal judgment would have set down principles for the interpretation of a market standard agreement, for example by referring more explicitly and clearly, and more often, to the ‘intention of the framers’. That the judgment did not do so supports a P.R.I.M.E. Finance view of the ability of its experts to interpret CFTs agreements. Section 2(a)(iii) is but one provision in one market standard agreement. Other similar interpretation-type disputes can be expected to arise both under the ISDA Master Agreement and under other market standard agreements. The Section 2(a)(iii) cases are potentially the tip of the iceberg, or perhaps an iceberg.

- (c) Consistent with and following the Supreme Court in the *Belmont Park* case,¹⁰⁶ the Court of Appeal judgment is notable for its reinforcement of the importance of party autonomy.¹⁰⁷

The courts will give effect to the right and ability of parties to describe their commercial bargain in their contracts and will hence be reluctant to override that

¹⁰⁴ See, *ibid* paras 75, 85, 87, 92, 117 and 133.

¹⁰⁵ Other market standard agreements contain equivalent provisions to S 2(a)(iii) of the ISDA Master Agreement (for example, the GMRA). The Global Master Securities Lending Agreement published by ISLA, however, only permits a party to withhold payment or delivery following an event of default until such time as the other party has made arrangements which are sufficient to ensure full delivery or payment.

¹⁰⁶ *Belmont Park Investments Pty Limited v BNY Corporate Trustee Services Limited and Lehman Brothers Special Financing Inc* [2011] UKSC 38. Lord Collins, at para 103, said that:

Despite statutory inroads, party autonomy is at the heart of English commercial law. Plainly there are limits to party autonomy in the field with which this appeal is concerned [insolvency], not least because the interests of third party creditors will be involved. But . . . it is desirable that, so far as possible, the courts give effect to contractual terms which the parties have agreed. And there is a particularly strong case for autonomy in cases of complex financial instruments such as those involved in this appeal.

The Court of Appeal adopted this statement: [2012] EWCA Civ 419, at para 85.

¹⁰⁷ [2012] EWCA Civ 419, at para 85 ff.

bargained-for position. If English law is that the courts will give effect to the commercial bargain struck by parties, then the case for P.R.I.M.E. Finance to resolve a CFTs dispute, in the absence of insolvency, arising out of an English law-governed market standard agreement is easier to make. That said, regulators are never best pleased with party autonomy.

- (d) Reading the Section 2(a)(iii) cases sequentially, it is apparent how the arguments in the later cases become more considered and sophisticated, and hence how better informed and reasoned are the decisions of the later courts. Put another way, it is apparent that counsel, and the particular judge, in the earlier trial cases were, in broad terms, feeling their way.¹⁰⁸

This is not surprising. The appellate court, the later trial judges, and also counsel in the later cases, had the considerable benefit of considering and developing the arguments raised, and accepted or rejected in the judgments, in the earlier cases.¹⁰⁹ As the later High Court cases came, new counsel appeared for the various parties who raised new arguments. It is not difficult to conclude that, in complex cases, a number of trial and appellate steps may be needed before the arguments are appropriately refined and put, and the issues settled. P.R.I.M.E. Finance would say that the arguments that were eventually put to the Court of Appeal should and would have been considered by and known to many of its experts. P.R.I.M.E. Finance might also ask about the shareholders' funds and forgone liquidation dividends spent, even wasted, by the various parties in the development of these arguments.

- (e) From a P.R.I.M.E. Finance perspective, the Section 2(a)(iii) cases are at the simple end of the CFTs complexity spectrum. These cases involve either simple interest rate swaps or simple freight forward cases, and, by and large, single outstanding transactions between bilateral pairs of parties rather than multiple outstanding transactions of different kinds under a particular ISDA Master Agreement and rather than multiple parties. Disappointingly from a market perspective, but perhaps

108 For example, Briggs J in *Anthracite Rated Investments (Jersey) Ltd v Lehman Brothers Finance SA (in liquidation)* [2011] EWHC 1822 (Ch), said, at para 116, that concessions in a line of earlier cases to the effect that the concepts of Loss and Market Quotation under the ISDA Master Agreement, although different formulae, are aimed at achieving broadly the same result, 'is one of those sensible concessions which has hardened into hornbook law'. The Court of Appeal agreed with this analysis: [2012] EWCA Civ 419, at para 129.

109 For example, the Court of Appeal agreed with the distinction that appears first to have been drawn in these cases by Gloster J in *Pioneer Freight Futures Company Ltd v TMT Asia Limited* [2011] EWHC 1888, at para 91, namely, that 'under Section 2(a)(iii), one is only looking at the payment obligation, rather than the debt obligation'. The Court of Appeal adopted that approach: [2012] EWCA Civ 419, at para 28. For example also, Briggs J in the *Firth Rixson v Lomas* case was referred only to the 1992 version of the ISDA Master Agreement in the context of the argument, with which he agreed, that s 9(c) of that version should be construed to provide that any suspended obligation is extinguished on maturity. The Court of Appeal, having been referred also to the 1987 version of the ISDA Master Agreement in order to construe the revised s 9(c) in the 1992 ISDA Master Agreement, took the contrary view, [2012] EWCA Civ 419, at para 53, saying that:

it cannot... have been the intention of the framers of the 1992 Agreement to introduce the concept of extinction of the payment obligation... If that had been their intention, they would have made that intention much more explicit...

Needless to say, the arguments put before Briggs J in the *Lomas v Firth Rixson* case at first instance were somewhat more sophisticated than those put before Flaux J in the *Marine Trade* case, but not, as it happens, in the *COSCO* case. In the *COSCO* case, Flaux J had the opportunity to revisit his conclusions in the *Marine Trade* case in view of Briggs J's conclusions in the *Lomas v Firth Rixson* case.

inevitably given the subject matter, these cases are at pains to say that the particular judgment should only be taken to apply to the particular transactions in issue. In the first instance *Lomas v Firth Rixson* case, Briggs J issued this warning:¹¹⁰

... this is a decision on these five interest rate swaps, rather than one which may automatically be relied upon in relation to all possible circumstances in which an ISDA Master Agreement might be used.

ISDA itself recommended this conservative approach:¹¹¹

ISDA was at pains to emphasise . . . that even the detailed effect of the general conditions in Section 2(a) may be different, as between different types of derivatives to which the Master Agreement is commonly applied.

What the market wants, of course, is a decision or decisions that apply more widely than this. In view of this perhaps to be expected natural judicial conservatism, and given the experience of the courts, it may be hoped that the P.R.I.M.E. Finance experts have the confidence to extend their decisions more widely. P.R.I.M.E. Finance would say that its experts should be able to do so.

- (f) From a P.R.I.M.E. Finance perspective, the Section 2(a)(iii) cases could have been seen coming. The circumstances giving rise to the Section 2(a)(iii) cases are familiar to derivatives lawyers.¹¹² It may need to be said softly, but the risk that Section 2(a)(iii) could and so would be used as a proxy for what is now called a walkaway clause was from the outset not so much writ large as known to some derivatives lawyers, if not perhaps to some or even all regulators. The banks and financial institutions principally responsible for the commenting on the drafting or framing of the ISDA Master Agreement over the years did not, needless to say, contemplate their own insolvency. Put another way, while it was in their contemplation that

110 *Lomas and others v Firth Rixson and others* [2010] EWHC 3372 (Ch) at para 114.

111 *ibid* 54.

112 When DFC New Zealand Limited (DFC) was made subject to statutory management in New Zealand (a moratorium regime somewhat akin to ch 11 in the United States) in October 1989, only one of its several counterparties that could have done so, Security Pacific Australia Limited (SecPac), invoked what was then called Limited Two-way Payments (a true walkaway clause) in order to book a substantial windfall gain under its out-of-the-money swap. It did so in the face of an express statement by the statutory managers of DFC, made with the approval of the New Zealand central bank immediately upon DFC being made subject to statutory management, that DFC would meet all of its derivatives obligations. SecPac terminated the swap some weeks after that announcement. It was thought that the gain so booked by SecPac was immediately brought into its profit and loss account for its year-end that ended barely days after the swap was terminated and the Limited Two-Way Payments clause invoked. By terminating the swap, SecPac made a profit for the relevant financial year when it evidently would not, when its financial statements were eventually published, otherwise have done so.

DFC sued. Among the allegations made by DFC was that the booking of that windfall gain, and the consequent profit rather than loss for that year, allowed bonuses to be paid that would not otherwise have been payable. Shortly after that allegation was made, the case settled. One of the lessons of the DFC case may be that to understand behaviour in many banking and markets cases, one needs, so to speak, to 'follow the money', to understand the interests that a particular party is protecting (eg whose bonus is at risk, by how much it is at risk, and when it is at risk—or perhaps when it is no longer at risk—and who is responsible for decisions made accordingly about the particular transaction).

Two further observations may be made about the DFC case. First, SecPac, and in due course its new parent, Bank of America, earned the considerable opprobrium of the wider derivatives world by invoking Limited Two-way Payments. ISDA put some pressure on both parties to settle and indeed sought to mediate a settlement at a meeting to which DFC was called if not summonsed. Secondly, this case, among a limited number of others, convinced ISDA, its members generally, and regulators that what we now know as the Second Method should be mandatory for regulated entities that wish to report their net rather than their gross ISDA Master Agreement exposures for risk capital and other purposes. The 1992 ISDA Master Agreement was amended accordingly.

Section 2(a)(iii) *could* be used against them, it was not in their contemplation that it *would* be. Some might say they were having it both ways. Moreover, it was expected that there would be multiple transactions outstanding at any one time under an ISDA Master Agreement and that some would be in- and some out-of-the-money at any particular time.

- (g) P.R.I.M.E. Finance would say that ambiguity is likely to be writ large in CFTs agreements, and hence that a market or framers' view or interpretation of a CFTs agreement is all the more necessary.

CFTS agreements place a premium on the knowledge and expertise of those using them. They are, literally by definition, complex. They are also full of what might be called 'code'—words, expressions and usages, as well as legal underpinnings, known and understood by those who use them. It is not surprising, therefore, that the judge in the *Lomas v Firth Rixson* case (at first instance) should observe that the 'difficulties in . . . [the Section 2(a)(iii)] case[s] arise from the fact that the express terms of Section 2(a)(iii) of the Master Agreement leave significant matters unsaid about the condition precedent to any payment obligation'.¹¹³ To some extent, the difficulties also arise from the fact that the ISDA Master Agreement is necessarily a compromise between brevity and the requirement for an agreement that is effective and enforceable under at least two governing laws, as well as under other laws that may be chosen as its governing law.

- (h) The Section 2(a)(iii) shows how easy it is for non-experts to fail to see the wood for the trees. P.R.I.M.E. Finance would say that its experts would, or at worst would be much more likely, to see the wood. In the *Lomas v Firth Rixson* case (at first instance), the four respondent Lehman counterparties each took as their:

starting point . . . that the Master Agreement was a clearly and precisely drafted document, developed over many years, into which the implication of terms was unnecessary and undesirable, both because of the clarity of its meaning, and because of the various options provided by ISDA whereby parties could, by additional provisions in the Schedule or in any Confirmation, make specific provision about particular matters. Unfortunately, the respondents' attempt to make that starting point good led them into protracted disagreements between themselves as to the meaning and effect of the condition precedent in Section 2(a)(iii) which, in the end, took up nearly as much time in oral argument as did the construction issues that separated them, viewed collectively, from the Administrators.

In relation to the so-called suspension versus extinction issue, these 'protracted disagreements' do not inspire confidence on a number of levels, including litigating CFTs involving the ISDA Master Agreement before a judge who is likely feeling his way in the complex world inhabited by that agreement. It is worth recalling again that Briggs J took as his starting point the axiomatic statement that the ISDA Master Agreement 'should, as far as possible, be interpreted in a way that serves the

113 *Lomas and others v JFB Firth Rixson, Inc and others* [2010] EWHC 3372 (Ch) at para 58.

objectives of clarity, certainty and predictability'.¹¹⁴ That may be so, but the submissions made by the respondent counterparties do not inspire confidence in a sensible and commercial judicial outcome.

Of no help to the judge, the four respondents in the *Lomas v Firth Rixson* case (at first instance) between them put forward two different interpretations of Section 2(a)(iii) in relation to the suspension versus extinction issue alone.¹¹⁵ (What is more, ISDA as intervener put forward yet a third interpretation.) One of these interpretations was acknowledged to be untenable had the issue arisen under the 2002 ISDA Master Agreement.¹¹⁶ On that ground alone, it is not surprising that the judge rejected it. Reading the case, one is struck by the fact that the respondent counterparties put forward interpretations that suited their commercial position rather than interpretations that reflected what Section 2(a)(iii) actually meant or at least was intended to mean. In that respect, those counterparties are open to the charge that they were gaming the court. Whether the judge was quite fully alive to that is not clear.

In any event, it is hard not to escape the conclusion that the lawyers involved at trial level rather viewed the ISDA Master Agreement as just another contract, to be interpreted in the same way as, so to speak, any other contract, in order to extract what partisan advantage they could from their interpretation of the agreement when before the court.

- (i) One's confidence in the judicial process is weakened somewhat by the fact that not only did ISDA advance yet a third different interpretation of the suspension versus extinction issue but also that Briggs J in the *Lomas v Firth Rixson* case (at first instance) rejected that interpretation. He did so, using strong adverbs and language,¹¹⁷ no doubt believing that he was serving his triple objectives of clarity, certainty and predictability. Of ISDA's interpretation, he said this:¹¹⁸

... ISDA was the only proponent of the indefinite survival of contingent obligations suspended by Section 2(a)(iii) ... I consider that [ISDA's interpretation] ... is *clearly* [not] to be preferred. My main reason is that it seems to me to be *wholly* inconsistent with *any reasonable understanding* of the Master Agreement that payment obligations arising under a Transaction could give rise to indefinite contingent liabilities, because of the possibility that an Event of Default may be cured long after the expiry of a Transaction by effluxion of time [emphasis added].

114 *ibid* para 53.

115 The two interpretations were (a) the obligations never arise (this was called the once and for all effect; or (b) assuming that the conditions precedent in S 2(a)(iii) are not met on a due date, that the obligations are 'suspended' until the conditions precedent are met or until the maturity date of the transaction, whichever is earlier.

116 Interpretation (a) *ibid*.

117 See, for example, that book so beloved of American college students and lawyers, W Strunk Jr. and EB White, *The Elements of Style* (The Macmillan Company 1959) 57–58, under the heading 'Write with nouns and verbs':

Write with nouns and verbs, not adjectives and adverbs. The adjective hasn't been built that can pull a weak or inaccurate noun out of a tight place ... it is nouns and verbs, not their assistants, that give to good writing its toughness and its color.

118 *Lomas and others v Firth Rixson and others* [2010] EWHC 3372 (Ch) at paras 77 and 78.

ISDA had put forward what it considered to be the market view (and practice) that the suspended contingent obligations under Section 2(a)(iii) continued indefinitely. Notwithstanding that ISDA might be expected, as intervener, to have no reason to put forward a view other than a market view or a view that it considered was unintended, Briggs J considered ISDA's interpretation to be 'wholly inconsistent with any reasonable understanding of the Master Agreement'.¹¹⁹ Unsurprisingly, the *Lomas v Firth Rixson* case (at first instance) was criticized on this ground, the criticism being based principally on the judge's lack of (reasonable?) understanding, as well as his mis-reading, of the ISDA Master Agreement.¹²⁰ The Court of Appeal disagreed with Briggs J on this point, but rather let him off the hook by not remarking on the reasonability of his understanding of the ISDA Master Agreement.¹²¹

- (j) From a P.R.I.M.E. Finance perspective, the first instance section 2(a)(iii) cases are an advertisement for an ability of parties to CFTs disputes to seek advisory opinions from P.R.I.M.E. Finance experts.¹²²
- (k) Various parties used the Section 2(a)(iii) cases at first instance to argue issues that derivatives lawyers and counsel had investigated at length at an early stage in the derivatives market: for example, whether Section 2(a)(iii) offends the doctrine of penalties where the triggering event of default is an event but not a breach of contract, and whether Section 2(a)(iii) constitutes a forfeiture in relation to which the court could grant relief. In view of Court of Appeal and House of Lords authority on these issues, one is tempted to regard the raising of these issues at first instance as a waste of shareholders' funds. Or perhaps to say that this is litigation, and litigation is ever thus. Or finally, perhaps, to say that a P.R.I.M.E. Finance tribunal of experts should not be susceptible to those sorts of arguments.

119 At para 78.

120 See Murray, (n 83) *passim*; Firth (n 13) para 11–012, *passim*.

121 [2012] EWCA Civ 419, at para 49 ff, partly on the basis of a change made to S 2(a)(iii) in the 1992 ISDA Master Agreement from that in the 1987 ISDA Master Agreement. See n 109 above.

122 Courts are loathe to give advisory judgments where a case has settled after argument, principally because to do so ties up valuable judicial time and resources. See *Pioneer Freight Futures Co Ltd v TMT Asia Ltd* [2011] EWHC (Comm) where the parties reached a confidential settlement after the hearing. Notwithstanding this, because the case raised issues on which her fellow High Court judges, Briggs and Flaux JJ, had reached different conclusions, the parties invited Gloster J to render a judgment. She said the following, at para 5:

In effect the Court is being asked to give an advisory opinion, in order to assist Pioneer and the market (not merely limited to the FFA market, but also to the wider financial market), in relation to the construction and application of important provisions of ISDA 92.

Since at least two of the three issues raised in argument also fell to be decided by the Court of Appeal in the then-pending *Lomas v Firth Rixson* and *COSCO Bulk Carrier* appeals, and because she had 'firmly reached the opposite conclusion' to Flaux J (at para 26), she thought it appropriate to express her views. See also *Barclays Bank Plc v Nylon Capital LLP* [2011] EWCA Civ 826, in which the Court of Appeal clarified the power of a court to give a judgment in a case that has been fully argued, even if the case has settled and the parties have asked that no judgment be given. This power is settled where a draft judgment has been sent to the parties. However, *Barclays Bank Plc v Nylon Capital LLP* held that a court may also give a judgment where the case raises an issue where the public interest requires it to do so. For example, the case may raise a point of law of general interest; the appeal court may differ from the court below; or where a wrongdoing should be exposed.

- (1) Finally, from a P.R.I.M.E. Finance perspective, it should be remarked that the section 2(a)(iii) cases arose under English law and were argued in the English courts. English law and English jurisdiction is considered to be one of the two laws and jurisdictions of choice for market participants worldwide. Several law firms and financial institutions in London have sophisticated and specialist CFTs teams, the commercial and insolvency bar is one of the most sophisticated and specialized in the world and the Commercial Court and Chancery judges are, rightly, recognized and admired similarly. Yet the fact remains that the Section 2(a)(iii) cases are advertisements for the difficulties that arise in CFTs disputes, notwithstanding those evident and impressive advantages.¹²³

That being so, the difficulties that courts hearing CFTs disputes face in other jurisdictions that do not have one or all of those advantages, or where English is not the mother tongue, are considerably greater still. P.R.I.M.E. Finance would say that its experts are well placed to hear CFTs disputes that otherwise might be resolved in those other jurisdictions and to provide advice and expert opinions accordingly.

Conflicting cases between jurisdictions—the Belmont Park and Lehman Brothers Holdings flip clause cases, and the Metavante flip clause cases

Certainty, clarity and predictability matter as much across jurisdictions as each does within a jurisdiction. But state and national courts are subject to their own laws, rules of procedure and, in particular, their own rules of contract interpretation,¹²⁴ not to mention their own jurisprudence. Is it, therefore, reasonable to expect, say, a French or a German court to interpret the same provision in a market standard agreement in the same way as an English or a New York court, or an English court to interpret that provision in the same way as a New York or a New Zealand court? Similar if not the same interpretations are of course desirable, but experience tells us instead that we should expect conflicting decisions. One way of viewing the jurisdiction cases discussed earlier in this article is that they indicate a perhaps too widespread view that the outcome of a CFT dispute may or will be (advantageously) different in one's home jurisdiction.

A key issue for markets and market participants, and hence for P.R.I.M.E. Finance, is the tolerance of those markets and participants for idiosyncratic outcomes. Asked

123 From a London legal market perspective, it is of course important that the English bar and courts remain the jurisdiction of choice in international commercial and financial cases. Tellingly, a quick review of London law firm commentary on the Court of Appeal judgment in the *Lomas v Firth Rixson* case throws up time and again the same comments, namely the 'robustness' and 'commerciality' of the decisions of the English commercial courts. Another view of those and similar words is to reflect on the possibly self-serving relief with which they are used and the nervousness which unexpected decisions in jurisdictions in leading financial markets can engender.

124 In the light of the preceding discussion about contract interpretation at common law, see, for example, art 1156 of the French Civil Code which provides that '[i]n interpreting the contract, one should seek the joint intent of the parties communicating through the contract and not stop at a literal meaning of the terms'. Compare also art 4.1 (*Intention of the parties*) of the UNIDROIT *Principles of International Commercial Contract*, which provides that:

1. A contract shall be interpreted according to the common intention of the parties.
2. If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.

another way, what confidence can we have that cases interpreting a clause in a standardized CFT agreement will be decided consistently?

It is not hard to find conflicting decisions. Perhaps the most prominent, from a P.R.I.M.E. Finance perspective, are the *Belmont Park*¹²⁵ and *Lehman Brothers Holdings*¹²⁶ flip clause cases, and the *Metavante*¹²⁷ case.

Belmont Park and Lehman Brothers Holdings flip clause cases: In the *Belmont Park* case, the English Supreme Court reached a different conclusion to a New York court in the *Lehman Brothers Holdings* case that considered essentially the same issue and facts.¹²⁸

The *Belmont Park* litigation arose out of the Lehman Brothers collapse in September 2008. The broad question that arose in this litigation was the enforceability in insolvency of a so-called ‘flip clause’. A flip clause is a familiar feature in structured finance documentation, including in particular securitizations and collateralized debt obligations (CDOs). A flip clause is an aspect of what is also known as the ‘waterfall’, the waterfall being a list of priorities of increasing subordination for certain payments to certain entitled persons. Upon the occurrence of certain events, for example insolvency or the termination of an agreement such as a swap, the priority or subordination of certain of those payments to certain of those entitled parties, including noteholders, is in some instances ‘flipped’ or changed.

Proceedings were filed in both London and New York.¹²⁹ The courts in each case were well aware of and followed the parallel proceedings in the other jurisdiction.

Both proceedings in effect raised public policy questions in the context of the applicable insolvency regime. In England, the public policy context was whether the flip clause contravened the anti-deprivation rule,¹³⁰ this rule having been familiar, along with the *pari passu* rule, to a generation of CFTs lawyers and counsel.¹³¹ The Supreme Court

125 *Belmont Park Investments Pty Limited v BNY Corporate Trustee Services Limited and Lehman Brothers Special Financing Inc* [2011] UKSC 38.

126 *Re Lehman Brothers Holdings Inc* 422 BR 407 (US Bankruptcy Court, SDNY, 2010).

127 *In Re Lehman Brothers Holdings Inc*, No 08-013555 (JMP) (Bankr. S.D.N.Y. 15 September 2009).

128 It appears that, in Australia, following *International Air Transport Association v Ansett Australia Holdings Limited* (2008) 234 CLR 151 (HC), ‘the anti-deprivation rule should not apply’: DJR Loxton, ‘One Flaw over the Cuckoo’s Nest – Making Sense of the “Flawed Asset Arrangement” Example, Security Interest Definition and Set-off Exclusion in the PPSA’ 2011 34(2) University of New South Wales LJ 472–523.

129 An interesting aspect of the English proceedings is that no relevant Lehman Brothers entity was the subject of insolvency proceedings in England. The parties, and the courts, nevertheless proceeded on the assumed basis that there was an insolvency proceeding and hence that English insolvency principles applied. In the case of the New York proceedings, the only substantive connection with that jurisdiction was the domicile of the swap counterparty. The assets were located in the UK and Australia. The documents were governed by English law. However, neither court was asked to decide the key question of which insolvency regime prevailed, the English regime or the New York regime. It was agreed at an early stage of the two proceedings, in order to limit potential conflict between the two jurisdictions, that relief would be limited to declaratory relief.

130 In the *Belmont Park* case, Lord Collins, at para 1, described the anti-deprivation rule, and the closely-related *pari passu* distribution rule, in these terms:

The anti-deprivation rule is aimed at attempts to withdraw an asset on bankruptcy or liquidation or administration, thereby reducing the value of the insolvent’s estate to the detriment of creditors. The *pari passu* rule reflects the principle that statutory principles for pro rata distribution may not be excluded by a contract which gives one creditor more than its proper share.

131 This familiarity is a result principally of *British Eagle International Airlines Ltd v Cie Nationale Air France* [1975] 1 WLR 758 (HL). The House of Lords in this case, reversing the judge at first instance and a unanimous Court of Appeal, was split 3–2,

held that the particular flip clause before it did not contravene the anti-deprivation rule.¹³² The flip clause was a ‘bona fide commercial transaction’ the main purpose of which was not an intention to evade mandatory insolvency law. In so deciding, the Supreme Court reinforced the valued English principles of party autonomy and freedom of contract, saying that this was particularly important in the case of CFTs.¹³³

In New York, the public policy context was whether the flip clause was an *ipso facto* clause that contravened Sections 365(e)(1) and 541(c)(1)(B) of the US Bankruptcy Code. Judge Peck in the Bankruptcy Court held that, even though formal bankruptcy proceedings had not been commenced in relation to the relevant Lehman Brothers entity, the flip clause was an *ipso facto* clause. The automatic stay that prohibited an *ipso facto* clause from taking effect applied because of an earlier bankruptcy filing of an affiliate (the US parent). Moreover, the flip clause was not within an existing safe harbour provision in the Bankruptcy Code. This decision is believed to be the first such interpretation of the Bankruptcy Code. It has led to uncertainty in the international securitization market, not least because flip clauses are regarded as boilerplate in many CFTs. The USA proceedings were settled. Accordingly, Judge Peck’s decision will not be the subject of a higher court ruling.

Metavante case: The *Metavante* case is a Section 2(a)(iii) ISDA Master Agreement case, also decided in the Bankruptcy Court by Judge Peck in the Southern District of New York. Lehman Brothers had filed for bankruptcy protection. Lehman Brothers interest rate swap counterparty, Metavante, was out-of-the-money. Just as, for example, did the counterparties in the *Lomas v Firth Rixson* case in England, Metavante elected not to terminate the swap upon the insolvency of Lehman Brothers. Under the ISDA Master Agreement, a delay in exercising that right does not constitute a waiver of that right. Instead, as was the case in the English Section 2(a)(iii) cases, Metavante relied on Section 2(a)(iii) not to make further payments while the insolvency of Lehman Brothers continued.

Lehman asked the Bankruptcy Court to declare that the termination rights of Metavante under the ISDA Master Agreement had become subject to the automatic stay in the Bankruptcy Code. Unsurprisingly, Metavante stood on its contractual rights under the ISDA Master Agreement, saying in effect that it had the right to wait to terminate the swap until rates moved in its favour. Metavante had in fact waited for over a year and had made no payments to Lehman Brothers.

meaning that the judicial ‘count’ was 3–6. The leading speeches on each side of that split were delivered by Lord Cross for the majority and Lord Morris for the minority. Of this split and this case, it can be said that Lord Cross reached the right decision for quite the wrong reasons and Lord Morris the wrong decision for quite the right reasons. Views on this case differ, and the reverse is well argued, perhaps the more so after the *Belmont Park* case.

132 The position in Australia, following *International Air Transport Association v Ansett Australia Holdings Limited* (2008) 234 CLR 151 (HC), and not because of the *Belmont Park* case, is that ‘the anti-deprivation rule should not apply’: Loxton (n 128) p. 480. The majority in the High Court in the *IATA v Ansett Australia* case ‘did not see there being some general overarching policy [i.e., the anti-deprivation rule] outside the express words of the relevant insolvency legislation’: Loxton (n 128) at p. 479.

133 See n 106.

Lehman Brothers argued that *Metavante* was in breach of Section 365(e)(1) of the Bankruptcy Code which provides as follows:

Notwithstanding a provision to the contrary in an executory contract . . . an executory contract . . . may not be terminated or modified . . . solely because of a provision in such contract . . . that is conditional on: (a) the insolvency or financial condition of the debtor; [or] (b) the commencement of a case under this title . . .

Judge Peck held in favour of Lehman Brothers. He said that the ISDA Master Agreement is subject to the general executory contract provisions in the Bankruptcy Code. Accordingly, *Metavante* could not rely on Section 2(a)(iii). The contractual right of *Metavante* not to pay was conditional on the insolvency of Lehman Brothers. Accordingly, that right fell within Section 365(e)(1). While *Metavante* did have a contractual right to terminate the swap, it waived that right by failing to do so within a reasonable period of time. The *Metavante* case subsequently settled.

In effect, the *Metavante* case decided that the Bankruptcy Code is overriding or mandatory legislation that prevails over contract law in the event of any inconsistency between the two. This case may therefore be better viewed as a decision based on the equitable jurisdiction of the court under the Bankruptcy Code rather than on how a New York court would interpret Section 2(a)(iii). Nevertheless, the *Metavante* case is now considered as authority for the propositions that Section 2(a)(iii) is unenforceable under US bankruptcy law and that there is a time limit within which the right to terminate must be exercised before it is lost.¹³⁴ What that period is remains uncertain. The *Metavante* case conflicts with the English Section 2(a)(iii) cases discussed above, not least in the broad sense that it is a pro-defaulting party case.

Some observations on Belmont Park and Lehman Brothers Holdings flip clause cases and the Metavante case: From a P.R.I.M.E. Finance perspective, a number of observations may be made on the *Belmont Park* and *Lehman Brothers Holdings* flip clause cases and the *Metavante* case.

- (a) These cases are insolvency cases. In insolvency, overriding or mandatory legislation and public policy considerations loom large, as does in the United States the equitable jurisdiction of the Bankruptcy Court. Those considerations are more properly the province of state and national courts. In the case of insolvency, and in particular cross-border insolvency, therefore, P.R.I.M.E. Finance can reasonably expect to have only a limited role. P.R.I.M.E. Finance can nevertheless usefully provide an advisory-type opinion or expert advice to the parties or a court on, for example, what provisions in a particular CFT agreement mean, or perhaps on what market practice is in the relevant circumstances, or a valuation for quantum purposes. One might hope such an opinion or advice is part of the ‘relevant

¹³⁴ It is thought that European courts are, in broad terms, also likely to imply terms imposing time limits within which the non-defaulting party must decide under S 2(a)(iii) of the ISDA Master Agreement whether or not to issue a termination notice. If that is so, then P.R.I.M.E. Finance would say that this is another reason for cross-jurisdictional certainty, clarity and predictability and for cases to be brought before its expert tribunals.

- background'. P.R.I.M.E. Finance can also assist in any court-ordered mandatory mediation.
- (b) That courts in both cases rendered decisions that conflict both with decisions in another jurisdiction and with market expectations about how a particular provision operates or what it means is not surprising. State and national courts are subject, as is said elsewhere in this article, to their own laws, regulations, precedents, procedures and policy dictates, etc. It is not intuitive that courts in different jurisdictions, except perhaps those with close cultural and legal affinities, will reach the same decision, even in the case of standard market agreements, desirable though that outcome may be from a market perspective. If parties and markets accept the proposition that it is desirable that a market-oriented outcome to their dispute be reached, then P.R.I.M.E. Finance has a role and should be able better to provide some cross-jurisdictional certainty, clarity and predictability, and probably more so than some state or national courts. That outcome depends to some extent on the publication of awards made by P.R.I.M.E. Finance tribunals.
- (c) Both cases were decided in two of the most sophisticated courts in the world, in which the arguments put to the courts are expected to be, and are, sophisticated. But many CFTs disputes will involve proceedings issued in courts in other jurisdictions. Many of those jurisdictions, including in particular those in emerging markets, do not enjoy the comparative advantages that the English and New York courts do. In relation to those proceedings, P.R.I.M.E. Finance would expect to be able to play a leading role.

Interpretation cases—ambiguities and nonsense

Many disputes, and not just CFTs disputes, raise issues of contract interpretation. Finally, therefore, under the broad heading of 'interpretation' cases, the following paragraphs consider recent cases where the courts are asked to interpret a contract or a provision that is ambiguous at best or nonsense at worst.¹³⁵ As is often said in the cases themselves, 'something has gone wrong with the language'.¹³⁶

The test for the ability of a court to correct obvious drafting mistakes in an agreement is set out by Lord Hoffman in *Chartbrook Limited v Persimmon Homes Limited*.¹³⁷

What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant.

A two-step process is accordingly required before a court will correct a clear drafting mistake: first, 'something must have gone wrong with the language' and, secondly, the correction required to give effect to the parties' intention 'should be clear'. As we have

¹³⁵ That drafting errors should be found recently in a relatively large number of CFTs agreements does not surprise lawyers who have worked in pressured and fast-moving markets for several years, for the broad reasons given in n 11.

¹³⁶ *Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 WLR 903 (HL) at p 913.

¹³⁷ [2009] UKHL 38 at para 25.

seen in the earlier discussion of the conflicting Section 2(a)(iii) cases, the act of interpretation is not always straightforward. Lord Hoffman recognizes as much:¹³⁸

It clearly requires a strong case to persuade the court that something must have gone wrong with the language and the judge and the majority of the Court of Appeal [in the *Chartbrook v. Persimmon* case] did not think that such a case had been made out. On the other hand, Lawrence Collins LJ thought it had. It is, I am afraid, not unusual that an interpretation which does not strike one person as sufficiently irrational to justify a conclusion that there has been a linguistic mistake will seem commercially absurd to another . . . Such a division of opinion occurred in the *Investors Compensation Scheme* case itself. The subtleties of language are such that no judicial guidelines or statements of principle can prevent it from sometimes happening.

Closely linked with these concepts is the ‘concept of commercial absurdity [which] has a long and distinguished history in the interpretation of business contracts’.¹³⁹

*LB Re Financing No. 3 (in administration) v Excalibur Funding No. 1 PLC and others*¹⁴⁰ and *Anthracite Rated Investments (Jersey) Limited and others v Lehman Brothers Finance S.A. in liquidation*¹⁴¹ are two examples of a number of similar cases where it is argued that ‘something has gone wrong with the language’ and/or that there is commercial absurdity as a result of the language.¹⁴² In the *LB Re Financing No. 3 Limited v Excalibur Funding*, no issue of fact between the parties arose. The issue was whether an event of default both had occurred and was continuing in terms of a securitization trust deed. The issue turned on the construction of a par coverage test or ratio. The issue was whether the ratio should be interpreted as if it included an unusually large cash credit balance that was not, by the terms of the ratio, expressly to be included as part of the collateral in its numerator. Had a calculation been able to be made just three days after the relevant calculation date, the ratio would have been met.¹⁴³ Briggs J was persuaded neither that the exclusion of the credit balance from the ratio was commercially absurd nor that there was an obvious

138 *ibid* para 15.

139 *LB Re Financing No 3 Limited (in administration) v Excalibur Funding No 1 PLC and others* [2011] EWHC 2111 (Comm) at para 45.

140 [2011] EWHC 2111 (Comm).

141 [2011] EWHC 1822 (Ch).

142 See also, for example, *ING Bank NV v Ros Roca* [2011] EWCA Civ 353 (overturning the decision at first instance that a literal reading of ‘EBITDA 2006’ in a formula used to calculate a success fee should be interpreted as ‘current EBITDA’, on the basis that it was not clear that something had gone wrong with the language; the mistake was not in the language but in failing to foresee the consequences; nevertheless, the Court of Appeal was able to reach the same (sensible) conclusion as the trial judge, but on other grounds (estoppel by convention)); and *State Street Bank & Trust Co v Sompo Japan Insurance Inc and others* [2010] EWHC 1461 (Ch) (where something had gone wrong with the language and it was clear that a mistake had been made in an applicable definition, and where the correction required to give effect to the parties’ intention was also clear, the court made a declaration regarding the true interpretation of the relevant provisions).

143 An interesting aspect of this case was the submission (described, at para 35, as counsel’s ‘apparently preferred’ submission) by counsel for the holder of the securities, the holder standing to benefit from the effective declaration of the event of default, that it could be seen from a ‘forensic examination of an earlier securitisation . . . that the offending phrase had been drawn’ (at para 36). In other words, the drafter of the securitization deed before the court has failed to include the correct cross-reference that had been included in a similar securitization sponsored by the Lehman Brothers entities and completed shortly before the one in issue. Briggs J, at para 53, was not persuaded by this submission:

it is based upon a wholly illegitimate, after the event, forensic analysis of the drafting process, none of which could possibly have been known to the audience to whom (or to which) the Trust Deed and the Conditions were addressed.

Nevertheless, the submission is a telling one: many a lawyer’s response to this aspect of this case would be to murmur quietly something about the Grace of God.

mistake, even though something had gone wrong with the language. '[E]ven a commercial absurdity argument must be confined to its proper role as a tool of interpretation rather than rewriting of an instrument'.¹⁴⁴ Briggs J accordingly held that an event of default had occurred. However, the consequence of that event of default was commercially absurd: the default was 'fleeting'. Briggs J decided that absurdity could be remedied by so construing the trust deed that the default did not continue beyond the relevant payment date three days later. There was no continuing event of default on the later date when the actual notice of default or acceleration was given. In short, Briggs J reached what was a commercially realistic, not to mention sensible, solution, described by him as 'ameliorating rather than curing the commercial absurdity'.¹⁴⁵ Had the default been declared when it first occurred (ie prior to the relevant payment date and during a three-day window before that date), then his conclusion regarding the continuing default would have created its 'own mini-absurdity'.¹⁴⁶

The *Anthracite Rated Investments v Lehman Brothers Finance S.A.*¹⁴⁷ case is another good example, another Part 8 case involving agreed facts. The question in this case was whether the phrase 'is terminated in whole for any reason' in a definition of an early redemption event in a note issue meant 'is terminated by notice for any reason other than a default by [Lehman Brothers Finance, the grantor of a put]'. The judge said that, despite 'having found it initially difficult to suspend my disbelief' that the more restrictive interpretation was correct, the 'combined effect of... [the] submissions... made the ascertainment of the meaning of [the early redemption event]... much more difficult than I had initially appreciated'.¹⁴⁸ Essentially, it was argued by Lehman Brothers Finance that what was on one view a form of automatic early termination should instead be construed as a form of optional early termination. That distinction is well known and accepted by market participants and their lawyers, and the danger or risk in particular of an automatic early termination is well understood, including that the circumstances in which the automatic early termination may occur may not be welcome at the time or known until after the event. While Briggs J was correct 'with the benefit of hindsight... [to] envisage that many commercial minds would think that an elective rather than [a] mandatory approach to early redemption would be better, more reasonable, and even fairer',¹⁴⁹ some CFTs lawyers would nevertheless consider that the court was being gamed. Needless to say, Briggs J rightly held Lehman Brothers Finance to its contracted-for bargain.

144 [2011] EWHC 2111, at para 59.

145 *ibid* para 71.

146 *ibid*.

147 [2011] EWHC 1822 (Ch).

148 *ibid* para 71.

149 *ibid* para 84.

Some observations on these interpretation cases involving ambiguity and nonsense: From a P.R.I.M.E. Finance perspective, a number of observations may be made about these interpretation cases involving ambiguity and nonsense.

- (a) A CFTs dispute involving agreed or assumed facts (eg a Part 8 case) is, in principle if not on that basis alone, a P.R.I.M.E. Finance case.
- (b) An interpretation case involving the construction of a provision in a market standard or other CFTs agreement where something has gone wrong with the language and that raises commercial absurdity arguments is also in principle a P.R.I.M.E. Finance case. It may be hoped if not expected that a P.R.I.M.E. Finance tribunal comprised of experts would understand the wider documentation context and any consequent absurdity, and also be alive to potential gaming by the parties.
- (c) These cases tend to see the light of day when one of the parties is in insolvency or is near insolvency and so misses a payment or delivery. The mandatory nature of insolvency law and principles, and the jurisdiction-centric nature of that law and those principles, means that a P.R.I.M.E. Finance tribunal is not likely to be best placed to hear a dispute that raises insolvency issues. That does not of course mean that a P.R.I.M.E. Finance expert cannot play a useful advisory or other expert role (eg as mediator) in such a dispute.

3. Mis-selling cases

The final type of case considered in this article is the so-called ‘mis-selling’ case. Unsurprisingly, clients and customers of banks and financial institutions following the global financial crisis made claims of mis-selling of CFTs in order to recover losses. By and large, the claims before the English courts have been made by institutional or professional, and hence (in some cases, supposedly) sophisticated, clients and customers—pension and hedge funds, municipalities, high net worth individuals, often trading through investment vehicles, and so on. Few claims by retail clients have been to trial, although many claims were no doubt raised and settled.

These disputes have common themes. They involve CFT-type products, often OTC derivatives and structured products. They involve sometimes breathtaking risk-taking, if not also feigned sophistication, by the client or customer investor in search of yield.¹⁵⁰ The products sold or traded resulted in sometimes substantial losses, often as a result of margin calls that were not met. The clients or customers tend to bring their claims on a broad basis, alleging the existence of an advisory rather than an execution-only

150 See *Bank Leumi (UK) plc v Wachner* [2011] EWHC 656 (Comm) (the client, ‘an extremely successful business-woman . . . [and] the former CEO of a . . . “Fortune 500 company”’ (at para 14), traded dozens of complicated reverse knock-in fx options); and *Michael Duthie Wilson and another v MF Global UK Limited and another* [2011] EWHC 138 (QB) (a ‘significant part of the strategy Mr Wilson had selected for himself . . . involved frequent day-trading [of contracts for difference and futures and options] in a very active and aggressive way’ (at para 104); and *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd* [2011] EWHC 479 (Comm) (in the ‘course of . . . [the client’s] dealings with . . . [the relevant bank account manager] he increasingly became interested in, and attracted and excited by, more adventurous investments’ (at para 125).

relationship and a breach of advisory and even fiduciary duty as a result,¹⁵¹ negligent or fraudulent misstatement,¹⁵² deceit,¹⁵³ breach of an implied term, misrepresentation or the making of an implied representation,¹⁵⁴ a lack of sophistication,¹⁵⁵ misunderstanding about the nature of the investment,¹⁵⁶ contractual terms signed but neither read nor understood,¹⁵⁷ the unsuitability to the investor of the products sold or trades made and breach of regulatory or statutory duty,¹⁵⁸ as well as illegality,¹⁵⁹ lack of capacity and lack of authority.¹⁶⁰ These last three claims are often raised in a jurisdictional dispute.¹⁶¹

In their defence, the banks argue that no such advisory relationship or breach exists,¹⁶² that they were merely selling (ie not acting in an advisory capacity) CFT-type products to

151 See *Standard Chartered Bank v Ceylon Petroleum Corporation* [2011] EWHC 1785 (Comm) (claim for damages arising out of an alleged breach of advisory duty, partly on the basis of the asymmetry of sophistication between the parties; it was held that the bank did not in the circumstances hold itself out as an adviser; rather, the bank acted in a sales capacity); and *Rubenstein v HSBC Bank plc* [2011] EWHC 2304 (QB); and *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm), affirmed *Springwell Navigation Corporation v JP Morgan Chase Bank* [2010] EWCA 1221 (the documentation contained risk disclosures and disclaimers that excluded and limited the bank's liability, all of which negated the existence of a duty of care, a fiduciary duty and negligent misstatement).

152 See *Camarata Property Inc v Credit Suisse Securities* [2011] EWHC 479 (the client claimed that, but for the bank's negligent advice, it would have sold a note issued by a Lehman Brothers entity before the Lehman Brothers collapse); *Cassa di Risparmio della Repubblica di San Marino S.p.A. v Barclays Bank Ltd* [2011] EWHC 484 (Comm); and *Bank Leumi (UK) plc v Wachner* [2011] EWHC 656 (Comm).

153 See *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm) (claim that the bank was liable in deceit for knowingly making false misrepresentations; however, the court found no evidence that any such false representations had been made with the requisite knowledge); and *Cassa di Risparmio della Repubblica di San Marino S.p.A. v Barclays Bank Ltd* [2011] EWHC 484 (Comm) (claim that the bank was liable in deceit in relation to structured credit notes that it purchased from the bank and which the bank then restructured).

154 See *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm) (claim that the bank made certain implied representations that had induced the client to participate in the syndication of a loan to an Enron entity; it was held that no such representation had been made; even if it had, it was not false and had not induced the client to invest); and *Standard Chartered Bank v Ceylon Petroleum Corporation* [2011] EWHC 1785 (Comm) (the alleged implied representations that the investment was a proper one were held to be vague, imprecise and inherently implausible).

155 See *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm) (a supposedly sophisticated client invested in a complex structured product involving Enron that at the time was nevertheless described by the bank's credit committee as the equivalent of '21st Century Alchemy').

156 See *Bank Leumi (UK) plc v Wachner* [2011] EWHC 656 (Comm).

157 See *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm), affirmed *Springwell Navigation Corporation v JP Morgan Chase Bank* [2010] EWCA 1221 (the bank could rely on client documentation signed but not read by its client).

158 See *Bank Leumi (UK) plc v Wachner* [2011] EWHC 656 (Comm) (the bank was not in breach of statutory duty by classifying its client as an 'intermediate customer' for the purposes of the Financial Services Authority's Code of Business Rules); *City Index Ltd (trading as Finspreads) v Balducci* [2011] EWHC 2652 (Ch) (the defendant failed in its argument that the claimant had given him investment advice in relation to his spread betting and that, among other things, had breached rules in the Financial Services Authority's Conduct of Business sourcebook by failing to take reasonable steps to make him aware of the risks of spread betting and failing to ensure that the product was suitable for him (in breach of its statutory duty to do so)); and *Soheir Ahmed Zaki and others v Credit Suisse (UK) Limited* [2011] EWHC 2422 (Comm).

159 See *Standard Chartered Bank v Ceylon Petroleum Corporation* [2011] EWHC 1785 (Comm) (defences raised by the defendant Sri Lankan state oil company, in English proceedings and in a non-jurisdictional context, of lack of capacity and authority to enter into allegedly speculative oil derivatives, and of illegality under Sri Lankan law of it making payments to the bank in the face of a direction from the Sri Lankan central bank, were dismissed).

160 See *Calyon v Wytwornia Sprzetu Komunikacyjnego PZL SA* [2009] EWHC 1914 (Comm) (the Polish corporate counterparty issued proceedings in Poland for recovery of sums paid to the bank under a foreign exchange derivatives transaction on the ground that the person acting on its behalf had no authority to enter into an agreement subject to the ISDA Master Agreement).

161 See *Berliner Verkehrsbetriebe (BVG) Anstalt Des Öffentlichen Rechts v JP Morgan Chase Bank N.A. and JP Morgan Securities Ltd* [2010] EWCA Civ 390, discussed above under the heading 'Jurisdiction cases'.

162 See *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm), affirmed *Springwell Navigation Corporation v JP Morgan Chase Bank* [2010] EWCA 1221 (JP Morgan did not owe a contractual or a tortious duty to its client; its client was a sophisticated investor; the lack of a written advisory agreement was a strong indication of the lack of an advisory duty).

their investor clients,¹⁶³ that the investors are contractually estopped by reason of applicable disclaimers and non-reliance clauses that, for example, exclude advisory duties,¹⁶⁴ and that, in any event, the banks did not cause the loss suffered by the investor—there was no reliance and no causation.¹⁶⁵

Generally, the English courts have taken a pro-bank and -financial institution approach.¹⁶⁶ They have taken a sensible if not a somewhat sceptical approach, tending to refuse to reassess risk in relation to CFT-type products with the benefit of hindsight following the global financial crisis. They have looked closely at the commercial context and the realities of the parties' relationship. The courts have given effect to party autonomy, and in particular have held the aggrieved investors to their contractual bargain in which they agreed that the banks' liability for misrepresentation was excluded, that the banks owed no advisory duty and that the investor anyway had not relied upon the bank in the first place. Where there is no duty, the investor in effect must rely on misrepresentation, which in turn requires the court to investigate in some detail what was said to the investor and by whom. The claims of regulatory breach tend to be more difficult. Some banks have been found wanting in terms of the communications made to their investor and the sales process, but the losses suffered by the investor were not caused by the bank or indeed foreseeable.

For these reasons, the mis-selling cases are fact-specific and much turns on the evidence, which the English courts have not shied from examining in great detail, no doubt in part to uncover opportunistic claims.¹⁶⁷ Where there has been a breach of duty,

163 See *Standard Chartered Bank v Ceylon Petroleum Corporation* [2011] EWHC 1785 (Comm) (claim for damages arising out of an alleged breach of advisory duty, partly on the basis of the asymmetry of sophistication between the parties; it was held that the bank did not in the circumstances hold itself out as an adviser; rather, the bank acted in a sales capacity).

164 See *Peekay Intermark v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386 (the principle of contractual estoppel permits parties to agree that a certain state of affairs forms the basis of their dealings, even if they know that this is not the case when their contract is made); *Cassa di Risparmio della Repubblica di San Marino S.p.A v Barclays Bank Ltd* [2011] EWHC 484 (Comm), a case involving the (re)structuring and sale of structured notes embedded with CDOs (ie a 'CDO squared') (the client investor claimed deceit, fraudulent misrepresentation regarding the default risk arising out of credit risk arbitrage—the bank used an internal model, the so-called CDO Evaluator, that assigned a significantly higher default risk to the CDO notes than was implied by the AAA credit ratings and so had valued the notes at a loss to the client at the time of sale—and an implied term; the court held that the client was contractually estopped from arguing that it was misled about the risk on the notes, by reason of the non-reliance and assessment and understanding provisions that it had signed, the client having warranted that it understood and accepted the terms, conditions and risk of purchasing the notes; the court also considered in detail the internal model used by the bank to evaluate the risk); *Titan Steel Wheels Ltd v The Royal Bank of Scotland PLC* [2010] EWHC 211; *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm); and *Bank Leumi (UK) plc v Wachner* [2011] EWHC 656 (Comm).

165 See *Rubenstein v HSBC Bank plc* [2011] EWHC 2304 (QB) (even though the client relied on the bank officer's negligent or unsuitable advice about a fund investment, and hence the bank was liable in contract and in tort, the ensuing losses were not recoverable since the loss was not caused by the negligent advice; moreover, the loss, which occurred as a result of the collapse of Lehman Brothers, was not reasonably foreseeable in 2005 when the investment was made; the client was accordingly entitled to nominal damages only); *Soheir Ahmed Zaki and others v Credit Suisse (UK) Limited* [2011] EWHC 2422 (Comm) (although notes in which the client invested were unsuitable during the height of the global financial crisis in 2008, the client was found to be a successful businessman who would have invested in them anyway; the bank did not cause his loss); and *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd* [2011] EWHC 479 (Comm) (even if the bank had been guilty of negligence or gross negligence, its fault did not cause its client's loss).

166 This approach is commonly described in law firm fliers and brochures as 'robust', 'pragmatic' and 'commercial', telling expressions all.

167 For example, the decision in *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm) is 278 pages long, the trial having lasted some seven months. See, also, *Bank Leumi (UK) plc v Wachner* [2011] EWHC 656 (Comm); *Rubenstein v HSBC Bank plc* [2011] EWHC 2304 (QB); and *Soheir Ahmed Zaki and others v Credit Suisse (UK) Limited* [2011] EWHC 2422 (Comm).

the courts have tended to find that there was no reliance and no causation and hence no loss,¹⁶⁸ or otherwise to hold the banks liable for nominal damages only.¹⁶⁹ The global financial crisis was, in broad terms, not reasonably foreseeable—banks and financial institutions cannot be liable for investments that turned sour as a result of that crisis, when the investor would have invested anyway. In the wholesale market at least, these mis-selling cases are often described, from the point of view of the investor client or customer, as being a matter of *caveat emptor*. All that said, it is likely that some claimants regard the English courts as unsympathetic to mis-selling claims. That being so, it may be expected that more jurisdictional issues may be raised in claims of this type.

Some observations on mis-selling cases

From a P.R.I.M.E. Finance perspective, a number of observations may be made about these mis-selling cases:

- (a) Typically, these cases involve claims by aggrieved bank clients and customers who may be expected to believe that a court will give them a sympathetic hearing, no doubt on the basis that we live today in a time in which banks and bankers are the subject of some public opprobrium. That being so, it may also be expected that such a claimant will be predisposed to issue judicial proceedings rather than agree *ex post* with the bank to submit their dispute to arbitration or mediation by a P.R.I.M.E. Finance. Since, and in broad terms, the English courts have not been sympathetic to claimants alleging mis-selling,¹⁷⁰ it may be that mis-selling claimants may be advised to seek extra-judicial resolution of their dispute.
- (b) The preceding observation does not, however, mean that mis-selling cases are not P.R.I.M.E. Finance cases. These cases are in principle P.R.I.M.E. Finance cases, but, since they tend to involve so-called b2c transactions or dealings, it may be that all parties may not be as willing to submit to arbitration and mediation as they are to litigate their dispute. Nevertheless, P.R.I.M.E. Finance would say that the neutrality and expertise of its experts lend themselves to the resolution of these disputes.
- (c) In an increasing number of jurisdictions, parties to pending litigation are required first to submit their dispute to mediation. Mandated mediation attracts mixed views: some take the view that mandated mediation often occurs too early in the dispute resolution process and that it encourages gaming behaviour. Nevertheless, mis-selling cases may be expected to be candidates for mediation at an appropriate time by a P.R.I.M.E. Finance expert, particularly where the expert is conveniently located to the parties to the dispute.

168 See *Rubenstein v HSBC Bank plc* [2011] EWHC 2304 (QB).

169 *ibid.*

170 It may, of course, also be that the reported cases are ones in which the banks have been confident of success at trial, or to put it another way that banks are settling mis-selling claims where they consider that their prospects of success at trial are not sufficiently strong to warrant taking the issues to that stage.

4. Concluding Remarks

The case for a specialized court or tribunal such as P.R.I.M.E. Finance on an international basis in the CFTs world is a compelling and a sound one. The case for P.R.I.M.E. Finance is that it is well positioned to address many issues that arise in CFTs disputes and to fill the asserted international void. State and national courts will always have their important place. However, conflicting recent cases in the English courts, as well as between the English and New York courts, are good examples of the difficulties and complexities that exist in the resolution of CFTS disputes in that world. These cases are also examples of how judges can struggle with admittedly complex issues that market participants would say have long and carefully been well-thought through and -understood, from a legal as well as a practical market perspective.

Markets and market participants can today bank on CFTs disputes continuing to occur if not increase. Markets and market participants need clarity, certainty and predictability, legal clarity, certainty and predictability not least. They also need confidence in the outcomes of the resolution of their disputes, as well as in disputes in other markets and of other market participants. P.R.I.M.E. Finance would again say that it is well positioned to assist in the provision of that confidence.

That said, the case for P.R.I.M.E. Finance can only be made once its tribunals and its college of expertise provide their services, and those services are tested.