

P.R.I.M.E. Finance

Panel of Recognized International Market Experts in Finance

NIAS/Woolf Fellowship



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“Report on your research project: show what P.R.I.M.E. Finance produces in academic work”

2011 HUGO (later Woolf) Fellowship at NIAS – the Netherlands Institute for Advanced Studies in Humanities and the Social Sciences at Wassenaar – to prepare a report on the options for P.R.I.M.E. Finance.

- ISDA Master agreement drafted by Professor Jeffrey Golden and Dan Cunningham with the help of over a hundred lawyers who took part in ISDA working groups.
- 2010 Mr Justice Briggs described it as “probably the most important standard market agreement used in the financial world”.



Lord Woolf of Barnes and Professor Golden, their work endorsed first by a small group of carefully selected market experts and then by a broad-based roundtable in The Hague and subsequent meetings in global financial centres, discovered that the agreement operated within an immense black hole of legal uncertainty.

It required creation of an independent tribunal and educational resource dedicated to complex financial transactions.



The result, supported by the Dutch Government and the City of The Hague: creation of The Panel of Recognized International Market Experts in Finance (P.R.I.M.E. Finance) as a Stichting, a charitable institution based in The Hague. My project - to identify what types of cases P.R.I.M.E. Finance should accept and how it should deal with them.

The context of the project: mismatch between:

- the burgeoning need for ever more sophisticated financial instruments to meet internationally the demands of modern commerce; and
- the institutional capacity to provide expert and urgent resolution of the inevitable disputes.

At stake were not only the immense sums the subject of actual complex transactions; but the confidence in legal systems, required to meet the challenges of economic and social disparity. These require ever greater provision of funds and other support by the developed to the developing world. The issues are of both academic and practical moment.



Starting point for the report - discussion with the initiators, who also introduced other world authorities in complex financing transactions (CFTs).

There followed a questionnaire addressed to an initial group of experts, followed by meetings about an evolving list of issues. We then sought to identify potential goals for P.R.I.M.E. Finance. These were:

- (1) bringing more certainty into CFTs;
- (2) resolving disputes arising from CFTs;
- (3) education and other outreach concerning (1) and (2).



But how to achieve these goals? That the primary topic of the report.

It became clear:

(1) legal uncertainty was itself an underlying risk factor in the market for complex financial transactions.¹ Vast topic embracing

- the issues mentioned in slide 4;
- a bewildering variety of techniques responding to ever-evolving demands and responses of market participants of high ability and no less creativity within a complex and ever-changing economic and political environment.

1. See *Henderson on Derivatives* (2 ed) para 1.15A



Inconsistent rulings on the interpretation of the same or similar versions of the ISDA Master agreement in different jurisdictions resulted from a lack of understanding of the document and of the contextual factors which are now recognized as relevant and sometimes crucial to meaning.² Accentuated by the shift from contractual relationship to imposition of legislative regulation discussed by Robert Pickel.

A document designed to cater for the sophisticated needs of the parties, as well as complying with regulations, requires equal sophistication of the counsel on *both* sides of a dispute and of the judge. Pressing need for greater professionalism and specialism in the way CFTs were dealt with.

2. Cf David McLauchlan “Continuity, not change, in contract interpretation?” L.Q.R. 2017, 133(Oct), 546-550 2017;



(2) The political implications of misunderstandings resulting from uncertainty fueled the intense political controversy over regulating derivatives and other CFTs.

(3) To remove such uncertainty required education of both judges and counsel, as well as of less sophisticated counter-parties to contracts prepared by the other side.

How was that to be achieved?



(4) P.R.I.M.E. Finance's task must be to focus on building up its major asset: **independent and unbiased expertise in relation to CFTS** and apply it to improvement of knowledge and processes, including:

- wider understanding of CFTs, their purpose and effect;
- improving dispute resolution;
- providing guidance and other forms of education;
- equipping itself to do so by embracing four roles, each supportive of the others.



(5) These roles were:

(i) **creation of a centre of international excellence** comprising:

- personnel of the highest quality;
- a state of the art derivatives and CFT – focused library, knowledge and database resource, and website;

(ii) **providing education of P.R.I.M.E. Finance derivatives and CFT experts, arbitrators, judges and other decision-makers** to raise the institutional competence of those responsible for dispute resolution;

(iii) since the demand for the benefits of CFTs is global, **extending the activities of P.R.I.M.E. Finance** to help meet the requirements of participants and legal systems in less developed and sophisticated markets;

(iv) **providing dispute resolution services** of the highest quality.

A major question was the scope of issues to be addressed by P.R.I.M.E. Finance.



The results

1 P.R.I.M.E. Finance has maintained its focus on the derivatives and other CFTs in which its experts have developed international reputations. Its policy is to attract and select outstanding members of three panels, comprising:

- specialists with profound experience in those fields;
- judges with the ability and experience to adjudicate justly and competently upon the resulting disputes;
- arbitrators with the ability and experience to ensure that processes are efficient as well as competent.

2 Its panels are carefully selected to conform with such policy and comprise internationally respected leading experts in each.



3 Its members have established such reputation for P.R.I.M.E. Finance internationally that:

(i) P.R.I.M.E. Finance has become party to a joint venture with the Permanent Court of Arbitration for the provision of dispute resolution services; its Secretary-General serves as a member of the Advisory Board of P.R.I.M.E. Finance;

(ii) it is nominated for that purpose by major financial institutions in their standard documents;

(iii) it has achieved excellent relationships with other major national and international institutions, including the City of The Hague;

(iv) its experts are personally in demand for appointment for resolution of major disputes internationally, often on more than one side;

(v) there is intense interest on the part of other experts for admission to the panels.

4 It has a proven record, and is in demand internationally, for provision of high quality judicial training courses.

5 It has reached agreement with LexisNexis whose experts are running the pilot database tool launched at this Conference.



- 6 Led by a dynamic Management Board chaired by Professor Golden and supported by an experienced Advisory Board it has an outstanding staff comprising its Secretary-General Professor Dr Meijer, its Executive Director Kristy Tillman, its Head of Secretariat Camilla Perera-De Wit, its Legal Officer Juan Pablo Valdiva Pizarro and Legal Interns Jannik Burth, Rosemary McLeod, Tancredi Rapone, Mathieu Taschereau and Edwin Trynes.

- 7 The success and high morale of P.R.I.M.E. Finance are evidenced by the support for this Seventh Annual Conference and the outstanding quality of both topics and speakers.



Conclusion

That the issues are of great academic, as well as practical, moment is borne out by the presence in this panel and in this company of Professor Cally Jordan and an increasing number of other scholars whose career is focused upon them. Their presence reminds us of the vision of the founders of P.R.I.M.E. Finance, who settled upon its character as a charity, operating in principled fashion across both professional disciplines and State borders.

Such vision was expressed in the creation of the Woolf Fellowships. It is hoped that they may continue to inspire the development of sound principles that will help other professionals to see immediate challenges in the context of their long-term social and economic potential.

