



Big Ben through Tunnel, London, UK | Daria Shevtsova

THE USE OF INTERNATIONAL ARBITRATION BY FINANCIAL SERVICES INSTITUTIONS: ANOTHER LOOK

By Rina See and Steven Finizio¹

I. INTRODUCTION

Although the use of international arbitration to resolve disputes involving financial institutions has grown over the last decade, international arbitration still remains the exception rather than the rule for many financial institutions. As discussed below, financial transactions vary greatly. That means that familiarity with and the use of arbitration differs greatly across the financial services sector, with wide familiarity and use for certain types of transactions and very little familiarity and use for others.

This note outlines current trends in the use of arbitration involving financial institutions, before exploring possible reasons for the apparent reluctance to use arbitration in at least some parts of the financial services industry and considering the suitability of arbitration for such disputes. **PART II** discusses existing initiatives directed at the use of arbitration in financial

services disputes, as well as indications of increased use of arbitration in certain types of financial services disputes. **PART III** examines the key features of arbitration in the context of financial disputes, along with recent developments in arbitral law and practice and their implications for the financial sector. It also considers when arbitration could be suitable in respect of different types of financial transactions. **PART IV** concludes with some observations for the future. In light of recent developments in arbitral practice that would address the specific needs of the financial sector, we ask: is it time for the financial industry to have another look at the use of international arbitration in financial disputes?

II. THE USE OF ARBITRATION IN FINANCIAL SERVICES DISPUTES

Litigation, traditionally in the financial centers of New York and London, has been the mainstay of dispute resolution in the financial services industry for many years.² Outside of consumer

contracts in the United States, the use of arbitration clauses in banking and finance transactions has been described as “practically non-existent” prior to 1995.³ While this traditional tendency has seen some change in the last two decades, the use of arbitration as a dispute resolution mechanism in the finance sector has been welcomed with restraint. For example:

- In 2013, the Queen Mary International Arbitration Survey found that 82% of respondents preferred court litigation for financial disputes, compared to 23% who preferred international arbitration.⁴ This figure is significantly lower than the 52% of respondents overall who considered international arbitration the preferred mechanism for cross-border disputes.⁵

- In 2016, a report on financial institutions and arbitration published by the ICC found that in the past five years, 70% of the financial institutions interviewed did not have any direct experience of arbitration, 24% had experience with arbitration but it represented 5% or less of their disputes, and only 6% had arbitrated more than 5% of their disputes.⁶

- In 2018, the Queen Mary International Arbitration Survey found that a 56% of respondents from the Banking and Finance sector thought it was likely that the use of international arbitration for resolving cross-border disputes would increase, concluding that “[f]inancial institutions and their counsel are contemplating arbitration with much greater interest than ever before.”⁷ But this was still lower than the 80% of respondents from other sectors (construction, energy, and technology) who considered that the use of international arbitration will increase.⁸

We outline below recent arbitration initiatives targeted at the financial services sector, before examining specific trends in the use of arbitration for disputes involving financial institutions, including what some commentators have described as “winds of change,”⁹ as increasing efforts are made to introduce international arbitration to financial institutions and adapt it to the needs of the finance sector.

A. Financial Services Sector-Specific Arbitration Initiatives

Reflecting the increasing interest in arbitration from the financial services sector, there have been several industry-specific arbitration initiatives in recent years. Two of the most notable are P.R.I.M.E. Finance and the ISDA Arbitration Guide. Other sector-specific arbitration initiatives include those promulgated by regional organizations such as the Financial Industry Regulatory Authority (FINRA) in the United States,¹⁰ and by arbitral and other dispute resolution organizations.

1. P.R.I.M.E. Finance

In 2012, the Panel of Recognized International Market Experts in Finance (P.R.I.M.E. Finance) was established to provide an alternative forum to judicial systems to resolve complex financial disputes.¹¹ Based in The Hague, P.R.I.M.E. Finance’s core activities are the provision of dispute resolution services, judicial training and education, and maintaining a database of international precedents and source materials.¹² Currently, P.R.I.M.E. Finance has a panel of more than 200 legal and financial experts.¹³

P.R.I.M.E. Finance offers dispute resolution services by facilitating arbitrations under the P.R.I.M.E. Finance Arbitration Rules,¹⁴ which are based on the UNCITRAL Arbitration Rules 1976 (as revised in 2010) and administered by the Permanent Court of Arbitration (PCA).¹⁵ There are several features of the P.R.I.M.E. Finance Arbitration Rules that are specifically tailored to address the concerns of financial institutions.

First, P.R.I.M.E. has created a “panel of experts” to act as arbitrators with experience relevant to financial disputes, including “judges, central bankers, regulators, academics, representatives from private legal practice and derivatives market participants (both dealer and buy side).” P.R.I.M.E. describes many of them as having “first-hand experience structuring and executing transactions, as well as with the laws, regulations and standard documentation of the structured finance market.”¹⁶

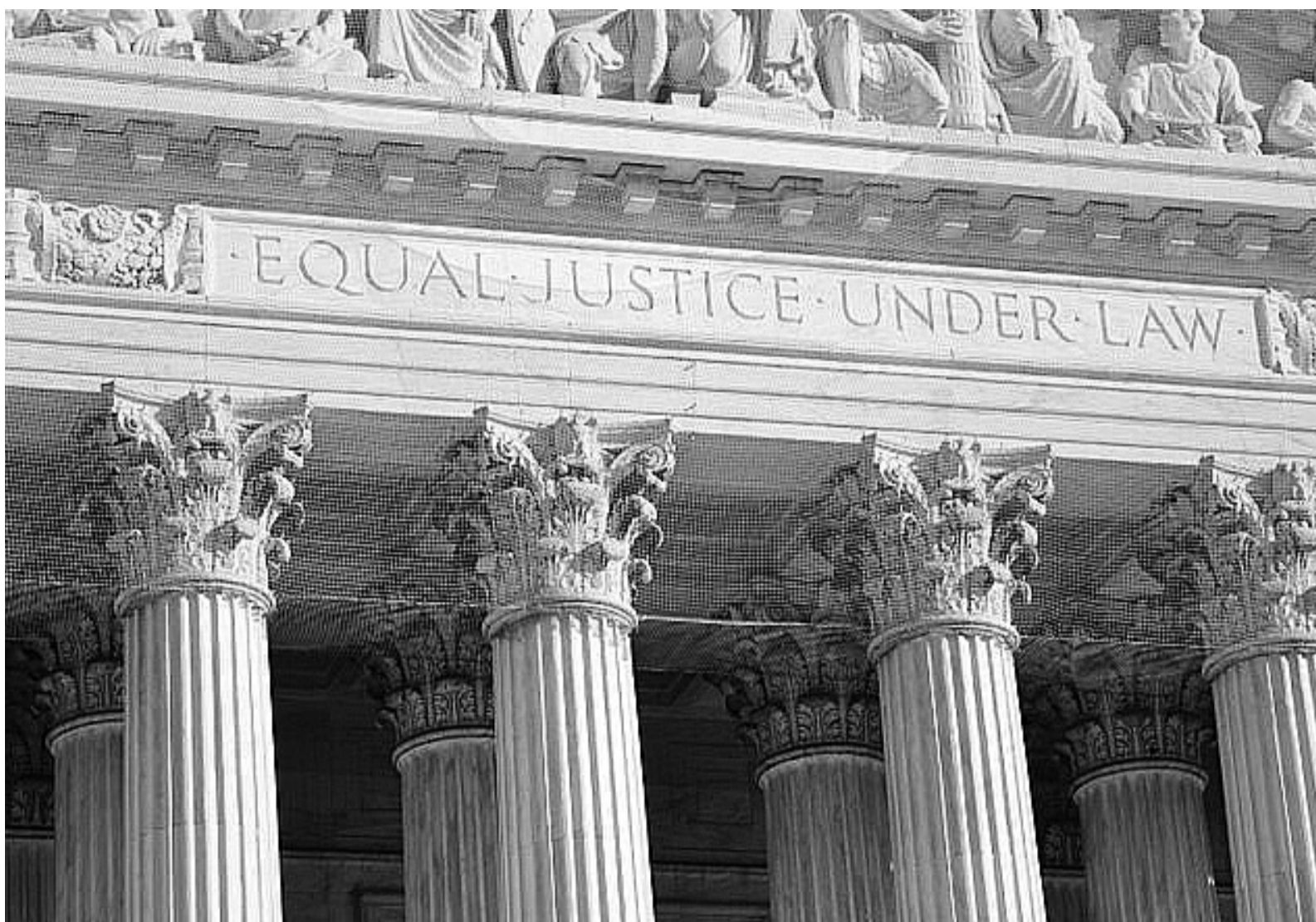
Second, the P.R.I.M.E. Rules include provisions targeted at resolving financial disputes efficiently and in an expedited manner. Article 2a allows for the parties to agree on expedited proceedings. As with the UNCITRAL Rules, Article 17 of the P.R.I.M.E. Finance Arbitration Rules allows the arbitral tribunal to extend or abridge any time period prescribed under the Rules and to conduct a document-only hearing.

Third, arbitral tribunals can grant interim measures if requested by a party. Article 26 allows a tribunal to grant interim measures generally, while Articles 26a and 26b provide options for urgent provisional relief. Article 26a provides for emergency arbitration proceedings to resolve requests for urgent provisional measures before the tribunal is constituted. Under Article 26b, if the parties have agreed to apply the Referee Arbitration Rules and the seat of arbitration is in the Netherlands, a party can seek urgent provisional measures in referee arbitral proceedings, which are fast track proceedings resulting in an enforceable award within 30 to 60 days. A referee arbitral award is recognized as a valid arbitral award under Dutch law.¹⁷

Fourth, to address the concern sometimes expressed by financial services users that, unlike litigation, arbitration fails to generate precedent, Article 35 provides that “P.R.I.M.E. Finance may publish the anonymized excerpts and anonymized awards furnished to it by the P.R.I.M.E. Finance/PCA Registry.”

Other distinctive features of the P.R.I.M.E. Finance Arbitration Rules are that the parties, the arbitrators and/or the appointing authority (the Secretary-General of the PCA) may appoint arbitrators not included on the P.R.I.M.E. Finance list of experts (Article 10a), the arbitral tribunal may invite or grant leave for amicus curiae to make submissions and appear (Article 30), and there are specific provisions relating to the currency of the award, interest calculations and permitting the tribunal to consider the tax consequences of the award (Articles 38 to 40).

The P.R.I.M.E. Finance Arbitration Rules are currently undergoing the process of consultation and revision, and a draft set of revised Rules were released in January 2021.¹⁸ The proposed amendments are focused on provisions around joinder and consolidation, efficiency, and transparency. The proposed



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joinder and consolidation provisions would bring the P.R.I.M.E. Rules in line with recent developments in other institutional arbitral rules,¹⁹ while the transparency initiatives include providing for the reporting of third-party funding agreements, further regulating the role of amicus curiae and the default publication of arbitral awards.²⁰

2. The ISDA Arbitration Guide

Arguably one of the most influential ways of promoting the use of arbitration is through its adoption in template agreements by trade organizations. The International Swaps and Derivatives Association (ISDA) represents participants in the market for over-the-counter (OTC) derivatives.²¹ The ISDA Master Agreement is widely used as an industry-standard framework template,²² with 90% of all OTC derivatives transactions conducted using either the 1992 or 2002 ISDA Master Agreements.²³ Both 1992 and 2002 Master Agreements only include the choice of English or New York courts in their dispute resolution clauses,²⁴ which reflects (and reinforces) the historical preference that many financial institutions have had for litigation in these courts.

This changed in 2013 when ISDA published its Arbitration Guide, which it updated in 2018. The ISDA Arbitration Guide provides guidance on the use of arbitration and its key features for users of the ISDA Master Agreement, and includes a range of model arbitration clauses that could be used instead of the jurisdiction clauses in the 2002 or 1992 Master Agreements.²⁵ The 2018 ISDA Arbitration Guide includes model clauses for 11 different institutional rules and a choice of seats.²⁶

With the publication of these ISDA model arbitration clauses, parties have increasingly been deviating from the default

dispute jurisdictional clause and electing to arbitrate instead.²⁷ The use of arbitration in OTC derivatives transactions would increase even more if the ISDA Master Agreement adopted an arbitration clause as its default dispute resolution clause.²⁸

3. Examples of Regional and Other Institutions with Rules for Financial Services Arbitration

There are also regional and other institutional examples of arbitration being used in the financial services sector.

In the United States, the Financial Industry Regulatory Authority (FINRA), a government-authorized industry organization that oversees U.S. broker dealers, administers arbitrations to resolve disputes involving broker-dealers and between member companies.²⁹ All broker-dealers are required to register with FINRA.³⁰ FINRA arbitrations are administered in accordance with the codes of arbitration procedure in the FINRA Rules, with the Customer Code applying to arbitral proceedings between investors and brokers and/or brokerage firms and the Industry Code applying between or among industry parties.

FINRA appoints arbitrators using a neutral list selection system, with party input.³¹ There are rules concerning who can serve as “public” and “non-public arbitrators,” depending on their level of affiliation with the financial industry,³² with the composition of a tribunal varying based on the type of case.³³ The FINRA codes provide for streamlined proceedings in the interests of efficiency. When the amount involved is \$50,000 or less, a simplified procedure of a single arbitrator without a hearing, unless the parties request otherwise.³⁴ Pre-hearing motions are limited,³⁵ experts are not required to file statements,³⁶ and tribunals are

also not required to render a reasoned award unless the parties specifically request this.³⁷

In Hong Kong, the Financial Dispute Resolution Centre (FDRC) was established in 2012 in the wake of the financial crisis to provide a platform to resolve disputes between financial institutions and customers. The FDRC's dispute resolution process generally adopts a "Mediation First, Arbitration Next" philosophy.³⁸ The FDRC's jurisdiction and the applicable procedure depends on whether the claim is up to HK\$1,000,000 and/or within the 24 month limitation period.³⁹ For eligible disputes, if mediation has failed, the arbitration procedure is an expedited one, resolved by a single arbitrator,⁴⁰ and may be a document-only proceeding⁴¹ or an in-person hearing if considered appropriate.⁴² The arbitrator is obliged to render an award within 30 days.⁴³ There is also an "early dismissal" process in which the FDRC may terminate a proceeding if it considers the claim deficient, and the deficiency is not fixed within the required time frame.⁴⁴

Other than industry organizations providing arbitration services, major arbitral institutions have also developed initiatives to facilitate the use of arbitration in the financial services sector. For example, the Hong Kong International Arbitration Center (HKIAC) has a set of Securities Arbitration Rules. The Singapore International Arbitration Center's (SIAC) SGX-DT Arbitration Rules and SGX-DC Arbitration Rules are targeted at disputes arising from derivative trading and clearing on the Singapore Exchange. Several Chinese arbitral institutions, including the China International Economic and Trade Arbitration Commission (CIETAC), also have arbitral rules specifically tailored for financial disputes. In 2018, the HKIAC also launched a panel of arbitrators for financial services disputes comprised of 30 arbitrators from 17 jurisdictions.⁴⁵

B. Indications of Increased Use of Arbitration in For Certain Financial Services Disputes

Although it is often difficult to get reliable empirical data about the use of international commercial arbitration, there are a number of indicators that financial services companies are increasingly using international arbitration to resolve disputes. In addition to the initiatives discussed above, two major arbitration institutions – the London Court of International Arbitration (LCIA) and the American Arbitration Association's International Center for Dispute Resolution (AAA-ICDR) – have reported significant increases in arbitrations involving financial services companies. It also appears that financial services dispute are increasingly being referred to arbitration in the Asia-Pacific region, and in China in particular.

1. LCIA and AAA-ICDR Arbitration

The LCIA has reported significant increases in arbitration involving financial institutions in recent years. In 2019, the LCIA reported that 32% of all cases commenced in the LCIA were in the financial services sector,⁴⁶ increasing from 29% in 2018 and 24% in 2017.⁴⁷ Similarly, the AAA-ICDR reported a 78% increase in its financial services cases in 2018 and a 58% increase in its financial services cases in 2019, even though financial services

cases still only comprise 6-18% of its total caseload.⁴⁸ In contrast, the ICC reported that, in 2019, between 4% to 7% of its new cases were considered to in the "financing and insurance" sector.⁴⁹ Only 11.9% of the HKIAC's new cases were identified as relating to banking and financial services in 2018.⁵⁰ And SIAC reported that 10% of its new cases were in its "other" category, which includes disputes concerning banking and financial services.⁵¹ Although comparisons of these statistics may be limited due to the different ways institutions identify the nature of disputes (including how they define financial services related disputes), the LCIA nevertheless appears to have seen both an increasing number of disputes relating to financial services and to be the preferred institution for such disputes, at least for certain parts of the financial services sector.

It is not surprising that some financial services companies would turn to the LCIA to administer arbitrations. English law is commonly used in financial services contracts. Given the traditional preference by some financial services companies for English courts and English law in resolving financial disputes, Stephen Trevis, Managing Director at Barclays Bank, has explained that "to the extent that arbitration is considered appropriate, LCIA has historically been considered a natural choice."⁵² Factors such as London's status as a global financial center and the neutrality and expertise of the English judiciary may also influence parties when choosing an arbitral seat,⁵³ and parties often look to arbitral institutions located in their preferred seat. As a result, it appears to be more common for international banks to refer to LCIA arbitration (with London as the seat of arbitration and English law the governing law) in banks' template agreements.⁵⁴ Given New York's status as a financial center, and the familiarity of many financial institutions with New York law, similar considerations may be driving the increase in financial services arbitration in the AAA-ICDR in recent years.

2. The Asia-Pacific and China

Arbitration of financial services disputes also appears to be growing in the Asia-Pacific region, and in China in particular.⁵⁵ This may be due to the confluence of a number of regional features.

- First, while there are many cross-border transactions within Asia-Pacific, there is less commonality of legal and regulatory regimes compared to countries within the European Union, and between the European Union and the United States—particularly in light of new laws and regulations implemented after the 2008 financial crises.⁵⁶ A lack of uniform legal systems leads to complexity and thus uncertainty associated with resolving disputes in a different country's courts, driving parties towards arbitration.

- Second, difficulties with enforcing foreign judgments also lead to increased use of arbitration in the region. For example, many parties see arbitration as preferable for financial disputes involving counterparties in China, because China does not have a reciprocal enforcement treaty for foreign judgments.⁵⁷

- Third, the presence of well-established arbitral institutions in the region, such as SIAC and HKIAC, may also encourage (and

facilitate) the use of international arbitration for financial services disputes.⁵⁸ Both Singapore and Hong Kong are associated with independent judiciaries and strong legal professions, and both institutions provide specialized arbitration rules for financial disputes.⁵⁹ Anecdotal, Chinese parties generally prefer HKIAC arbitration, whereas parties from South East Asia and India tend to choose SIAC arbitration.⁶⁰

Available data shows that financial disputes in China are increasingly resolved by arbitration. In 2018, the Ministry of Justice of China released statistics showing that approximately 22.1% (120,358) of the cases administered by the 255 Chinese arbitration institutions were financial disputes, which amount to approximately 33.6% of disputes by value.⁶¹ The Shanghai International Economic and Trade Arbitration Commission (SHIAC) administered 381 financial disputes in 2018, amounting to 34% of the total cases received.⁶² In particular, arbitration has been increasingly used for disputes in China involving financial leasing and asset management.⁶³ In 2019, a CIETAC report noted that 58.1% of all arbitrations initiated were financial disputes, with the disputed amount involved in such disputes accounting for 34.19% of the total aggregate of all arbitration cases.⁶⁴ The Beijing Arbitration Commission (BAC) alone administered 2,973 finance cases in 2019, which constituted 44.16% of all cases accepted, 69.69% higher than the previous year.⁶⁵

Commentators observe that factors contributing to the growth of arbitration of financial disputes includes strong governmental and judicial support, and efforts by arbitral institutions to promote the use of arbitration in this area.⁶⁶ The Shanghai Financial Court, which was established in August 2018, is responsible for conducting judicial reviews of domestic and international financial arbitration awards and for administering proceedings for the recognition and enforcement of foreign financial arbitration awards.⁶⁷ The Beijing Financial Court, established in March 2021, has the same remit in Beijing.⁶⁸ Many Chinese arbitral institutions have also published arbitration rules tailored for financial disputes. As noted above, CIETAC has had a set of Financial Disputes Arbitration Rules since 2003, which was revised in 2014.⁶⁹

The growing use of arbitration in London and the Asia-Pacific region for financial services disputes may precede a wider change in the way financial disputes are generally resolved.

III. SUITABILITY OF ARBITRATION FOR FINANCIAL SERVICES DISPUTES

Commentators have attributed financial institutions' historical reluctance to embrace the use of international arbitration to cultural practices, inertia and the use of standardized documentation, such as the litigation default contained in the ISDA Master Agreements.⁷⁰ The ICC's Report on Financial Institutions and International Arbitration also observed that there appeared to be an "overall lack of awareness" of potential benefits of international arbitration and in banking and finance matters and "common misperceptions" about the process.⁷¹ However, there are also some practical reasons why financial institutions may prefer litigation over arbitration, such as the availability of summary

judgment procedures, the ability to create binding precedent, the ability to appeal, and the ease of joining third parties.⁷² Thus, it is important to consider what benefits arbitration could confer over litigation and whether the reasons for favoring litigation are in fact unavailable in arbitration. It is also necessary to consider the specific type of financial transaction and dispute at issue to identify the features of arbitration or litigation that are of the greatest importance.

A. Key Features of Arbitration for Financial Disputes

The reasons that commercial parties typically choose arbitration to resolve cross-border disputes largely also apply to disputes in the banking and finance sector. These include:

a. *Expertise.* Unlike in litigation, where the judge is assigned, in arbitration, parties can choose an arbitrator who has the necessary experience and expertise in resolving disputes.⁷³ The ability to choose a decision-maker with specific expertise in financial disputes is gaining in importance, as financial disputes become more complex and technical due to the fast-changing nature of the law in the financial sector.⁷⁴ Being able to choose an arbitrator who understands the industry provides assurance as to the soundness of the outcome,⁷⁵ and could lead to cost and time savings if the tribunal is familiar with the subject matter of the parties' claims and evidence.⁷⁶

b. *Neutrality.* Contracting parties may be unwilling to litigate in their counterparty's local courts, due to a concern about prejudice or bias in favor of the party whose home State it is, or concerns about the level of expertise or lack of experience with the financial disputes or a foreign governing law.⁷⁷ Arbitration provides a neutral venue in which to resolve disputes, where the seat of the arbitration can be a third jurisdiction unrelated to either counterparty.

c. *Flexibility.* Parties enjoy great procedural flexibility to tailor the arbitral proceedings according to their specific needs.⁷⁸ The parties are free to select the seat of arbitration, the venue of the hearing, the language of the proceedings, the rules governing the arbitral procedure, and other procedural aspects.⁷⁹ Indeed, arbitral proceedings have made the transition to remote hearings during the COVID-19 pandemic relatively smoothly, as many arbitral rules already provided for the ability to conduct hearings by video conference.⁸⁰

d. *Speed and cost.* Arbitration can potentially be more time- and cost-efficient than litigation, compared, for example, to US court proceedings, in which there is typically an extensive discovery process and the right to appeal.⁸¹ While arbitration is sometimes criticized for not being faster or cheaper than litigation, parties in arbitration have more control over the timing and nature of the proceedings used, and arbitral rules provide options that can be used to decide issues more quickly, such as the option to choose expedited proceedings.⁸²

e. *Confidentiality.* Unlike court proceedings, arbitral proceedings are generally confidential and may allow the parties to avoid negative publicity or sensitive information



Cityscape with cathedral and Ferris wheel in London | Olga Lioncat

becoming public.⁸³ There are differences in the exact scope of confidentiality that applies based on the arbitral seat or rules applied, but generally, parties are free to agree on the confidentiality of the arbitration.

f. *Finality*. An arbitral award is final once rendered, and there is generally no mechanism for appeal.⁸⁴ Although an award debtor can seek to set aside the award at the seat of arbitration, this can only be done on very limited grounds such as where the arbitral tribunal lacked jurisdiction, if there are serious concerns with due process or the award is contrary to public policy. As a result, the parties generally have a greater degree of certainty that the dispute is resolved once an award is rendered, which saves time and costs compared to the potentially lengthy appeals process associated with litigation.

g. *Enforceability*. The comparative ease with which an arbitral award can be enforced over that of a foreign judgment is one of the most significant benefits of arbitration over litigation.⁸⁵ There are 168 State parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which requires each of the contracting states to recognize arbitral awards as binding. Foreign judgments do not enjoy this widespread enforceability. While there are mechanisms for reciprocal recognition and enforcement of foreign judgments within the European Union, and a patchy network of other reciprocal arrangements, including those propounded by the Hague Convention,⁸⁶ none of these have the scale or success of the New York Convention.

The ISDA Arbitration Guide lists most of these points as key features of arbitration whose importance may vary depending on the party and even the transaction.⁸⁷ However, some of these features that are usually considered advantages of arbitration may not in fact be perceived by financial institutions as advantages

over the traditional choices of English and New York courts, and in some cases may even be considered disadvantages compared to litigation. Nevertheless, as discussed below, financial services institutions may need to reconsider some of these perceptions in light of ongoing developments.

First, some financial institutions may (perhaps erroneously) perceive that arbitration does not necessarily confer any advantages over litigation in London and New York in respect of expertise and neutrality. Judges in these jurisdictions have a wealth of specialist knowledge on resolving financial disputes, and these courts are selected as neutral (and creditor-friendly) jurisdictions, often with no connection to the parties or dispute at hand. However, there are indications that counterparties in emerging markets may be increasingly unwilling to agree to a choice of English or New York courts, such that arbitration may be a more acceptable alternative,⁸⁸ but overall, expertise and neutrality may not tip the scales in favor of arbitration. Moreover, following the United Kingdom's exit from the European Union, the enforceability of English court judgments in the EU is no longer clear, while arbitral awards are still enforceable in courts in EU countries as a matter of international convention.

Second, some financial institutions may (again, perhaps erroneously) perceive the flexibility of arbitral procedure as not being an advantage compared to litigation in English or New York courts. These courts have developed streamlined and standardized procedures to deal with financial disputes; financial institutions' familiarity with these procedures compared to the perceived lack of standardized arbitral procedure may lead to a resistance to adopting arbitration for financial disputes.⁸⁹ As discussed above, however, there are many well-established institutional arbitral rules like those from the LCIA, SIAC and HKIAC, or finance sector-specific rules like the P.R.I.M.E. Rules, that set out clearly defined procedures for arbitral proceedings – often in a more

user-friendly manner than the rules of civil procedure in court litigation. Financial institutions may also have the (erroneous) perception that arbitration is incapable of handling requests for urgent injunctive relief or to issue summary or default judgments,⁹⁰ and would be slower and costlier than going to court.

Third, the attributes of confidentiality and finality may not be perceived as desirable for certain types of financial disputes compared to predictability and certainty about the law, and a concern about the “correctness” of the final decision. As a result, the perceived lack of transparency in arbitration has been highlighted as a concern to certain financial services institutions.⁹¹ In particular, given the use of standard form documentation in certain types of financial agreements, financial institutions value predictable and consistent interpretation,⁹² and may want to make sure that decision is legally “correct” because it may have implications beyond the parties to the particular dispute due to the systemic and inter-related nature of certain types of transactions. For at least those types of cases, financial institutions may be concerned that the confidentiality of arbitral proceedings, the lack of a system of precedent, and the limited bases for challenging an arbitral award are disadvantages compared with London and New York courts, which can establish binding precedent and are subject to appeal. The perception may also be strengthened by the (debatable) belief (often driven by experiences with domestic rather than international arbitration) that arbitral awards lack the same level of legal rigor as court judgments.

Fourth, in addition to the above, arbitral proceedings are also sometimes perceived (again, often erroneously) as having the following limitations when compared to court proceedings:

- *Joinder and consolidation.* Due to the consensual nature of arbitration, where multiparty, multi-contract disputes are concerned (such as in project finance or syndicated loans), there may be difficulties with joining related parties to a dispute or consolidating multiple proceedings.⁹³ These difficulties may play out in costly jurisdictional arguments and there may be concerns that parties may be subject to several parallel proceedings involving related matters, and worst still, inconsistent or contradictory awards in those related matters. Of course, issues of jurisdiction and the risk of parallel proceedings are not unique to arbitration: where cross-border litigation is concerned, the issues of which court has jurisdiction over the dispute and the risk of multiple proceedings in different courts is often why arbitration is selected in the first place. Moreover, as discussed below, financial services companies may not be familiar with the strong trend by major arbitral institutions to revise their rules and approach to consolidation and joinder, or to the options available to address such issues through language in arbitration agreements.

- *Non-arbitrability.* Some types of financial disputes may not be arbitrable in certain jurisdictions, such as disputes involving consumer finance and financial disputes concerning insolvency or where security interests are enforced.⁹⁴ In these types of disputes, or disputes where there is a possibility of related consumer finance or insolvency proceedings, arbitration may not be permitted.

Many of these issues are valid concerns that financial institutions should carefully weigh when considering a choice between an arbitration or choice-of-court clause in the particular agreement. However, several of the “limitations” of arbitration discussed above have been addressed in recent developments in arbitral law and practice, or can otherwise be mitigated. In order for financial institutions to make the assessment as to whether arbitration or litigation is preferable properly, it is necessary to be fully aware of these options.

B. Recent Developments In Arbitral Law and Practice

As discussed above, there appears to be a perception that arbitration is incapable of handling cases that require injunctive relief, or “open-and-shut” cases that lend themselves toward summary judgment procedures. There are also concerns around issues of consistency, predictability and transparency in arbitral procedure and arbitral awards, and issues around the arbitral tribunal’s jurisdiction. Many of these concerns have driven the innovations that can be seen in finance sector-specific arbitral initiatives, such as those adopted by P.R.I.M.E. Finance. This section considers these aspects of arbitral practice in more detail, focusing on (1) emergency arbitration and referee arbitral procedures; (2) early dismissal procedures; (3) joinder and consolidation of arbitral proceedings; (4) publication of awards and other transparency initiatives; and (5) appellate mechanisms in arbitration.

1. Urgent Interim Measures

Traditionally, a party seeking urgent interim relief before the institution of proceedings was required to go to court to do so. This is no longer the case, with many arbitral institutions and arbitral rules now providing for emergency arbitration procedures, where a party can obtain interim relief from an emergency arbitrator before an arbitral tribunal is constituted for the main dispute.⁹⁵ These provisions generally apply unless the parties have expressly opted out of emergency arbitration rules in writing,⁹⁶ and the rules oblige the parties to comply with the emergency arbitrator’s order or award.⁹⁷ An emergency arbitrator can grant interim relief in the form of an order or award to preserve evidence, to maintain or restore the status quo, or to preserve assets.⁹⁸

Most major arbitral rules provide for emergency arbitration, with only slight differences in applicable procedure. For example, the 2020 LCIA Rules allow parties to apply for a temporary sole arbitrator to conduct emergency proceedings at any time before the arbitral tribunal’s formation.⁹⁹ The emergency arbitrator must be appointed within three days of receipt of the application or as soon as possible thereafter, and must decide the claim within 14 days of appointment.¹⁰⁰ Other arbitral rules have similar provisions, and, as discussed above, As noted above, the P.R.I.M.E. Finance Arbitration Rules provide not only for emergency arbitration but also for referee arbitration, reflecting the special procedure for interim measures permitted by Article 1043b of the Dutch Code of Civil Procedure.^{101 102} These provisions generally give parties the option of both pursuing urgent interim relief through the applicable arbitration rules or through a court of competent jurisdiction.

2. Early Dismissal

As with interim measures, arbitral institutions have taken steps to make clear “summary” procedures are available in arbitration. Among other things, arbitral institutions have added express references to the use of summary procedures and some institutions have added more detailed provisions for summary decisions. For example, in its 2016 rules revision, SIAC introduced specific provisions on the early dismissal of claims and defenses.¹⁰³ Under Rule 29 of the SIAC Rules, a party may apply to a tribunal for the early dismissal of a claim or defense on the basis that it is “manifestly without legal merit” or “manifestly outside the jurisdiction of the Tribunal.”¹⁰⁴ A tribunal is required to make an order or award on the application within 60 days of its filing (unless extended in exceptional circumstances), and must give reasons, although this may be in summary form.¹⁰⁵ Other institutions including the HKIAC and most recently the LCIA have since incorporated similar provisions on early dismissal in their rules.¹⁰⁶

The English courts have had occasion to comment on summary procedures in arbitration in *Travis Coal v Essar Global Fund*.¹⁰⁷ In a dispute under a guarantee relating to a stock purchase, the tribunal had granted summary judgment (under governing New York law) on certain defenses in an arbitration conducted under the ICC Rules.¹⁰⁸ It had done so in a “hybrid” fashion, where oral testimony was accepted but without a full hearing on the merits.¹⁰⁹ The award debtor challenged the enforcement of the award on the basis that the tribunal did not have the power to issue summary judgment and doing so was a denial of due process.¹¹⁰ The English High Court observed that a summary judgment process rendered by an arbitral tribunal would not in itself necessarily amount to a denial of due process,¹¹¹ before confirming that under the broad arbitration agreement at issue and relevant provisions of the ICC Rules, the award debtor did not have a realistic prospect of showing that the tribunal exceeded its powers.¹¹²

3. Joinder and Consolidation

Although the obligation to arbitrate only binds parties to the arbitration agreement, many arbitral rules provide mechanisms to join further parties into an existing arbitration and consolidate two or more related proceedings into a single arbitration.¹¹³ Moreover, many arbitral institutions have repeatedly refined and broadened their provisions for joinder and consolidation in recent rules revisions. Many arbitral institutions, including the ICC, LCIA, ICDR, and HKIAC rules among others, have recently expanded and liberalized their joinder and consolidation provisions,¹¹⁴ allowing for the joinder of parties and consolidation of arbitral proceedings in a wider set of circumstances. The most recent SIAC Rules already have comprehensive provisions on joinder and consolidation,¹¹⁵ and the SIAC is currently undergoing a rules revision process, with a subcommittee on multiple contracts, consolidation and joinder.¹¹⁶

As an example, the LCIA Rules provide that a tribunal can order joinder of a party to the proceedings where the third person and applicant party expressly consents.¹¹⁷ A tribunal can also consolidate arbitrations with the approval of the LCIA Court either where the parties agree to consolidation in writing, or where

the parties have commenced arbitrations (1) under the same arbitration agreement or compatible arbitration agreement(s); (2) between the same disputing parties or arising out of the same transaction or series of related transactions; and (3) if no arbitral tribunal has yet been appointed for the other arbitration or the tribunal consists of the same arbitrators.¹¹⁸ Other arbitral rules contain similar provisions.¹¹⁹

Thus, although the parties’ consent is generally required to join third parties, tribunals are increasingly being granted powers to consolidate proceedings where it would be sensible to do so – subject to the requirement that the arbitration agreements are the same or “compatible.” In practice, only proceedings commenced under the same arbitral institution can be consolidated,¹²⁰ and it is desirable for the arbitration agreement to provide for the same seat and governing law. While there have been proposals on cross-institution cooperation for the consolidation of international arbitral proceedings,¹²¹ no such proposals have been formally adopted to date. This underscores the importance of ensuring that separate but related agreements contain consistent dispute resolution clauses.¹²² Parties could also expressly address this issue by expressly consenting to arbitrate disputes from related agreements in a single proceeding in the arbitration agreement.¹²³

4. Transparency Initiatives

There have been efforts at increasing transparency in international arbitration. Extracts of ICC awards are regularly published in journals, and from 2019 onwards, final ICC awards may be published in their entirety not less than two years after its making unless a party objects.¹²⁴ Other arbitral institutions also provide for the publication of awards with the parties’ consent, albeit to differing extents.¹²⁵ Despite confidentiality being a key feature of arbitration, it is not uncommon for tribunals to give persuasive value to other arbitral awards, where such awards are available.¹²⁶ Indeed, in investment arbitration, the publication of awards is common, and while decisions of other tribunals are not legally binding, they are often referred to and relied on in investment treaty arbitrations in a manner that aims to achieve consistency in interpreting a specific standard in investment treaties or under international customary law.¹²⁷

To this end, the early inclusion of an express provision in the P.R.I.M.E. Finance Arbitration Rules for publication of anonymized awards is meant to address the importance that some financial services companies place on legal predictability and consistency.¹²⁸ As noted above, P.R.I.M.E. Finance’s draft revised rules provides for the publication of an anonymized copy of arbitral awards by default.¹²⁹ P.R.I.M.E. Finance also maintains a central database of international precedents and source materials, with a view to increasing transparency and accessibility.¹³⁰

5. Appellate Procedures

Generally, arbitral awards are not subject to appeal (as opposed to annulment or set aside actions, which are more limited), in keeping with the principle of finality. As discussed above, some financial institutions would prefer the option of challenging arbitral awards for errors of law, as can be done with first instance

court decisions. This is sometimes due to a (perhaps misplaced) belief that international arbitration awards are less reasoned than court judgments (this perception may come from experience with domestic arbitration). However, this concern may also be driven by concerns about the systemic impact of the interpretation of standard agreements and similar issues. In those cases, it is possible to include appellate procedures within arbitration.¹³¹ It is also possible in some jurisdictions to have a court in the seat of arbitration review an arbitral award for errors of law.

These procedures can be conceptualized as serving the two primary purposes of appeals: the correction of errors, and, particularly in common law countries, the development of the law. There are therefore options that financial institutions could consider incorporating if the inability to appeal against awards is a concern.

Internal appellate mechanisms within an arbitral body consist of a second-tier board or tribunal that reviews the arbitral award. An example is the “opt-in” procedure at some major arbitral institutions, such as the AAA-ICDR Optional Appellate Rules. To opt into these Appellate Rules, parties can provide for this procedure in their arbitration agreement.¹³² Appeals are limited to grounds of material and prejudicial errors of law and/or clearly erroneous determinations of fact.¹³³ An appeal tribunal can be appointed by the parties or by the AAA.¹³⁴ Other arbitral institutions with appellate rules include the JAMS Optional Arbitration Procedure and the CPR’s Appellate Arbitration Procedure.

Several national arbitration laws also provide for recourse to national courts for appeals on points of law, either on an opt-in or opt-out basis.¹³⁵ For example, section 69 of the English Arbitration Act 1996 allows for a party to arbitral proceedings seated in England to appeal to the English court on a question of English law arising out of an arbitral award,¹³⁶ albeit only in restrictive circumstances.¹³⁷ The court can confirm, vary, set aside, or remit the award to the tribunal to reconsider pursuant to the court’s determination.¹³⁸ Section 69 is a non-mandatory provision, such that parties can opt out of this provision.¹³⁹ In practice, this provision is irregularly used, because even if section 69 is not expressly excluded by the parties, a choice of institutional rules that excludes the right to appeal (*e.g.*, LCIA Rules, ICC Rules) would be considered a waiver.¹⁴⁰ The Hong Kong Arbitration Ordinance provides for a similar ability to appeal against an arbitral award on a question of law, but on an opt-in basis.¹⁴¹ In Singapore, consultations are taking place on whether its International Arbitration Act should allow for appeals on errors of law on an opt-in basis.¹⁴² In the United States, however, where the Federal Arbitration Act applies, it is not possible to expand a reviewing court’s limited scope of review beyond the grounds specified in 9 U.S.C. §§ 10 and 11, so it would not be possible for a US court to review or vacate an arbitral award for errors of law.¹⁴³

C. When is Arbitration Suitable for Financial Disputes? Overview of the Use for Certain Types of Financial Transactions

As the discussion above demonstrates, arbitration and litigation differ in various aspects that may hold varying degrees of importance for different types of financial disputes. The

2016 ICC Report on Financial Institutions and International Arbitration observed that different types of financial transactions are “not amenable to a ‘one size fits all’ approach,”¹⁴⁴ and noted that financial institutions tend to favor arbitration when (1) the transaction is complex or significant, (2) confidentiality is important, (3) a state-owned counterparty is involved, and (4) when the enforcement of foreign judgments may be more difficult to enforce than an arbitral award in the counterparty’s jurisdiction.¹⁴⁵ This section briefly considers the suitability of arbitration in four types of financial transactions: (1) derivatives; (2) bonds, (3) project finance; and (4) asset management.

1. Derivatives

Derivatives are a financial product whose value is determined by fluctuations in the value of an underlying asset. Derivatives traded on outside official exchanges (over the counter or “OTC”) accounts for the bulk of derivatives trading,¹⁴⁶ and, as noted above, approximately 90% of OTC transactions are conducted under the ISDA Master Agreement.¹⁴⁷ Arbitration is not the default choice under the ISDA Master Agreement, but parties can replace the default jurisdiction clause with a model arbitration clause from the ISDA Arbitration Guide.¹⁴⁸

The ICC Task Force found that one of the main reasons why arbitration is less commonly used, particularly in Europe, is that arbitration is not yet viewed as a ‘default’ dispute resolution mechanism when financial institutions enter into contracts.¹⁴⁹ However, there appears to be increasing willingness to use arbitration, particularly where counterparties are from emerging markets, because of difficulties enforcing court decisions in those jurisdictions.¹⁵⁰

Arbitration may also be advantageous for derivatives disputes due to the ability to maintain confidentiality and to select arbitrators with relevant expertise.¹⁵¹ Confidentiality may be particularly important where parties are concerned about systemic risk (the risk that events arising out of one transaction can lead to instability or collapse of the whole financial system), and parties may wish to avoid the consequential effects on financial markets that publicity from the dispute could cause.¹⁵² Considering these benefits, commentators have suggested that arbitration could be designated as the default dispute settlement mechanism in the ISDA Master Agreement.¹⁵³

2. Bonds

Financial transactions involving bonds are another area in which arbitration may be suitable as a dispute settlement mechanism. Generally, financial institutions engage in three types of transactions involving bonds: issuing bonds, purchasing bonds, and using bonds to raise finance.¹⁵⁴ The most common dispute involving bonds relates to non-payment, and in such disputes the duration of the proceeding is likely to be of greatest concern to financial institutions.¹⁵⁵ Parties can stipulate the adoption of expedited procedures—such as those in the ICC, SIAC, HKIAC and ICDR Rules—in their arbitration agreement, even for higher value disputes. As with derivatives, the enforceability of an award is a key benefit as

there are increasing numbers of cross-border disputes, including those involving emerging markets.¹⁵⁶

Where sovereign bonds are concerned, neutrality is one of the most important reasons favoring the use of arbitration—i.e., the ability to avoid resolving disputes in the sovereign’s national courts.¹⁵⁷ Additionally, the ability to appoint an arbitrator who is independent of sovereign counterparty’s influence was an advantage to use arbitration.¹⁵⁸

3. Project Finance and International Financing

Project financing is an area in which the use of arbitration has been steadily increasing, particularly where parties or assets are located in a developing country.¹⁵⁹ This contrasts with other types of international financing, such as secured and unsecured lending, syndicated lending, asset financing and trade finance, where financial institutions prefer to litigate such disputes.¹⁶⁰ The ICC Task Force found that financial institutions prefer arbitration in jurisdictions where domestic courts are perceived as unreliable or lacking in independence.¹⁶¹

In addition to the advantages of confidentiality, neutrality and enforceability that arbitration can confer, where there are numerous project participants located in different jurisdictions, parties can avoid having multiple parallel litigation proceedings by stipulating the same or consistent arbitration agreements across related agreements, and bringing disputes with multiple parties into a single arbitration proceeding through consolidation.¹⁶²

4. Asset Management

Asset management services are those involving the management of portfolio investments or the provision of investment advisory services. The ICC Task Force found that arbitration is seldom used in asset management disputes.¹⁶³ However, asset management disputes involve issues that are commonly resolved through arbitration, including issues of repayment, misrepresentation, mistake, false inducement, misappropriation, force majeure, unexpected changes in circumstances or in regulations.¹⁶⁴ As noted above, the use of arbitration in asset management disputes is reported to be growing in China.¹⁶⁵

Arbitration may be an attractive option for asset management disputes in two main ways. First, to the extent that asset management disputes are a niche area requiring special technical competence, parties are able to select a decision maker with expertise in the field.¹⁶⁶ Second, confidentiality is highly desirable where the identities of asset managers and their

clients, as well as private clients’ sensitive financial information, is concerned.¹⁶⁷

D. *The Use of Unilateral (Asymmetrical) Clauses*

One area in which financial institutions have contributed to the development of arbitration law is in the use of unilateral or asymmetrical dispute resolution clauses. These are clauses that allow only one of the parties (typically the lender) to choose between litigation and arbitration after a dispute has arisen. These clauses had frequently been used in the financial sector, but their use has decreased in recent years as their enforceability has been challenged in a number of jurisdictions, including in France, Russia, Bulgaria, and others.¹⁶⁸ In other jurisdictions, such as England and Germany, unilateral clauses are permitted.¹⁶⁹

Unilateral dispute resolution clauses provide flexibility to the lender to determine, on a case-by-case basis, whether arbitration or litigation is better suited for the dispute.¹⁷⁰ Where this is an important consideration, and having carefully considered the enforceability of such clauses under all potentially applicable laws, financial institutions may choose to use such clauses in their contracts.

IV. CONCLUSION

There have been a number of attempts in recent years to promote the use of international arbitration in the banking and finance sector, and, in return, financial institutions have shown slow but steady interest. There are a number of reasons why litigation may continue to be preferred over arbitration, not least because its use is ingrained in many areas of the industry, but also because of perceived limitations in arbitration compared to litigation. Recent developments in arbitral practice go some way to addressing these limitations, and the benefits of arbitration may become more important as counterparties in financial transactions become increasingly diversified. Ultimately, a continued dialogue between arbitration providers and financial services institutions is critical to ensure both international arbitration can develop in order to better meet the needs of those users and that they are aware of ongoing developments in international arbitration practice so that they are making an optimal and considered choice when deciding on dispute resolution options in financial services contracts.

Rina See and Steven Finizio

1 Rina See and Steven Finizio are counsel and partner, respectively, in the international arbitration practice at Wilmer Cutler Pickering Hale and Dorr LLP. The authors are grateful to Seung-Woon Lee and Muhamed Tulic for their research assistance.
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- 128 2016 P.R.I.M.E. Finance Arbitration Rules, Art. 34(5).
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- 130 LexisNexis, P.R.I.M.E. Finance and LexisNexis Announce Complex Financial Case Database, dated 24 January 2018, available at <https://www.lexisnexis.co.uk/media/press-details?date=01/24/2018&id=1>.
- 131 See Mateus Aimoré Carreteiro, “Appellate Arbitral Rules in International Commercial Arbitration,” 33 *Journal of International Arbitration* 186 (2016).
- 132 2013 AAA Optional Appellate Rules, Art. A-1.
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- 134 2013 AAA Optional Appellate Rules, Art. A-5.
- 135 There is also a separate ability to determine a preliminary point of law during the course of arbitral proceedings on an opt-in or opt-out basis: see, e.g., English Arbitration Act, section 45; Hong Kong Arbitration Ordinance, Schedule 2, paragraph 3.
- 136 Arbitration Act 1996, sections 69 and 82(1) (definition of “question of law”). See also David Wolfson and Susanna Charlwood, Chapter 25: Challenges to Arbitration Awards, in Julian David Mathew Lew, Harris Bor, et al. (eds), *Arbitration in England*, with chapters on Scotland and Ireland ¶25-77 (2013).
- 137 Arbitration Act 1996, section 69(3):
Leave to appeal shall be given only if the court is satisfied—
(a) that the determination of the question will substantially affect the rights of one or more of the parties,
(b) that the question is one which the tribunal was asked to determine,
(c) that, on the basis of the findings of fact in the award—
(i) the decision of the tribunal on the question is obviously wrong, or
(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.
- 138 Arbitration Act 1996, section 69(7).
- 139 Arbitration Act 1996, section 69(1).
- 140 2020 LCIA Rules, Art. 26.8 (“[T]he parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other legal authority, insofar as such waiver shall not be prohibited under any applicable law.”); 2021 ICC Rules, Art. 35.6 (“[T]he parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.”). See also David Wolfson and Susanna Charlwood, Chapter 25: Challenges to Arbitration Awards, in Julian David Mathew Lew, Harris Bor, et al. (eds), *Arbitration in England*, with chapters on Scotland and Ireland ¶25-72 (2013).
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- 145 2016 ICC Report on Financial Institutions and International Arbitration, 42.
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- 149 2016 ICC Report on Financial Institutions and International Arbitration, 71.
- 150 2016 ICC Report on Financial Institutions and International Arbitration, 69.
- 151 2016 ICC Report on Financial Institutions and International Arbitration, 69-71.
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- 155 2016 ICC Report on financial institutions and international arbitration, 78. See also Irene Han, *Rethinking the Use of Arbitration Clauses by Financial Institutions*, *Journal of International Arbitration* 207, 229 (2017).
- 156 See Irene Han, *Rethinking the Use of Arbitration Clauses by Financial Institutions*, *Journal of International Arbitration* 207, 229 (2017).
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- 158 2016 ICC Report on financial institutions and international arbitration, 77.
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