

# ICC COMMISSION REPORT

## FINANCIAL INSTITUTIONS AND INTERNATIONAL ARBITRATION

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# Contents

## Financial Institutions and International Arbitration

<b>I</b>	<b>Introduction</b>	<b>2</b>
A	General overview	2
B	Scope	2
C	Outline of the Report	<b>3</b>
<b>II</b>	<b>Recommendations</b>	<b>3</b>
<b>III</b>	<b>The changing landscape of financial disputes</b>	<b>5</b>
<b>IV</b>	<b>Financial institutions' experience of arbitration</b>	<b>8</b>
A	Preferences in conducting arbitration	8
	<i>(i) Policies and guidelines</i>	8
	<i>(ii) Institutional vs ad hoc arbitration</i>	8
	<i>(iii) Selection of arbitrators</i>	8
	<i>(iv) Specific clauses (multi-tiered, asymmetric, appeal)</i>	8
B	Perceived advantages of arbitration	9
C	Perceived limitations of arbitration	10
<b>V</b>	<b>Derivatives</b>	<b>11</b>
<b>VI</b>	<b>Sovereign finance</b>	<b>12</b>
<b>VII</b>	<b>Investment arbitration</b>	<b>13</b>
<b>VIII</b>	<b>Regulatory matters</b>	<b>15</b>
<b>IX</b>	<b>International financing</b>	<b>17</b>
<b>X</b>	<b>Islamic finance disputes</b>	<b>18</b>
<b>XI</b>	<b>International financial institutions, development finance institutions, export credit agencies</b>	<b>19</b>
<b>XII</b>	<b>Advisory matters</b>	<b>20</b>
<b>XIII</b>	<b>Asset management</b>	<b>21</b>
	<b>Annex I - Questionnaire Submitted to the Financial Institutions Interviewed for the Purpose of the Report</b>	<b>23</b>
	<b>Annex II - List of Financial Institutions Interviewed</b>	<b>27</b>
	<b>Acknowledgements</b>	<b>28</b>

# Financial Institutions and International Arbitration

## Report of the ICC Commission on Arbitration and ADR Task Force on Financial Institutions and International Arbitration

### I INTRODUCTION

#### A General overview

- 1 The ICC Commission on Arbitration and ADR (hereinafter the "Commission") recognised the need to study financial institutions' perceptions and experience of international arbitration.<sup>1</sup> This Report is the work of the Commission's Task Force on Financial Institutions and International Arbitration (hereinafter the "Task Force").
- 2 Task Force members conducted interviews with approximately 50 financial institutions and banking counsel from around the globe.<sup>2</sup> The interviews, together with a review of relevant literature, internal policies, relevant arbitral awards, and data received from 13 participating arbitral institutions, form the basis of the findings and recommendations set out in this Report.
- 3 The Task Force found that the banking and financial sector's use of and expectations about international arbitration are unique in many respects – and evolving. Financial institutions use arbitration in a broad array of banking and financial transactions, although not on a consistent basis or on a large scale. There is an overall lack of awareness of the potential benefits of international commercial arbitration and investment arbitration in banking and financial matters and there are some common misperceptions about the process.
- 4 Historically, financial institutions have preferred national courts in key financial centres (i.e. New York, London, Frankfurt, Hong Kong), but have sought to avoid the courts in emerging markets. However, the changing regulatory environment and the nature of the financial disputes that have

arisen in the wake of the global financial crisis of 2008 have led financial institutions increasingly to view international arbitration as an important alternative to litigation.

#### B Scope

- 5 The Task Force examined a wide range of banking and financial activities, whether undertaken by licensed banks or by funds (equity, investment or sovereign wealth).<sup>3</sup> The Task Force examined arbitration in derivatives, sovereign lending, regulatory matters, international financing, trade finance, Islamic finance disputes, advisory matters, asset management and inter-bank disputes.
- 6 The study covered many types of financial institutions, including multilateral and bilateral development financial institutions and export credit agencies providing credit-enhancement or risk-mitigation tools, insofar as those institutions use arbitration from time to time and often have a persuasive role in proposing arbitration as an option to lending syndicates in which they participate or those that they guarantee.
- 7 The Task Force analysed both international commercial and investment arbitration. The latter is a relatively novel feature in the banking and financial landscape with a number of investment awards holding that financial instruments ranging from straightforward loans to negotiable instruments, securities and oil hedges are qualifying investments under the relevant treaties. These awards open up broad horizons with respect to treaty claims that could have a catalysing effect on the receptiveness of the banking and financial sector to arbitration in general.

<sup>1</sup> In this Report the expression "financial institution" is to be understood broadly, as explained in paragraph 5 and 6.

<sup>2</sup> The financial institutions interviewed are listed in Annex II, unless anonymity was requested. The questions they were asked are set out in Appendix I.

<sup>3</sup> The Task Force did not consider consumer and mortgage lending, where the case for arbitration is less compelling, or insurance and third-party financing of litigation/arbitration, which constitutes a specialised area with its own idiosyncratic rules and approaches, which are often jurisdiction-specific and evolving.

## C Outline of the Report

- 8 The Report is structured as follows:
- Section II sets out the Task Force's detailed recommendations for tailoring the arbitration procedure to suit the needs of the banking and finance sector.
- Section III discusses the changing landscape of financial disputes.
- Section IV describes financial institutions' experience of arbitration, including their preferences in conducting arbitration proceedings, and the advantages and perceived limitations of arbitration in banking and financial disputes.
- Sections V to XII address issues relating to the use of arbitration in specialist sectors of finance and banking practice:
- Section V discusses arbitration of derivatives disputes.
- Section VI discusses arbitration of sovereign finance disputes.
- Section VII discusses investment arbitration applied to banking and finance disputes.
- Section VIII discusses arbitration of disputes relating to regulatory matters.
- Section IX discusses arbitration of international financing disputes.
- Section X discusses arbitration of Islamic finance disputes.
- Section XI discusses arbitration of disputes relating to advisory matters.
- Section XII discusses arbitration of disputes relating to asset management.
- 9 Supplementary materials addressing some of these topics in more detail are available online at [www.iccwbo.org](http://www.iccwbo.org).

## II RECOMMENDATIONS

- 10 One of the key benefits of international arbitration is the flexibility it gives parties to tailor the arbitral procedure to their needs – both when drafting their dispute resolution clause and during the arbitration process. The Task Force offers the following general recommendations for tailoring the arbitration procedure to suit the needs of the banking and finance sector. Legal advice should be sought in each case.
- 11 **Case management/reducing time and costs.** The Task Force notes the case management techniques listed in Appendix IV to the ICC Rules of Arbitration (hereinafter the “ICC Rules”), which can be used by the arbitral tribunal and the parties to reduce time and costs. In particular, Article 24 of the ICC Rules provides that as soon as possible after the tribunal has been constituted, it shall convene a case management conference to consult the parties on procedural measures that may be adopted, including one or more of the case management techniques described in Appendix IV.

- 12 In addition, the Task Force notes the Commission's guide *Effective Management of Arbitration: A Guide for In House Counsel and Other Party Representatives*, including in particular:
- Topic Sheet 5 regarding the possibility of limiting the number of rounds of submission(s) to avoid repetition and reduce costs;
- Topic Sheet 6 on the production of documents and the possibility of having either no document production or limiting it to specific or narrow categories of documents that are relevant and material to the outcome of the dispute;
- Topic Sheet 7 on fact witnesses and the option of not having fact witnesses or identifying issues on which factual evidence will be given;
- Topic Sheet 8 on the use of witness statements and the option of limiting their scope;
- Topic Sheet 9 regarding expert witnesses and the option of either not having any expert evidence or having a tribunal-appointed expert; and,
- Topic Sheet 10 setting out options for hearings, which include eliminating hearings or limiting the length of hearings.
- 13 If the parties wish to reduce the time allowed under the ICC Rules and practice for constituting the tribunal, making submissions, or for the tribunal to issue an award, they may specify these reduced time limits in the dispute resolution clause. Before doing so, they are advised not only to seek legal advice as to the feasibility of the proposed time limits, but also to contact the Secretariat of the ICC International Court of Arbitration to verify that the dispute resolution clause can be administered as drafted.
- 14 **Dispositive rulings.** Appendix IV (Case Management Techniques) to the ICC Rules expressly encourages bifurcating the proceedings or rendering one or more partial awards on key issues, when doing so may genuinely be expected to result in a more efficient resolution of the case. If the parties nonetheless wish to make clear that the arbitrators are empowered to address dispositive issues, they can expressly so provide in their dispute resolution clause.<sup>4</sup>

<sup>4</sup> In *Travis Coal v. Essar Global Fund*, the English High Court recognised that summary procedures may be available to tribunals in appropriate cases, noting in particular that Article 22 of the ICC Rules requires the tribunal to “conduct the arbitration in an expeditious and cost-effective manner” and empowers the tribunal to adopt such procedural measures as it considers appropriate.

- 15 **Summary disposition.** The ability to obtain summary judgment from courts in New York and London, for example, is one of the reasons why financial institutions have traditionally opted for litigation in those places, particularly when there is no factual dispute that payment has not been made. Where parties wish to empower the arbitral tribunal to consider claims or defences on a summary basis or summarily dismiss claims or defences that are manifestly without legal merit, they may include such provisions in the dispute resolution clause.
- 16 **Confidentiality.** Unless otherwise provided under the applicable law, ICC arbitration is not confidential per se. When confidentiality is important, parties can specify in their dispute resolution clause that the arbitration shall remain confidential. Confidentiality may also be agreed in the Terms of Reference. In addition, Article 22(3) of the ICC Rules provides that: "Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information." Alternatively, parties may agree to greater transparency, such as by providing for the award, the proceedings or the parties' submissions to be made public. This option may be relevant to entities in the public sector subject to transparency obligations.
- 17 **Expertise of arbitrators.** The parties can agree in their dispute resolution clause that the arbitrators must have particular expertise relating to the financial sector generally, or a specific financial instrument. That said, experience shows that the more specific the requirements laid down, the greater the risk of challenges for alleged lack of the required expertise. Moreover, it is advisable that at least one member of the arbitral tribunal, normally the president, has arbitration experience.
- 18 **Interim relief.** Before the tribunal is constituted, parties have two options for obtaining interim measures. First, under Article 28(2) of the ICC Rules, they may apply to any competent judicial authority for interim or conservatory measures. Second, under Article 29 of the ICC Rules, a party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal may make an application for such measures pursuant to the Emergency Arbitrator Rules. Examples include the need to seek an order enjoining the presentation of a demand for payment under a demand guarantee, or a protective measure to safeguard perishable collateral. Under Article 28(1) of the ICC Rules, once the arbitral tribunal has been constituted, it may, at the request of a party, order any interim or conservatory measure it deems appropriate. If the parties wish to limit their ability to obtain interim relief, they may modify these provisions in the dispute resolution clause.
- 19 **Joinder and consolidation.** The ICC Rules contain specific provisions with respect to multiparty and multi-contract arbitrations in Articles 7 to 10. With respect to multi-contract arbitration, if the parties are open to all disputes arising from more than one agreement related to a project being dealt with together, it may be desirable for them to consent expressly to treating disputes arising from related agreements in a single proceeding. A global or master arbitration agreement for a particular project can also achieve this objective. On the other hand, if a financial institution wishes to avoid being drawn into proceedings covering disputes arising from different contracts to which it is a party, it will need to consider whether it should expressly preclude the possibility of claims deriving from different contracts with the same party being treated in a single arbitration. With respect to multiparty arbitration, parties need to ensure that they are all bound by the arbitration clause.
- 20 **Cost shifting.** In international arbitration, no party has an automatic right to recover any costs of the arbitration. Article 37(4) of the ICC Rules says of the final award that it shall fix the costs of the arbitration and decide which of the parties shall bear those costs or in what proportion they shall be borne by the parties.<sup>5</sup> Parties seeking certainty regarding the allocation of costs may expressly provide that the tribunal shall award the prevailing party its attorneys' fees and costs; alternatively, parties may expressly stipulate that each party is responsible for its own fees and costs, provided this is permitted by the applicable law.
- 21 **Appellate procedures.** A minority of financial institutions expressed an interest in an appellate procedure in arbitration. Given that arbitration is contractual, it may be possible to include an appellate procedure in a dispute resolution clause, although this is seldom the case because such a procedure would need to be carefully crafted to address, among other issues, the scope of the review conducted by the appellate tribunal and the recognition that such a provision may not be enforceable in certain jurisdictions. An appellate procedure would also necessarily increase the time and costs involved in obtaining a final award.
- 22 **Agreeing on arbitration after a dispute arises.** While most arbitration agreements are made before a dispute arises, parties may decide on arbitration only once a dispute has arisen, although such an agreement can be difficult to achieve at that point.

5 For a full discussion on this topic, see the Commission's report *Decisions on Costs in International Arbitration*.

- 23 **Arbitrations involving sovereign parties.** For insights and recommendations on how arbitration agreements and procedures may be adapted to account for the involvement of a sovereign party, financial institutions and sovereign bodies should refer to the Commission's report *States, State Entities and ICC Arbitration* (2012).
- 24 **Assess avenues of recourse under investment treaties.** Before an investment is made, financial institutions should determine whether they are afforded protection under applicable investment treaties. After a state has brought an action, a financial institution should determine whether an applicable investment treaty provides it with an avenue of recourse through arbitration that might not otherwise be available through its contractual relationships.<sup>6</sup>
- 25 **Derivatives.** The International Swaps and Derivatives Association's 2013 ISDA Arbitration Guide is available to help with the drafting of dispute resolution clauses involving derivatives. To facilitate a gradual shift towards arbitrating derivatives disputes, financial institutions could use arbitration as an initial means of resolving specific types of derivatives disputes, subject to the possibility of opting out in particular cases (rather than opting in, as is generally the case today). Emphasis could be placed on using arbitration for disputes involving derivatives for a particular commodity, or for disputes involving counterparties from a particular location.
- 26 **Islamic finance.** Islamic finance remains an untapped area when it comes to international arbitration. To assist with a preliminary assessment of any transaction or dealing involving Islamic finance that might give rise to a dispute, financial institutions may wish to appoint dispute resolution professionals who are well versed in Islamic finance transactions and disputes to their fatwa or sharia compliance councils. In addition, financial institutions engaged in Islamic finance transactions, as well as those that offer Islamic finance products, are encouraged to develop and strengthen their global and regional connections in order foster discussions and exchanges on sharia compliance issues, sharia boards and fatwa councils. This will facilitate the development of common usage(s) and practices that can form the basis of the applicable rules of law.
- 27 **Internal policies.** It is recommended that financial institutions develop their own set of internal policies regarding the use of international arbitration and preferred ingredients of an arbitration agreement, tailored to the particular circumstances and segments of their business.
- 28 **Continue dialogue with trade associations.** Financial institutions could continue to assess how to make optimal use of arbitration through their relationships with trade associations, universities, law firms and arbitral institutions. Trade associations representing financial institutions, which include the Bankers Association for Finance and Trade (BAFT), the Emerging Markets Traders Association (EMTA), the International Capital Markets Association (ICMA), the International Swaps and Derivatives Association (ISDA), the Loan Market Association (LMA), and the Loan Syndications & Trading Association (LSTA), could usefully engage with arbitration institutions on behalf of their members to identify appropriate ways of standardising arbitration clauses for their respective sectors.

### III THE CHANGING LANDSCAPE OF FINANCIAL DISPUTES

- 29 Arbitration is increasingly a part of the strategic options considered for cross-border banking and financial disputes. For example, organised exchanges such as Euronext refer to arbitration as a method of resolving disputes related to market transactions.<sup>7</sup> Trade, export and project finance contracts/documentation sometimes provide for arbitration agreements, especially in dealings with state instrumentalities in emerging countries. Where arbitration has not been initially contemplated, it may be subsequently considered following the exercise of step-in rights or the assignment of receivables stemming from contracts providing for arbitration.
- 30 Recently, there has been an increase in the number of industry-specific arbitration initiatives, including the introduction in 2013 of the "ISDAfied" optional arbitration clauses into the ISDA Master Agreement. These initiatives complement the existing bodies and rules that specifically target arbitration in the banking and financial sector, such as PRIME Finance in The Hague (working jointly with the Permanent Court of Arbitration), Hong Kong's Financial Dispute Resolution Centre (FDRC), the United States' Financial Industry Regulatory Authority (FINRA) and CIETAC's Financial Disputes Arbitration Rules. In addition, countless colloquia, articles and academic works have recently been devoted to this topic.<sup>8</sup>

6 According to the Commission's 2012 report *States, State Entities and ICC Arbitration* (para. 11), 18% of known BITs allow for the application of the ICC Rules. The 2012 ICC Rules included changes to ensure their compatibility with investment treaty arbitration. In particular, Article 1(2) refers simply to "disputes" rather than "business disputes" as in Article 1(1) of the 1998 Rules; Article 13(4) provides for the direct appointment of an arbitrator by the ICC Court (if necessary) when a state or state entity is involved; and Article 21(2) on the law applicable to the merits replaced Article 17(2) of the 1998 Rules, which provided that the tribunal "shall take account of the provisions of the contract", with the wording that the tribunal "shall take account of the provisions of the contract, if any, between the parties", thereby acknowledging the potential absence of contracts between the parties to an investment arbitration proceeding.

7 Euronext Rule Book, Book 1: Harmonised Rules, Rule 1701 (Euronext Group, 1 July 2016).

8 The Task Force has compiled a bibliography on arbitration in banking and financial matters, which will be available online at [www.iccwbo.org](http://www.iccwbo.org).

- 31 It may be noted that bank regulators sometimes take the initiative of proposing arbitration mechanisms in the banking sector. One example is FDRC, set up in the wake of the demise of Lehman Brothers as a joint initiative of the local bank regulator (the Hong Kong Monetary Authority) and the local arbitration institution (the Hong Kong International Arbitration Centre). Elsewhere, the initiative emanated from national banking associations. An example is Spain's DIRIBAN, a quasi-arbitral mechanism set up by the Spanish Banking Association with the support of the central bank, which aims to resolve disputes among its members.<sup>9</sup>
- 32 The Task Force found that international arbitration in the banking and finance sectors does exist – in various forms and in various lines of business – but is not used to its full potential. The limited use of arbitration appears to be due to a lack of awareness of the benefits of international arbitration in banking circles, combined with the traditional view that arbitration is unsuitable for certain segments of the banking sector.
- 33 **Specifics of banking and finance.** The banking and finance sector involves transactions that are not amenable to a “one size fits all” approach. Export finance, for instance, is different from arbitrating securities on the secondary market. The approach to risk-weighting in project finance involving state instrumentalities differs considerably from what is involved in mortgage lending. Besides, a large part of the banking industry does not involve lending at all, as when banks and specialist funds offer advisory services in corporate restructuring, sovereign lending, securities listing and privatisation.
- 34 Financial institutions often participate in commercial transactions like any other corporate entity. They purchase products, supply services, invest in equity stakes in other companies, agree to engage in joint-venture projects with other parties, arbitrage their portfolio of financial instruments, discount their long-term receivables or issue shares to the public, all of which are common business transactions with a few features peculiar to banking. The well-known *Bank for International Settlements* arbitration in 2003 serves as a case in point.<sup>10</sup>
- Disputes arising in the context of such dealings are expected to be resolved by arbitrators in the same way as they would be between non-banking parties. By contrast, there is a broad range of bank-specific dealings that require an in-depth understanding of banking regulations, practices and the organisational models used by financial institutions. For example:
- (a) Shipping documents presented under a buyer's credit are not necessarily examined for documentary compliance according to the same standards as those applicable to documentary credits.
  - (b) Bank guarantees and counter-guarantees are devised as independent instruments, yet it would defeat the economic rationale of the indirect guarantee chain if tribunals were to render irreconcilable decisions (e.g. one requiring the guarantor to pay the beneficiary and another depriving that guarantor of the opportunity to seek reimbursement from the counter-guarantor).
  - (c) Localising an investment in an infrastructure project for the purpose of determining whether an investment treaty applies is different from localising dematerialised securities or swaps. In the latter case, specific connecting factors with the host state might need to be considered to ascertain whether the financial investment is territorially linked to that state.
  - (d) The position of creditors of failing banks in resolution proceedings is different from that of corporate creditors holding seemingly similar debts under general insolvency regimes. While a bail-in resolution decision has to be fair, non-discriminatory and respectful of the due-process rights of creditors and shareholders, it is bound to involve forceful write-downs and conversion measures, which need to be assessed in light of the importance of protecting the country's banking system and avoiding public funding of the failing bank.
  - (e) Deciding whether a foreign economic sanctions regulation applies to a banking activity may require a different analysis from that undertaken when a similar regulation targets corporate entities in other sectors. The reasoning must take into consideration the necessary liquidation of bank-initiated payments in foreign currency solely through foreign correspondent banks. This remains the case regardless of the nationality and domicile of the payee, the global banks' international network of branches and the requirement in many countries for banks to hold ring-fenced capital, which makes them more vulnerable to local exactions and enforcements.

9 Through its International Centre for ADR, ICC also offers a confidential, quick and cost-effective procedure – known as Documentary Instruments Dispute Resolution Expertise (DOCDEX) – for settling disputes concerning trade finance-related instruments. DOCDEX Decisions are rendered in English, usually within two to three months, and are confidential. They are binding on the parties only if all of them have expressly so agreed. A DOCDEX Decision is not an arbitral award, however.

10 The Bank for International Settlements (BIS) was established in 1930 to facilitate cooperation between central banks. Under its statutes, disputes between the bank and its shareholders are subject to arbitration. In 2001, a general meeting of BIS shareholders decided to restrict the ownership of shares to central banks and to cancel all the privately-owned share certificates that existed. The excluded shareholders contested the price set by the BIS for the mandatory redemption of their shares. In the subsequent arbitration proceedings conducted under the auspices of the Permanent Court of Arbitration, the tribunal ruled on the issue of the proper valuation of the cancelled

shares. The Partial Award of 22 November 2002 and the Final Award of 19 September 2003 are published in full on the website of the Permanent Court of Arbitration ([www.pca-cpa.org](http://www.pca-cpa.org)).



- (f) Islamic finance's modern financing techniques rest on the parties' commitment to abide by the rules of sharia. Some state courts have expressed unease over applying rules of a religious nature to govern financial transactions. International arbitration has pioneered the concept of non-statutory legal rules being viewed as applicable law within the context of international contracts. Experienced institutions, including ICC, are able to offer a more suitable forum, combining the sophisticated expertise of their designated arbitrators with a commitment to offering the parties the full benefit of the legal environment that they originally selected when entering into their sharia-compliant transaction.
- 35 In all of these examples, as well as in many others, arbitration in the banking and finance sector needs to be tailored to the specific circumstances of the transaction in question. Recommendations to that end are included below.
- 36 **Investment arbitration and financial instruments.** The Task Force found no fewer than 47 investment arbitration cases over the last three decades (both within and outside the ICSID system) that dealt with financial institutions or financial products. They involved claimants or respondents from Europe, Africa, Asia and the Americas. Investment treaties typically refer to banking and financial instruments, and their increasing relevance appears to be one of the most important causes of the growing interest in arbitration in banking circles. Not only can bank investors seek redress before international, neutral tribunals (notwithstanding an exclusive jurisdiction clause in favour of local courts in their investment contract with the host state), they also have the ability to require bank regulators to account for their discriminatory treatment of the regulated investor bank by asserting the claim that the bank was denied the right to fair and equitable treatment.<sup>11</sup> Recent bank recovery and resolution regulations in Europe may give rise to claims that confirm investment arbitration's potential to vindicate the rights of bailed-in bank creditors and shareholders.
- 37 In the last few years a number of investment arbitral awards found that various types of financial instruments qualify as investments that benefit from the protection provided in the relevant treaty. Financial instruments considered to be qualifying investments include straightforward loans, negotiable instruments, sovereign bonds and oil price hedges,<sup>12</sup> although the characterisation of a qualifying investment depends on both the terms of the treaty and the facts of the case. Sovereign bonds were considered as a qualifying investment in three ICSID cases but not in a fourth case.<sup>13</sup> Similarly, a bank guarantee was considered to be a qualifying investment in a PCA case under the UNCITRAL Arbitration Rules but denied that benefit in an ICSID case.<sup>14</sup>
- 38 **The global financial crisis.** The global financial crisis of 2008 brought an unprecedented wave of claims by and against financial institutions, as well as among financial institutions. The grounds for these claims ranged from debt recovery and foreclosure actions over collateral to claims by borrowers and their shareholders against financial institutions on negligence grounds and claims alleging breach of the lenders' and financial advisors' duty of care. Many of those claims were certified on behalf of classes. Amid the emotion brought on by the crisis, few financial institutions, particularly abroad, welcomed the prospect of jury verdicts. Moreover, it was believed that the impact of those massive claims would fuel the interest of financial institutions in arbitration.
- 39 A review of cases registered with arbitral institutions between 2008 and 2010 suggests a slight increase in the number of claims likely to have been prompted by the financial crisis. In their answers to our questionnaire, arbitral institutions did not report a noticeable change in the percentage of their cases involving financial institutions. We consider that this is mainly due to the fact that many of the surveyed arbitral institutions do not have a systematic method for tracking these types of claims.

11 See *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (ICSID Case ARB/09/2), Award (31 October 2012) [*Deutsche Bank*]; *Antoine Goetz v. République du Burundi* (ICSID Case ARB/95/3), Award (10 February 1999). For a case where the ICSID tribunal upheld its jurisdiction *ratione materiae* over a claim against a national bank regulator but did not award damages, see *Levy de Levi v. Republic of Peru* (ICSID Case ARB/10/17), Award (26 February 2014).

12 *Oko Pankki Oyj v. Republic of Estonia* (ICSID Case ARB/04/6), Award (19 November 2007); *Fedax N.V. v. Bolivarian Republic of Venezuela* (ICSID Case ARB/96/3), Award (9 March 1998); *Abaclat v. Argentine Republic* (ICSID Case ARB/07/5), Decision on Jurisdiction and Admissibility (4 August 2011) [*Abaclat*]; *Deutsche Bank*.

13 *Abaclat; Ambiente Ufficio S.p.A. v. Argentine Republic* (ICSID Case ARB/08/9), Decision on Jurisdiction and Admissibility (8 February 2013); *Giovanni Alemanni v. Argentine Republic* (ICSID Case ARB/07/8), Decision on Jurisdiction and Admissibility (17 November 2014); *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic* (ICSID Case ARB/13/8), Award (9 April 2015) [*Poštová*].

14 *Joy Mining Machinery Ltd. v. Arab Republic of Egypt* (ICSID Case ARB/03/11), Award on Jurisdiction (6 August 2004).

40 The global financial crisis also had a considerable impact on regulatory disputes, and this impact is expected to increase in the future. Financial rescue measures that governments had to take in order to prevent failing global systemically important banks (G-SIBs) from collapsing often led to alleged expropriation or discriminatory measures with, in certain cases, arguable breaches of state-aid laws and the principle of fair and equitable treatment of foreign investments. Bailed-in bond holders and depositors, unsecured creditors and shareholders of nationalised financial institutions (some of which are themselves financial institutions) have filed claims before investment arbitral tribunals, as well as numerous claims in national courts, relating to those state measures.<sup>15</sup> The institutionalisation of bail-in measures in the wake of the entry into force of the EU Bank Recovery and Resolution Directive<sup>16</sup> might also generate claims by bailed-in creditors and shareholders that may potentially be filed before investment arbitral tribunals.

#### IV FINANCIAL INSTITUTIONS' EXPERIENCE OF ARBITRATION

41 The interviews conducted by the Task Force reveal that most financial institutions do not have substantial experience of international arbitration: 70% of interviewees were not aware of whether their financial institutions had participated in any international arbitration proceedings in the last five years; 24% of the financial institutions interviewed had participated in a small number of international arbitration proceedings in the previous five years representing 5% or less of all the financial institution's disputes; and 6% of the financial institutions interviewed had participated in a larger number of arbitration proceedings.<sup>17</sup>

42 Financial institutions tend to favour arbitration when: (i) the transaction is significant or particularly complex; (ii) confidentiality is a concern; (iii) the counterparty is a state-owned entity; and (iv) the counterparty is in a jurisdiction where the recognition of foreign judgments is problematic or where it is expected that enforcement of an arbitral award under the New York Convention will be easier than enforcement of a court judgment.

43 One financial institution responded that it is more likely to submit a dispute to arbitration when the parties believe that the confidentiality it offers may encourage a settlement of the dispute before an award is rendered. A dispute arising out of the acquisition by a hedge fund of a stake in a company subject to a squeeze-out was cited as an example.

#### A Preferences in conducting arbitration

##### (i) Policies and guidelines

44 Most of the financial institutions interviewed had no internal policy or precise guidelines concerning recourse to arbitration, but several mentioned that they take different approaches depending on the region(s) concerned. For instance, one financial institution indicated that, for reasons of cost, it would select arbitration only when its counterparty is located in a jurisdiction that does not recognise foreign judgments, or when the counterparty is a sovereign entity.

##### (ii) Institutional vs ad hoc arbitration

45 Most of the financial institutions interviewed preferred institutional arbitration, as institutions have settled procedural rules and are usually accustomed to handling complex and high-value disputes. ICC, LCIA, HKIAC and SIAC are the institutions whose rules are most frequently selected, although ad hoc proceedings under the UNCITRAL Arbitration Rules have occasionally been chosen.

46 The arbitration seats selected most frequently are, in alphabetical order, Geneva, Hong Kong, London, New York, Paris, and Singapore.

47 The language chosen most often is English.

##### (iii) Selection of arbitrators

48 Financial institutions generally prefer three-member tribunals, with the president appointed by the two co-arbitrators. However, it is accepted that in more straightforward matters a sole arbitrator may be appropriate. The criteria they consider important when selecting arbitrators include: industry expertise and experience, availability and responsiveness, common sense, language skills, and independence and impartiality.

##### (iv) Specific clauses (multi-tiered, asymmetric, appeal)

49 Multi-tiered clauses (where a form of alternative dispute resolution such as negotiation or mediation precedes arbitration) are rarely used in agreements involving financial institutions. Mediation, however, is frequently used, albeit without prior contractual commitment.

<sup>15</sup> *Poštová; Marfin Investment Group Holdings S.A., Alexandros Bakatselos v. Republic of Cyprus* (ICSID Case ARB/13/27).

<sup>16</sup> Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms.

<sup>17</sup> One of the financial institutions interviewed indicated that it had been involved in over 100 arbitration proceedings, and that such proceedings exceeded the number of its state court proceedings, particularly in the United States.

50 Asymmetrical or unilateral option clauses, which allow one party to choose a competent jurisdiction (including for arbitration), while the other party is bound to a predetermined exclusive jurisdiction, were previously used on a regular basis but are less common today in certain regions where their enforceability has been challenged.<sup>18</sup> Yet, those clauses are still viewed as important by a number of financial institutions which consider that litigation provides them with greater legal certainty.

51 Most financial institutions perceive the finality of an award in arbitration and the limited grounds for challenge to be an advantage compared to litigation. However, some financial institutions wish to have a means of appeal in arbitration, provided this does not undermine certainty and there is an upfront agreement between the parties addressing the circumstances in which a party could appeal and an agreement as to the overall timing.

## B Perceived advantages of arbitration

52 **Enforcement.** As with arbitration more generally, a significant consideration in most banking and financial cases is the question of cross-border enforcement. Several financial institutions canvassed consider enforceability under the New York Convention to be a key advantage of arbitration compared to litigation. An arbitral award is far more likely to be enforced – and easier to enforce – than a court judgment. However, some banks indicated that they encounter difficulties when enforcing arbitral awards, even in countries that are parties to the New York Convention. For loans and financing in developing markets, one institution reported that rating agencies look more favourably upon transaction documentation that contains an arbitration agreement rather than a jurisdiction clause submitting disputes to state courts.

18 See e.g. Bulgarian Supreme Court, 2 September 2011, judgment 71, case 1193/2010; Russian Supreme Commercial Court (Arbitrazh), 19 June 2012, *CJSC Russian Telephone Company v. Sony Ericsson Mobile Communications Rus LLC*, No.1831/12, Resolution (19 June 2012); French Court of Cassation, 1st Civil Chamber, 26 September 2012, *Mme X v. Banque Privée Edmond de Rothschild Europe*, No. 11-26.022 (although a recent French decision confirmed that asymmetrical jurisdiction clauses are valid as long as the option contains objective criteria to determine the competent courts: Court of Cassation, 1st Civil Chamber, No. 14-16898 (7 October 2015); see generally G. Affaki & H. Grigera Naón, *Jurisdictional Choices in Times of Trouble* (ICC, 2015)).

53 **Technical expertise.** The ability to appoint arbitrators with sector-specific expertise is perceived as a key advantage of arbitration in banking and financial matters. Several financial institutions expressed the view that arbitrators should have experience in and knowledge of the relevant financial sector. Although courts in a financial institution's own jurisdiction may be well placed to deliver robust judgments, the courts in a counterparty's jurisdiction may lack similar expertise, or may arouse concerns regarding neutrality.

54 **Flexibility.** Another advantage of arbitration for financial institutions is procedural flexibility, including the ability to tailor the procedures, the language of the arbitration, the selection of arbitrators, and the presentation of evidence, to meet their needs. However, few of the interviewed financial institutions showed full awareness of the immense flexibility that arbitration offers or of the range of procedural matters on which parties may agree before or during the proceedings. Those financial institutions that were convinced of the advantages of arbitration said they would welcome a restatement of the possibilities that arbitration allows (i.e. a user's manual). As noted by one financial institution that favours arbitration, "the Bank wants clearly defined procedures and rules for its corporate transactions".

55 **Confidentiality.** Confidentiality is frequently a determining factor in a financial institution's preference for international arbitration, insofar as it is upheld in the *lex arbitri*, imposed under the rules of the administering institution, or incorporated into the parties' agreement. Yet, confidentiality is also considered to be undesirable in the context of certain banking activities, such as derivatives and syndicated lending, where a large degree of standardisation is sought. The need for precedent trumps the advantages of confidentiality in those areas of banking and finance where it has a role to play. Arbitration under the ICC Rules is private but not expressly confidential, so if confidentiality is sought a provision to this effect should be included in the dispute resolution clause.

56 **Finality.** The limited ability of parties to appeal an arbitral award is generally perceived as another advantage of international arbitration. One financial institution concluded that allowing the losing party to have access to an appeal mechanism akin to that of the courts would rob the process of its finality. Another noted that the finality of arbitration is desirable, provided that the process is performed with integrity. Echoing recent developments in both investment arbitration and commercial arbitration, some financial institutions expressed an interest in exploring the inclusion of an appeal mechanism in arbitration, subject to the consent of all the parties to the dispute in clear terms.

57 **Neutrality.** The perceived political neutrality of arbitration is considered to be advantageous for the banking sector, particularly for multinational organisations and other institutions lending to or advising parties in developing countries. The submission of disputes to arbitration in a neutral venue, even if governed by the local law of the client company or a neutral body of law, represents a less contentious proposal than submission to English or New York courts, for instance.

### C Perceived limitations of arbitration

58 **Interim measures.** Few financial institutions are aware that the ICC Rules – like the rules of most other arbitral institutions – now provide a procedure for the appointment of an emergency arbitrator to consider applications for interim relief before a tribunal is constituted. The need to go to court to obtain interim measures before an arbitral tribunal is constituted has been perceived as a disadvantage of arbitration within the banking sector, so the existence of the emergency arbitrator procedure will allay this concern. Financial institutions appear to be tailoring their arbitration clauses to address the question of interim measures. One financial institution reported that its practice was to choose arbitral seats such as New York, London, Paris, Hong Kong and Singapore, where it can be sure of accessing the courts for interim measures.

59 **Summary/default awards.** The absence of summary disposition in arbitration (unless the parties have agreed to it), which would allow the rapid adjudication of claims in open-and-shut cases, continues to be viewed unfavourably within the banking sector. Similarly, the perceived inability of tribunals to issue a default judgment, even if a party fails to appear in the proceedings, is viewed as a disadvantage in terms of both cost and efficiency. This issue can be addressed, however, if the parties expressly authorise the arbitral tribunal to dispose of claims, or any part thereof, on a summary basis. Alternatively, absent an agreement, a party may petition the arbitral tribunal to use its powers, as conferred by the applicable law or institutional rules, to deal with a claim in an expedited or limited manner. It is generally understood that a tribunal may proceed with a case even if a party fails to participate, provided that party has been properly notified of the arbitration.

60 **Consolidation.** In relation to complex transactions involving multiple contracts, financial institutions have expressed concern over the risk of finding themselves involved in several parallel, albeit related, proceedings. ICC arbitration allows a party to request the consolidation of pending separate arbitrations under the conditions set out in Article 10 of the ICC Rules. However, consolidation will not be imposed or required where the economic rationale underlying the banking transaction militates in favour of isolating the transaction from the related group of contracts. This would be the case, for instance, in the context of project finance where the project company's obligation to repay the lenders is not expected to be impacted by the performance of the contract, absent an agreement or specific circumstances to the contrary.

61 **Setting precedents.** Apart from in the fields of M&A, asset management and banking advisory services, where confidentiality is of utmost importance, some financial institutions consider the lack of precedent to be a disadvantage of arbitration. Establishing precedents with respect to internationally recognised standard templates such as Loan Market Association (LMA) facility agreements or the ISDA Master Agreement is critically important. If the parties agree, an award that would otherwise be confidential may be published (with the possibility of redaction to avoid disclosure of sensitive information). In the sub-industries where precedent-setting is important, an industry-wide standard could be agreed, mandating institutions to publish redacted awards with the parties' agreement. ICC and other arbitration institutions regularly publish redacted awards, unless expressly prohibited by the parties.

62 **Costs.** In some jurisdictions (those where court proceedings are minimal – i.e. short hearings, with no examination of witnesses), arbitration is viewed as more expensive than litigation. To effectively manage their proceedings and reduce costs, the parties may adopt one or more of the techniques suggested in the Commission's report *Controlling Time and Costs in Arbitration*.

63 **Lack of transparency.** Some interviewees expressed concern over the lack of transparency in arbitration and, more specifically, the perception of arbitration as an exclusive club. Some admitted that they did not feel comfortable or at ease when "navigating" in this world. It should be noted, however, that transparency has been the focus of recent reforms at ICC, which has decided, for example, to publish the names of all sitting arbitrators in cases filed after 1 January 2016, provided the parties do not object.

- 64 **Insolvency and enforcing security interests.** An arbitral tribunal cannot commence an insolvency proceeding or disregard a court order concerning the commencement of such a proceeding. Nor is it entitled to appoint an insolvency administrator or consider whether the assertion of a claim by a creditor before the arbitral tribunal dispenses with the need to file that claim with the court-appointed insolvency administrator. Likewise, an arbitral tribunal cannot impose a penalty on a debtor that is protected by a pending insolvency proceeding for failure to pay an amount awarded in an interim order or an award. However, contractual claims that are not impacted by the stay imposed by the insolvency proceeding are clearly arbitrable, even if the award were to impact the validity or the amount of such claims. For instance, an arbitral tribunal has jurisdiction to rule on the issue of whether the claim of a bank against a borrower is due, even if the borrower is the subject of an insolvency proceeding. It also has jurisdiction to rule on whether the opening of an insolvency procedure against an individual should trigger a cross-default clause in the loan agreement or a derivative contract with a related party. In essence, an arbitral tribunal can assert its jurisdiction over all matters that are not specifically within the exclusive jurisdiction of the insolvency court.
- 65 Modern laws on secured transactions provide a means for the secured creditor to enforce its right over the collateral out of court, be it through self-appropriation or extra-judicial sale, if so agreed between the grantor and the creditor. While an arbitral tribunal cannot replace a court with respect to enforcement matters that are exclusively attributed to that court by the relevant statutes, it can arbitrate private enforcement disputes, as agreed between the parties and permitted in the relevant enforcement statute. The Task Force notes (with approval) Article 68 of the Model Inter-American Law on Secured Transactions (2002) which provides: "Any controversy arising out of the interpretation and fulfillment of a security interest may be submitted to arbitration by the parties, acting by mutual agreement and according to the legislation applicable in this State."

## V DERIVATIVES

- 66 Derivatives are traded on both special derivatives exchanges (exchange-traded derivatives or ETD) and outside official exchanges (over the counter or OTC). OTC derivatives trade accounts for the bulk of all derivatives trading. At the end of 2014, the OTC market had a total notional amount outstanding of approximately USD 630 trillion. This is an important area of financial activity, and dispute resolution options for derivatives disputes are therefore worth examining and, if possible, improving for the benefit of the participants.<sup>19</sup>
- 67 Derivatives transactions give rise to a multitude of disputes, including those involving: (a) misselling and wrongful investment advice; (b) calculation of payment streams and settlements; (c) the occurrence of specific events or the calculation of dates; (d) the quantity and quality of commodities; and (e) various rights and obligations imposed by the ISDA Master Agreements which govern most OTC derivatives transactions.
- 68 The international framework for the arbitration of derivatives disputes has been evolving. ISDA Master Agreements traditionally provide for litigation of derivatives disputes in English or New York courts, but arbitration has increasingly been presented as a viable alternative to litigation. The ISDA Arbitration Guide (2013) provides information and guidance on arbitrating derivatives disputes, and offers parties a number of model arbitration clauses which can be incorporated into their ISDA Master Agreements.<sup>20</sup> Disputes can be resolved under a range of arbitral institutional rules, some of which offer special procedural rules that are tailored to financial disputes.
- 69 Knowledge of arbitration has also been growing. Interviews conducted by the Task Force with representatives of banks and financial institutions engaged in derivatives dealings indicate that their familiarity with arbitration and willingness to utilise it have been on the rise, yet there is also an indication that more can be done to develop this trend further. The interviewees also specified that while derivatives arbitration is a dispute resolution option less commonly used in Europe, it features more prominently where counterparties are from emerging markets. This is due in large part to: (a) the difficulty of enforcing court decisions in a number of jurisdictions in emerging markets, and (b) general satisfaction, thus far, with the enforcement of state court decisions in Europe.

19 The concerns relevant to the arbitration of derivatives disputes also apply to other spheres of capital markets, such as debt and equity capital markets. However, given the significance of derivatives disputes, and the similar questions which arise in both contexts, we have focused on the former.

20 See <http://www2.isda.org/search?keyword=arbitration>.

- 70 Additionally, given the complexity inherent in many derivatives products, the interviewees emphasised that the financial expertise of the decision-makers is critical to the outcome of a dispute. In this regard, arbitration may offer an advantage over litigation, where parties cannot select the judges who hear their dispute. Similarly, the enforceability of arbitral awards may persuade parties to opt for arbitration to reduce the expense and uncertainty associated with enforcement proceedings. Although market participants in the financial sector value predictability and publicly-available precedent, confidentiality and the possibility of a speedy dispute resolution procedure are important factors which could lead parties to choose arbitration over litigation where the circumstances so warrant.<sup>21</sup>
- 71 While the interviewees had mixed views on the merits of arbitration for derivatives disputes, they were generally willing to arbitrate such disputes when counterparties suggested doing so. This is crucial because it appears that a major reason why arbitration is less commonly used in the European context is that it is not yet viewed as a “default” dispute resolution option, but rather one that banks and financial institutions would consider if it was presented to them in particular transactions.
- 72 The ISDA Master Agreement already offers a framework for greater use of arbitration by banks and financial institutions. The issue is how to take this even further – that is, how that framework can be actually applied and used more readily and frequently.
- 74 To determine the current use of international arbitration within the context of sovereign finance, the Task Force reviewed documentation from bonds issued by 92 sovereign governments.<sup>23</sup> Of the 92 sovereign bonds,<sup>24</sup> 82 were issued between 2010 and 2015. Arbitration was available as a means of dispute settlement in 18 of the 92 sovereign bonds. With these 18 bonds representing 20% of the 92-bond sample, the selection of arbitration as a means of dispute resolution in the sovereign finance context may be more prevalent than is generally perceived.
- 75 Of the 18 sovereign bonds that provided for the use of arbitration, 16 made arbitration available to bondholders and to the issuer, while the other two made arbitration available to bondholders only. Of the same 18 sovereign bonds, seven made litigation available to bondholders only, six made litigation available to both parties, and five provided for arbitration as the sole method of dispute resolution.
- 76 Of the 50+ financial institutions interviewed by the Task Force, 33 responded to a question asking whether the financial institution would be more or less inclined to select arbitration as a dispute resolution mechanism in the context of a contract with a sovereign counterparty.<sup>25</sup> Of these 33 institutions, 22 (67%) indicated that they would be more inclined to select arbitration, while only five (15%) indicated that they would be less inclined to select arbitration. The remaining six financial institutions (18%) indicated that they would be equally inclined to select arbitration, or that their inclination would depend upon the factual circumstances of the contract.

## VI SOVEREIGN FINANCE

- 73 Financial institutions and sovereigns have many types of agreements for which arbitration can be used as a dispute resolution mechanism. This section focuses on bonds and capital market instruments, which are widely used by sovereigns and which document hundreds of billions of dollars of credit extended to sovereigns. Arbitration would also be available as a dispute resolution mechanism when sovereigns enter into loan agreements, loan guaranties, custody agreements, investment management agreements, derivative contracts, acquisition agreements, shareholder agreements, commodities contracts, and contracts for financial services such as investment banking. Other sections of this Report examine many of these relationships and, in conjunction with this section, may be informative when a sovereign is involved.<sup>22</sup>
- 77 Some interviewees provided additional comments regarding factors that would make them more inclined to select arbitration as the preferred means of dispute resolution in the context of agreements with a sovereign counterparty. The most commonly cited factor was neutrality, viz. the ability to avoid submitting disputes to courts within the jurisdiction of the sovereign counterparty, as well as the ability to appoint arbitrators who are outside the scope of influence of the sovereign counterparty. The other factors mentioned reflect the commonly perceived advantages of arbitration on a general level: flexibility in the arbitral process, confidentiality, the ability to appoint arbitrators with relevant expertise, and the enforceability of arbitral awards.

21 It was reported to the Task Force that counsel who specialise in disputes involving derivatives consider that because derivatives transactions often carry systemic risk, there are some disputes that financial institutions want resolved out of the public domain to avoid any impact on the market and in such circumstance they consider a post-dispute submission agreement opting for arbitration.

22 Another useful source with respect to international arbitration involving sovereign parties is the Commission's report *States, State Entities and ICC Arbitration* (2012).

23 The Task Force found relatively little evidence of commercial arbitration proceedings involving financing for sovereigns, as opposed to sovereign instrumentalities (e.g. state-owned companies).

24 For the purposes of this assessment, bonds issued by Abu Dhabi and Hong Kong, as well as a *sukuk* issued by Malaysia, were included as sovereign bonds.

25 See Annex I, question 16. The inquiry encompassed contracts and accordingly was not limited to bonds.

78 In the context of sovereign finance, non-payment is the most common cause of disputes. In such a case, the expertise of the adjudicator may be a factor that is less significant, whereas the ability to exercise control over the duration of a proceeding might assume greater importance for financial institutions. In the context of sovereign finance disputes concerning non-payment, investor-state arbitration may offer fewer potential benefits as compared to the benefits that it might offer in other contexts.<sup>26</sup> However, for more complicated sovereign finance disputes (e.g. disputes over processes used to restructure sovereign debt), several features of investor-state arbitration, including national treatment and most-favoured-nation obligations, may be more pertinent.

## VII INVESTMENT ARBITRATION

79 Investment arbitration has grown exponentially over the past 20 years. There are more than 3,000 bilateral investment treaties (BITs), involving virtually every country, which grant substantive protections to foreign investors that can be enforced through arbitration. Arbitration of investment disputes remains a major issue in the negotiation of multilateral treaties between the Americas and the Asia-Pacific region (the Trans-Pacific Partnership (TPP)), the United States and the European Union (the Transatlantic Trade and Investment Partnership (TTIP)) and the European Union and Canada (the Comprehensive Economic Trade Agreement (CETA)). Such treaties, or international investment agreements (IIAs), generally include the right to fair and equitable treatment, national and most-favoured nation treatment, prohibition of arbitrary or discriminatory treatment, mandatory compensation for expropriation, and the right to freely transfer funds across the host state's borders.

80 The Task Force analysed the protections afforded by IIAs and investor-state dispute settlement (ISDS) mechanisms and considered: (i) the extent to which financial institutions contemplate protections provided by these mechanisms at the time investments are made or only ex post facto; (ii) whether financial institutions and states are satisfied with current levels of IIA protection given the recent drafting of treaties such as CETA, TPP or TTIP; and (iii) whether or not investment tribunals are considered to be sufficiently sophisticated to reach appropriate decisions. These questions are highly relevant because IIAs could, or should, be useful tools for financial institutions as they offer both substantive and procedural protections to foreign economic actors in a given host state.

81 First, the Task Force looked at the five key jurisdictional issues that arise in ISDS cases involving financial institutions, or their shareholders, and/or financial instruments:

- (a) Issues *ratione materiae*: these have been raised in at least 18 investment arbitration proceedings involving financial institutions, 16 of which resulted in an award or decision on jurisdiction,<sup>27</sup> or a combined award on jurisdiction and the merits.<sup>28</sup> The overwhelming majority of tribunals retained their jurisdiction over the subject matter of the dispute.
- (b) Issues *ratione personae*: objections on this basis have been made in no fewer than 13 investment disputes, two of which are still pending.<sup>29</sup> In many cases, the objections dealt with whether the investor party was actually a foreign investor or simply a domestic investor,<sup>30</sup> but arguments were also raised regarding the viability of a claim where the claimant party was controlled by a state and not a private investor.<sup>31</sup>

27 In investment arbitration parlance, a decision on jurisdiction is typically called a "decision on jurisdiction" if any objections raised are dismissed and the case proceeds to the merits, and an "award on jurisdiction" if any objections raised are upheld and the case does not proceed to the merits.

28 See *ABCI Investments Limited v. Republic of Tunisia* (ICSID Case ARB/04/12) [*ABCI Investments*]; *Alex Genin and others v. Republic of Estonia* (ICSID Case ARB/99/2), Decision on Jurisdiction (18 February 2011); *Blue Bank International & Trust (Barbados) Ltd v. Bolivarian Republic of Venezuela* (ICSID Case ARB/12/20), Award (25 June 2001) [*Blue Bank*]; *British Caribbean Bank Ltd v. Government of Belize* (PCA Case 2010-18, UNCITRAL Arbitration Rules), Award (19 December 2014); *Československa obchodní banka, a.s. v. Slovak Republic* (ICSID Case ARB/97/4), Award (29 December 2004) [*Československa obchodní banka*]; *Continental Casualty Company v. Argentine Republic* (ICSID Case ARB/03/9), Award (5 September 2008) [*Continental Casualty*]; *Daimler Financial Services AG v. Argentine Republic* (ICSID Case ARB/05/1), Award (22 August 2012) [*Daimler Financial Services*]; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (ICSID Case ARB/09/2), Award (31 October 2012) [*Deutsche Bank*]; *Fireman's Fund Insurance Company v. United Mexican States* (ICSID Case ARB(AF)/02/1), Award (17 July 2006); *Hesham Talaat M. Al-Warraq v. Republic of Indonesia* (UNCITRAL Arbitration Rules), Final Award (15 December 2014) [*Hesham Talaat M. Al-Warraq*]; *Invesmart BV v. Czech Republic* (UNCITRAL Arbitration Rules), Award (26 June 2009) [*Invesmart*]; *KT Asia Investment Group B.V. v. Republic of Kazakhstan* (ICSID Case ARB/09/8), Award (26 June 2009) [*KT Asia Investment Group*]; *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic* (ICSID Case ARB/03/5), Decision on Jurisdiction (27 April 2006), Award on the Merits (6 June 2008) [*Metalpar*]; *Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc v. Republic of Estonia* (ICSID Case ARB/04/6), Award (19 November 2007); *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic* (ICSID Case ARB/13/8), Award (9 April 2015) [*Poštová*]; *Rafat Ali Rizvi v. Republic of Indonesia* (ICSID Case ARB/11/13), Award on Jurisdiction (16 July 2013); *Renee Rose Levy de Levi v. Republic of Peru* (ICSID Case ARB/10/17), Award (26 February 2014) [*Renee Rose Levy de Levi*]; *Valle Verde Sociedad Financiera S.L. v. Bolivarian Republic of Venezuela* (ICSID Case ARB/12/18) [*Valle Verde*]. The cases of *Blue Bank* and *Valle Verde* are still pending.

29 See *ABCI Investments*; *Blue Bank*; *Československa obchodní banka*; *Continental Casualty*; *Daimler Financial Services*; *Deutsche Bank*; *Hesham Talaat M. Al-Warraq*; *Invesmart*; *KT Asia Investment Group*; *Renee Rose Levy de Levi*; *Saluka Investments v. Czech Republic* (UNCITRAL Arbitration Rules), Partial Award (17 March 2006) [*Saluka*]; and *Valle Verde*. *Blue Bank* and *Valle Verde* are still pending.

30 See *Renee Rose Levy de Levi* and *Valle Verde*.

31 See *Československa obchodní banka* and *Blue Bank*.

26 Section VII of this Report reviews investor-state arbitration within the broader context of international finance.

- (c) Issues *ratione temporis*: objections were raised in at least seven investment disputes<sup>32</sup> regarding claims that had allegedly arisen prior to the entry into force of the relevant legal instrument or after the protections invoked had ceased to be binding on the state party to the dispute.
- (d) Issues *ratione loci*: these have been raised in at least seven investment arbitration proceedings.<sup>33</sup> At issue was whether the investment was protected, and particularly whether the economic instrument or activity could be considered to have been an investment “in the territory” of the host state for jurisdictional purposes. In the case of financial instruments, determining whether the investments are actually made within the host state territory can involve an assessment of ambiguous facts and law. Tribunals consistently adopted a completely functional approach in order to determine where the investment would actually have an impact in the host state, focusing more on the end result as opposed to assessing the nature of the actual investment itself. This is a tailor-made test for financial instruments and is very favourable to retention of jurisdiction.
- (e) Issues *voluntatis causae*: five cases involving financial institutions or interests in financial institutions addressed an objection that there was no agreement to arbitrate,<sup>34</sup> but no tribunal resolving an investment dispute involving financial entities has declined jurisdiction on this basis to date.
- 82 Second, the Task Force turned to substantive matters. The two principal standards invoked by investors in cases concerning state interference with regard to financial institutions are: (a) fair and equitable treatment and (b) prohibition of expropriation.
- (a) Fair and equitable treatment (FET), especially in the form of protection of legitimate expectations,<sup>35</sup> is the principal standard investors invoked to protect their rights in cases involving financial institutions. The investor should not expect absolute legal stability (unless, of course, a particular commitment has been made by the state to the investor); generally, a state’s right to regulate will not be unreasonably impaired.<sup>36</sup> Furthermore, with respect to FET: (i) the expectations must be reasonable, (ii) they must flow from the business environment at the time of the investment, (iii) the investor’s own conduct is
- taken into account in analysing the obligation of the investor to perform its own due diligence at the time of investment (as is common practice for financial institutions),<sup>37</sup> (iv) the expectations can flow from a direct commitment on the part of the state, (v) the investor should not be discriminated against (which is particularly important in financial emergency cases), and (vi) states should refrain from making official statements that may provoke panic among the depositors and severely aggravate the financial situation of the investment.
- (b) Expropriation claims by investors in financial institutions have been invoked at a secondary level, mainly because FET claims seem to be more successful for investments in financial institutions and products. A characteristic obstacle for claimants is that, in order to claim expropriation, the investors must show that they were substantially deprived of the economic value of their investments as a result of state interference;<sup>38</sup> at the same time, it is extremely difficult to distinguish the reduction in investment value caused by such interference from the decrease in value caused by financial crises generally.
- 83 Third, the Task Force considered what qualifies as an investment. In essence, there have been only five investment treaty arbitrations concerning sovereign debt products that have reached the stage of a binding decision on issues material to this Report. *Fedax* was for 15 years an isolated decision regarding negotiable instruments in the secondary market, until *Abacalat* considered the same issue in relation to dematerialised government bonds. *Abacalat* was followed by three awards concerning this same issue: *Ambiente*, *Alemanni*, and *Poštová*.
- 84 While these decisions have caused heated debate, the argument essentially boils down to two issues, which are: first, whether a sovereign bond in the form of dematerialised securities falls within the ordinary meaning of “investment” as defined in a typical BIT; and second, whether such a product, particularly when it is acquired on the secondary market, must also satisfy an objective test which entails determining whether the investment possesses the character of an “investment”.
- 85 As to commodity hedging agreements (a derivative), it seems that only one case, *Deutsche Bank*, has touched upon whether these agreements may qualify as protected investments.

32 See *ABCI Investments*; *Blue Bank*; *Continental Casualty*; *Daimler Financial Service*; *Metalpar*; *Poštová*; and *Valle Verde*. Of these, *Blue Bank* and *Valle Verde* remain pending.

33 See *Fedax N.V. v. Bolivarian Republic of Venezuela* (ICSID Case ARB/96/3), Award (9 March 1998) [*Fedax*]; *British Caribbean Bank*; *Československa obchodní banka*; *Deutsche Bank*; *Abacalat and others v. Argentine Republic* (ICSID Case ARB/07/5), Decision on Jurisdiction and Admissibility (4 August 2011); *Ambiente Ufficio S.p.A and others v. Argentine Republic* (ICSID Case ARB/08/9), Decision on Jurisdiction and Admissibility (8 February 2013) [*Ambiente*]; *Giovanni Alemanni and others v. Argentine Republic* (ICSID Case ARB/07/8), Decision on Jurisdiction and Admissibility (17 November 2014) [*Alemanni*].

34 See *ABCI Investments*; *Československa obchodní banka*; *Continental Casualty*; *Hesham Talaat M. Al-Warraq*; and *Metalpar*.

35 *Invesmart*, Award (26 June 2009) para. 202.

36 *Saluka*, Partial Award (17 March 2006) para. 305.

37 *Invesmart*, Award (26 June 2009) para. 254.

38 R. Dolzer & C. Schreuer, *Principles of International Investment Law*, 2d ed. (Oxford, 2012), page 67.



- 86 Fourth, the Task Force analysed when regulatory activity may give rise to an investment arbitration claim. This is a relatively recent development and one that has attracted interest within the banking community. Some key factors need to be kept in mind here:
- (a) Financial entities are subject to substantial domestic regulation in virtually all countries because of the sheer size of their balance sheets, their deposit-taking activity and the important role they play in the economy. Therefore, determining when regulatory activity may give rise to an investment arbitration claim almost invariably involves a balancing of legitimate regulatory interests and interests that are perceived as not being legitimate.<sup>39</sup>
  - (b) Financial entities often bear the brunt of regulations intended not specifically for them but for the economy in general. For example, this is the case of foreign exchange controls imposed in a given country.
  - (c) There is an overlap in some situations between regulatory activities and the sale of financial assets by state authorities. Although frequently related to regulation, such situations are not covered by this analysis.<sup>40</sup>
- 87 In view of the public interest served by financial regulation, investment arbitration tribunals have, on the whole, shown deference to what is viewed as being legitimate regulatory activity with respect to financial institutions.<sup>41</sup> Nevertheless, there are circumstances in which a state may be held liable for the improper and discriminatory regulatory activities of state agencies.<sup>42</sup>
- 88 Fifth, the Task Force notes recent changes in the suitability of ISDS for the resolution of disputes between financial institutions, and the impact those changes may have had on the likelihood of recourse to arbitration. Because many (if not most) of the IIAs were entered into at a time when capital-importing states were keen to attract foreign direct investment, the types of foreign direct investments enjoying protection under IIAs have evolved from the traditional mining, oil and gas, and production sectors (brick-and-mortar industries) to include investments in financial institutions and financial products.
- 89 As a result, investors in financial institutions and their products are not unequivocally subject to the protections offered in the relevant BITS and Free Trade Agreements (FTAs). The vague and unclear definition of an investment

has not deterred the investors from bringing their claims; but it has made for murky waters, especially when it comes to the predictability of investment protection for financial institutions and their products.

- 90 A new era of treaty negotiations has opened, which may help to resolve uncertainties. Recent case law and a background of financial crises have prompted the drafters of various IIAs now to refer specifically to financial instruments. States seem to be increasingly sceptical when it comes to sovereign debt restructuring and allowing international arbitral tribunals to decide on these types of issues following the actions of sovereign states. Indeed, there is a noticeable trend towards restricting the scope of BITS and FTAs when it comes to financial instruments.
- 91 As a concluding point, it is noted that most of the awards reviewed in this section were issued during the last three to five years. Many of the issues are still being decided (such as Greece and Cyprus) and others are expected to generate a significant number of disputes that may be eligible for ISDS (possibly as a result of the misapplication of a resolution decision in relation to the EU Bank Recovery and Resolution Directive). The law in this area is not settled but continues to evolve and should be monitored.

## VIII REGULATORY MATTERS

- 92 The term “regulatory matters” encompasses, in the context of financial institutions, a broad range of subjects including the application and enforcement of rules of conduct for doing business, the regulation of financial products and markets, and prudential supervision. In examining the arbitration of regulatory matters involving financial institutions, the Task Force focused on three areas: (i) the arbitrability of disputes between clients or investors and financial institutions involving regulatory breaches; (ii) the use of investment arbitration by financial institutions or their shareholders to seek remedies in response to allegedly improper actions on the part of regulators; and (iii) specialised arbitral institutions that administer dispute resolution proceedings between clients and financial institutions.
- 93 **Empirical findings.** Few financial institutions had experience of the arbitration of regulatory matters or issues of arbitrability. One possible explanation is that regulatory matters often concern questions of public policy, and they have traditionally been addressed by regulators themselves or in the context of claims brought in the courts. Nevertheless, the responses the Task Force received suggest a willingness on the part of financial institutions to consider arbitration in connection with disputes relating to the civil and financial consequences of regulatory breaches.

39 See *Renée Rose Levy de Levi*, Award (14 February 2014) paras. 157ff.

40 For an illustration, see *Československa obchodní banka*, Award (29 December 2004).

41 See e.g. *Continental Casualty*; *Renée Rose Levy de Levi*; *Invesmart*; and, with respect to certain matters, notably suspension of the trading of certain securities, *Saluka*.

42 See e.g. *Antoine Goetz et consorts v. République du Burundi* (ICSID Case ARB/95/3); *Valeri Belokon v. Kyrgyz Republic* (UNCITRAL Arbitration Rules); and, for certain regulatory decisions, notably the regulator’s approach to addressing bad debts in financial institutions, *Saluka*.

- 94 **Arbitrability.** Generally, disputes arising in connection with agreements between parties where one party is a financial institution should be capable of being arbitrated, like those relating to other commercial agreements. However, claims based on breaches of statutory provisions involving public rights or the interests of third parties, such as securities laws, have in the past given rise to issues of arbitrability. More recently, the trend in many jurisdictions has been to view the financial consequences of a dispute based upon a regulatory breach as being arbitrable. This general assertion is, nevertheless, subject to some exceptions, which vary from jurisdiction to jurisdiction, and typically do not apply exclusively to disputes involving financial institutions. These exceptions can include issues such as consumer protection, insolvency situations, and can also involve public policy considerations.
- 95 **Investment arbitration.** In light of the significant public interest underlying the regulation of financial institutions, there is an expectation that regulations will be rigorous and extensive. Accordingly, investment arbitration claims concerning regulatory actions tend to require the balancing of legitimate regulatory interests and interests perceived as being illegitimate. The dividing line between the two has not yet been clearly defined, but a certain degree of deference on the part of arbitral tribunals to the exercise of “police powers” can be observed. However, arbitral tribunals have shown much less deference to states where discriminatory or arbitrary actions appear to have been taken by regulators in relation to foreign financial entities, or financial entities that are subject to foreign control.
- 96 **Specialised institutions.** Arbitration is generally not considered to be the appropriate dispute resolution mechanism for determining whether a financial institution has breached regulatory provisions.<sup>43</sup> Those determinations are typically made in judicial or administrative proceedings. Arbitration can, however, provide an efficient forum for addressing the civil consequences of those breaches, and can be particularly beneficial for resolving disputes between customers and financial institutions. Two mechanisms that provide an alternative to traditional litigation illustrate this point:
- 97 First, the Financial Industry Regulatory Authority (FINRA) in the United States is a non-governmental self-regulatory organisation which, inter alia, provides a forum for the adjudication of disputes through its arbitration rules. Customers may (and do) initiate FINRA arbitration proceedings in relation to claims founded upon regulatory breaches, some of which involve brokerage firms that are part of major banks. FINRA has delineated and streamlined arbitration procedures, which depend upon the size of the claim. For claims over USD 100,000, FINRA requires an in-person hearing conducted by a panel of three arbitrators. For smaller claims (USD 50,000 – USD 100,000), there is generally a hearing conducted by a sole arbitrator. Cases involving claims up to USD 50,000 are subject to a Simplified Arbitration Process in which the arbitrator decides the case on the basis of the parties’ submissions, without a hearing. Filing fees can be waived upon a showing of financial hardship, and claims that are settled (or withdrawn) more than 10 days prior to the hearing date may be eligible for a partial refund. FINRA’s streamlined procedures are therefore cost-sensitive, which makes them suitable for resolving small investor disputes.
- 98 Second, the Financial Dispute Resolution Centre (FDRC) in Hong Kong offers mediation and arbitration services for certain small customer claims (not exceeding HKD 500,000, including interest) against financial institutions in Hong Kong. The Mediation and Arbitration Rules applied by the FDRC are aimed at resolving disputes prior to the arbitration stage.<sup>44</sup> Disputes that meet the eligibility requirements<sup>45</sup> are first referred to mediation. If the mediation fails, only the customer can decide to commence arbitration proceedings against the relevant financial institution, and the institution’s consent is not required. The rules applied by the FDRC provide for a simplified arbitration procedure within an expedited timeframe. Disputes are resolved by a sole arbitrator. Most cases proceed on the basis of documents only. The arbitrator may order an in-person hearing, but only if the circumstances justify such a hearing and the parties agree to assume the additional costs associated with a hearing. These features of FDRC arbitration result in reduced costs, thereby making arbitration accessible to investors who

44 According to the Annual Report 2015, since the commencement of its operations, the FDRC has administered 103 applications for mediation, and only eight for arbitration. It appears that the very high rate of settlement of claims through the use of mediation has resulted in few claims being referred to arbitration to date.

45 In order to be eligible, a dispute must satisfy, inter alia, the following criteria: (i) be of a monetary nature; (ii) involve a claim that does not exceed HKD 500,000 (including interest); and (iii) arise out of a contract between an Eligible Claimant and a financial institution that was entered into or arose in Hong Kong, or the act or omission of the financial institution in connection with the provision of a financial service to the Eligible Claimant, where the financial institution acted as an agent. An “Eligible Claimant” is defined as an individual or sole proprietor who has, or who has had, a customer relationship with a financial institution or who has been provided with a financial service. See the Terms of Reference for Financial Dispute Resolution Centre (FDRC) in relation to the Financial Dispute Resolution Scheme (FDRS), February 2014, available on the FDRC website ([www.fdrc.org.hk](http://www.fdrc.org.hk)).

43 In the section on investment arbitration, this Report addresses numerous instances where claims were filed by banks or their shareholders in relation to discriminatory treatment or other violations of duties by national bank regulators in the course of performing their regulatory functions.

cannot afford to finance lengthy proceedings in court or before an arbitral tribunal. The broad confidentiality obligations that apply in FDRC arbitration are likely to appeal to many financial institutions, particularly those that wish to avoid setting/creating a precedent, or where there is reputational risk involved.

## IX INTERNATIONAL FINANCING

- 99 International financing refers to transactions by way of loans and facility agreements (excluding debt securities) or unfunded guarantee facilities, where the parties and/or assets are located in several countries.
- 100 International financing includes:
- (a) unsecured bilateral or syndicated lending, involving multiple lenders represented by an agent bank, with possibly several tiers of financiers whose respective rights are determined under inter-creditor arrangements;
  - (b) secured or guaranteed bilateral or syndicated lending, involving security on assets or guarantees from a parent or subsidiary;
  - (c) project finance, involving non-recourse loans to a project company (i.e. they create no rights against sponsors and are secured primarily by the cash flows and the physical assets of the project), with lenders having the right to step in and take over the project in the event of the borrower's failure to perform adequately; and
  - (d) trade finance, which typically includes:
    - short-term trade finance transactions (e.g. letters of credit (LCs), including documentary and standby LCs), and letters of indemnity (LOIs);
    - factoring/forfeiting/receivables financing agreements, bank payment obligations;
    - medium-term trade finance transactions (e.g. revolving LC issuance facilities, buyer/seller credit/guarantee facilities, pre-export financings, participations and silent confirmations); and
    - complex trade finance instruments: countertrade and offset agreements.
- 101 The Task Force noted a marked reticence on the part of financial institutions to use arbitration in international financing transactions, for which they favour court litigation. That reticence is stronger in syndicated lending and in asset finance than in international project finance in the emerging markets. Recently, however, there have been signs of a change or shift in attitudes. Notably, both multilateral and commercial lenders have an increasing amount of arbitration experience in regions of the world where arbitration is often used in project finance deals and in the context of secured/unsecured loans.
- 102 In particular, financial institutions prefer arbitration to court litigation when a party or an asset is located in a jurisdiction where the courts are perceived to be unreliable, and no agreement can be reached on the choice of a court deemed acceptable by both parties.
- 103 In project finance, arbitration attracts considerably more interest than in other areas of international financing such as trade finance, because project finance will often involve parties and assets that are located in or are otherwise subject to the jurisdiction of courts that are perceived by lenders as being inadequate to handle the disputes that may arise in such transactions. This is also the case where the borrower's default on the project loan is the direct result of actions or omissions on the part of other project participants (e.g. contractor, offtaker).
- 104 Although loan agreements are separate from contracts with other project participant(s), the implementation of a single dispute resolution scheme may prove beneficial to lenders when the choice of separate state courts as potential fora would lead to fragmentation of the project unity and a delay in effective remedies. Arbitration offers lenders the possibility of agreeing to the resolution of multiparty disputes in a single arbitration forum. At the same time, it also allows them to retain the right to isolate reimbursement actions from issues relating to commercial contracts entered into by the project company.
- 105 In trade finance, there has ceased to be any clear preference for either traditional court litigation or arbitration among market players. Instead, the long-time preference of financial institutions for traditional litigation appears to have been replaced by a recognition that litigation may not be in their best interest in all circumstances.
- 106 In secured transactions, the adequacy of arbitration as a means of resolving disputes concerning enforcement of security rights over movables has been questioned, as it is thought that the intervention of a national court cannot be avoided. However, the belief that disputes relating to security agreements are not arbitrable is unfounded. Only a few types of procedure to enforce security require the intervention of a court (if not enforced voluntarily) and, typically, it will not make sense to choose arbitration in these cases. But whenever the security at issue is self-enforcing, there is no inherent reason for disputes arising out of such security to be referred to a national court as opposed to an arbitral tribunal.

107 Whether arbitration is attractive in any given transaction will depend on the specific circumstances (i.e. the quality of the courts available as an alternative to arbitration, the desirability of ensuring that any litigation is brought before a specific national court or of avoiding a specific national court). In matters involving insolvency proceedings, the arbitral tribunal's decision regarding enforcement remains subject to compliance with the decisions of the insolvency court on matters over which it has mandatory and exclusive jurisdiction (e.g. the validity of security posted during the look-back period, the approval of the statement of secured claims), and with the timetable of the insolvency proceedings (i.e. stay of enforcement against assets). Thus, the rights of third-party creditors are in no way threatened by the choice to arbitrate.

The question, therefore, is not whether disputes relating to the taking or enforcement of security rights are arbitrable, but rather whether the choice to arbitrate makes sense in the circumstances and in light of any idiosyncrasies in the applicable law.

## X ISLAMIC FINANCE DISPUTES

- 108 The exponential growth that Islamic finance has experienced in the past few years has led to an increase in the breadth and sophistication of product offerings in international finance. Yet, the potential of international arbitration in the context of Islamic finance transactions and dealings remains completely untapped.
- 109 Islamic finance can be defined as financial intermediation accomplished in a manner that is rooted in fundamental Islamic principles. These principles are articulated in the sharia (Islamic law), which sets out the means by which financial intermediation can be accomplished. Islamic financial intermediation is viewed as a partnership in which all participants take a risk and share in both profits and losses. Compliance with sharia must be maintained throughout the lifecycle of the Islamic finance transaction – not only with respect to the collection and pooling of available funds, but also during the investment and the distribution of returns.
- 110 Islamic finance operates within the sphere of international financial markets and must consequently offer financial products that are compliant with both sharia and with the requirements of operations in global financial markets. Hence, simultaneous compliance with sharia and with the secular laws governing financial intermediation is necessary for all Islamic financial products. This can present challenges not only for capital adequacy, risk management, corporate governance, transparency and
- disclosure, but also for dispute resolution. Compliance is verified upfront, with the help of sharia boards. However, issues may still arise, as in any dispute resolution process. The possible outcomes can be illustrated by juxtaposing two decisions, one made in the English courts and the other in arbitration.
- 111 In the first case, involving a *murabaha* financing agreement,<sup>46</sup> the English court was called upon to interpret a governing law clause that provided as follows: “Subject to the principles of the Glorious Sharia, this Agreement shall be governed by and construed in accordance with the laws of England.”<sup>47</sup> The court found the proviso “subject to the principles of the Glorious Sharia” to be inadequate for the purpose of incorporating the principles of Islamic law into the parties’ agreement, and thus English law, not sharia, governed the transaction.
- 112 This ruling was upheld by the Court of Appeal,<sup>48</sup> which confirmed that the reference to sharia was not an enforceable provision:
- [...] the words [of the provision] are intended simply to reflect the Islamic religious principles according to which the Bank holds itself out as doing business rather than a system of law intended to “trump” the application of English law as the law to be applied in ascertaining the liability of the parties under the terms of the agreement.
- 113 In the second case, which pertained to an *istisna’a* financing arrangement,<sup>49</sup> arbitration was the chosen dispute resolution mechanism, the place of arbitration was London, and the applicable substantive law was stated as follows: “This dispute shall be governed by the Laws of England except to the extent it may conflict with Islamic Sharia, which shall prevail.”
- 114 The arbitral award, which was enforced in England, gave effect to the parties’ choice of English law, subject to its compatibility with sharia. The arbitrator, who was an expert in Islamic law, issued a monetary award of both principal and profit, but disallowed claims for additional damages because, although such claims were compliant with English law, they would have been in conflict with sharia principles.
- 115 The potential risk that English courts may disregard the parties’ choice of sharia to govern their dispute will not cause all participants in Islamic finance transactions to reject the benefits of submitting their disputes to the English courts. Nonetheless, uncertainty over the attitude of the English courts encourages the use of arbitration, particularly for those participants whose religion is the primary driving force behind their participation, i.e. the depositors.

46 *Shamil Bank of Bahrain v. Beximco Pharmaceuticals Ltd.*, [2003] EWHC Comm 2118.

47 *Ibid.*, page 1, para. 5.

48 *Beximco Pharmaceuticals Ltd. v. Shamil Bank of Bahrain*, [2004] EWCA Civ 19, para. 54.

49 *Sanghi Polyesters Ltd (India) v. The International Investor KCSC (Kuwait)*, [2000] 1 Lloyd’s Rep. 480.

- 116 In the long term, sights should be set on creating a global legal framework for Islamic finance, through the convergence and codification of Islamic contract law. In the near term, another option is to provide for dispute settlement through arbitration when the parties wish the mandatory principles of sharia to prevail. This would also allow parties to ensure that nothing is permitted during the dispute resolution phase that would be prohibited by sharia. Hence, it would be beneficial to make depositors aware of the advantages of arbitration as a dispute resolution mechanism in the sphere of Islamic finance. It would also be crucial to train the professionals who may be involved in the resolution of Islamic finance disputes.
- 117 In recent years, two arbitral institutions have promoted themselves as specifically suited to Islamic finance disputes. In 2007, several Islamic financial institutions located primarily in the MENA region established the International Islamic Center for Reconciliation and Mediation (IICRA), which is based in Dubai, UAE. IICRA has reportedly administered a small number of arbitral proceedings but has not achieved widespread acceptance in the Islamic financial community. In 2012, the Kuala Lumpur Regional Centre for Arbitration (KLRCA) published its i-Arbitration Rules for disputes arising out of commercial agreements based on sharia principles. These rules allow the parties to designate any country as the seat of the arbitration. However, this remains a challenge on a practical level because they have not met with any significant uptake outside South East Asia. It may be noted that the ICC Rules are suitable for the arbitration of Islamic finance disputes, as they are for any other dispute involving financial institutions.
- 118 Most advocates of the arbitration of Islamic finance disputes regard arbitration as being well suited to ensuring that the Islamic finance industry meets its customers' expectations over compliance with sharia. They generally decry the industry's practice of designating English or New York law (to the exclusion of sharia) as the governing law of contracts, arguing that this practice will have a negative impact on the industry's growth as its customers become increasingly sceptical about the compliance of their contracts with sharia. These individuals advocate resolving Islamic finance disputes through arbitration conducted by arbitrators mandated to decide the parties' dispute in accordance with both sharia and national (i.e. secular) law.
- 119 Precedent(s) for this kind of arbitration do exist, as illustrated by the English Commercial Court's judgment that denied an application to set aside an arbitrator's award in *Sanghi Polyesters Ltd (India) v. The International Investor KCFC (Kuwait)*.<sup>50</sup> Moreover, both KLRCA and IICRA offer procedures that specifically contemplate that the parties' contract will be governed by sharia in addition to national law.
- 120 However, the push to promote the arbitration of Islamic finance disputes appears to have gained very little traction among major Islamic banks and financial institutions. This can most likely be attributed to a potential lack of desire on their part to have their disputes decided in accordance with sharia.
- 121 Secular arbitration is also an option for Islamic finance transactions. In this case, the parties to an Islamic finance transaction provide in their contract that any dispute will be referred to arbitration, but they require the arbitrators to apply only English or New York law (to the exclusion of sharia). This option may, at present, appear to be advantageous, because: (1) the parties can agree to arbitrate in an arbitration-friendly jurisdiction that is geographically convenient for them; (2) the parties can select arbitrators with general expertise in financial disputes; (3) an arbitral award can be easier to enforce internationally as opposed to a court judgment; and (4) arbitration is a flexible process that can be adapted to the specific circumstances of the dispute.
- 122 In 2010, ISDA and the International Islamic Financial Market (IIFM) endorsed the secular arbitration option when they launched the ISDA/IIFM Tahawwut (Hedging) Master Agreement. Section 13(c) of the agreement gives the parties the option of choosing ICC arbitration with a London or New York seat, and of applying English or New York law as the governing law. To dispel any doubts, section 1(d) specifically provides that the governing law does not include Islamic sharia.

## **XI INTERNATIONAL FINANCIAL INSTITUTIONS, DEVELOPMENT FINANCE INSTITUTIONS, EXPORT CREDIT AGENCIES**

- 123 International financial institutions (IFIs), bilateral development finance institutions (DFIs) and export credit agencies (ECAs) are important players in the financial world. IFIs, DFIs and ECAs often work closely with private sector financiers (such as commercial banks) in project and export financing. As a direct result, they exercise significant influence over financing documentation, including the dispute resolution mechanisms that are used in international financing transactions.

<sup>50</sup> See *supra* note 49 and accompanying text.

- 124 The interviews with IFIs, DFIs and ECAs support the original working hypothesis that these bodies often show a very strong interest in using international arbitration as a means of dispute resolution within their business. However, international arbitration is by no means the only remedy used. Their choice may also depend on legal advice received regarding a specific project or even a specific contract.
- 125 The fact that most of these institutions do not have a written policy on the use of international arbitration as opposed to traditional litigation, or vice versa, reflects and underlines this flexible approach. On the other hand, the findings suggest that these bodies have a clear understanding of the specific features of arbitration that they prefer to select, such as (in most cases) institutional arbitration rather than ad hoc proceedings, three arbitrators as opposed to only one, and arbitrators with expertise in the subject matter in preference to arbitrators who possess no such expertise.
- 126 Each IFI, DFI and ECA has its distinct objectives, operational features, geographical coverage and institutional structure. Thus, it is important not to stereotype them or use the same approach for all of them. The key findings from the interviews demonstrate that:
- (a) IFIs, DFIs and ECAs tend to have larger operations in emerging countries, which often leads to a preference for international arbitration as a means of dispute resolution, especially if the host country does not recognise foreign judgments, or foreign judgments are subject to de novo review on the merits;
  - (b) IFIs, DFIs and ECAs also tend to pay greater attention to the neutrality of the forum, especially if the counterparty is a sovereign or a state-owned entity, and international arbitration is thought to be a neutral process as compared to litigation in national courts; and
  - (c) for some IFIs, their status as multilateral institutions that enjoy privileges and immunities in their member countries plays a role in their choice to arbitrate, because they see this as a way to protect their privileges and immunities and avoid being subjected to the jurisdiction of national courts.
- 127 The absence of an appeal mechanism – resulting in earlier finality of decisions – is also viewed as an advantage. Many IFIs, DFIs and ECAs seem to have standard dispute settlement clauses reflecting their preferences. The clauses often contain asymmetric dispute settlement clauses which provide for arbitration, while permitting the financial institution to select litigation as an alternative. This can be beneficial in certain circumstance, e.g. in cases involving enforcement of collateral.
- 128 In summary, although IFIs, DFIs and ECAs do not appear to have many international arbitrations (nor litigations, for that matter), these groups of financial institutions are relatively open (as compared to purely private-sector financial institutions) to agreeing to international arbitration as the applicable dispute resolution mechanism for the various reasons discussed above.
- 129 One specific feature of international lending that has a substantial impact on the choice of a dispute settlement mechanism is the fact that disputes typically involve monetary claims following a borrower's default on payment, and rarely raise complex legal issues. This may help to explain the deeply embedded tradition within some financial institutions – including some IFIs, DFIs and ECAs – of choosing litigation in the courts of England or New York to resolve disputes arising out of their international lending operations and transactions.

## XII ADVISORY MATTERS

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- 130 Investment banks, generally through their corporate finance divisions, provide advisory services to their clients in two main areas: M&A (mergers and acquisitions) and equity capital markets. In simple terms, an M&A transaction is the sale or acquisition of a business or company by another.<sup>51</sup> Legally speaking, such transactions can take a number of forms, such as a straight sale or purchase, a merger, an asset swap, a public tender offer or a privatisation.
- 131 These services include assisting the client throughout the M&A process up to and including its (hopefully) successful conclusion. To this end, the bank performs a number of tasks, which may include, for instance, providing a valuation of the target, preparing the marketing documents (e.g. teaser, information memorandum), monitoring the data room, providing advice to the client during the course of the negotiations, assisting with communication/contact with regulators, or acting as the sponsoring bank in the context of a takeover bid.
- 132 M&A practice does not stop there, however. Financial institutions also act as sellers and buyers on their own behalf. Here, they use M&A practices and transactions when buying or selling parts of their businesses or subsidiaries. Banks may also act as investors for an in-house portfolio. They employ the same methods and skills in these transactions as they do for client-driven M&A deals.

<sup>51</sup> The value of the transactions concerned is very high: global M&A activity (value of deals) amounted to approximately USD 3.2 trillion in 2014 and USD 1.7 trillion in the first half of 2015.

- 133 Equity capital market activities mainly consist of preparing and executing initial public offerings (taking a company public through a primary listing, also known as an IPO) or the issuance of listed securities (e.g. debt or equity instruments) on the regulated markets, which allow an issuer to raise funds. Privatisations can occur in this manner.
- 134 In all of these contexts, a financial institution will enter into a number of contracts with either its client (mainly through the use of an engagement letter, referred to in the profession as a mandate, covering its role as financial advisor) or its counterparty (in the case of a deal conducted on its own behalf, e.g. a share purchase agreement or a shareholders' agreement), and all of these contracts will, unsurprisingly, contain a dispute resolution clause.
- 135 International arbitration appears ideally suited to M&A and advisory work given the typically complex issues they raise, the frequent need for confidentiality, their generally sensitive nature in terms of both cost and reputation, and the potential difficulty of enforcing court judgments. The limited experience financial institutions have of using arbitration in this context can be attributed to cost (at least in some jurisdictions) and their unfamiliarity with the process.
- 138 The survey of financial institutions conducted by the Task Force demonstrated that arbitration is used less within the asset management industry. In some instances, the existence of arbitration was completely unknown to the interviewees. However, this is not necessarily the case with respect to all institutions and players within the asset management sector (e.g. investment funds, investment houses and managers, private clients). Scholarship and legal materials on this topic are scarce and the case law is limited.
- 139 Use of arbitration to resolve disputes relating to asset management seemed to arouse in the institutions interviewed the same fears and concerns as are expressed in relation to arbitration in general. For some interviewees, the primary deterrents were cost, lack of speed and the absence of *stare decisis* (i.e. no system of established legal precedent). However, for others, arbitration presented some significant advantages, including confidentiality, expertise, reasonable costs and speed, no appeal mechanism and worldwide enforcement.

### XIII ASSET MANAGEMENT

- 136 Asset management can be defined as an activity carried out by individuals and companies that manage investments on behalf of others or advise them on their investments. Depending on the circumstances and the role played, discretionary powers may or may not be available. Asset management in banking and finance aims to expand substantially the client's financial portfolio by using a process that combines research, interviews and statistical analyses of companies, markets and trends. It also includes evaluating asset financing options and asset accounting methods in order to maximise a client's financial portfolio value.
- 137 Asset management is generally conducted through business units (or companies) that are quite distinct from other banking activities (e.g. M&A). The types of parties involved may also vary. In M&A and trade finance, the parties are generally commercial companies (i.e. banks or other companies in the financial sector), on one side, and industrial, commercial companies (listed, large or SMEs), on the other side. This kind of business-to-business relationship is characterised by more or less equal powers and responsibilities in the negotiation, execution and performance of the transactions. In asset management, the private banker is generally dealing with one or more individuals (sometimes a family estate), SMEs and/or non-profit organisations that typically have less expertise in financial investments. In the European Union, the trend in favour of consumer protection is codified in the successive iterations of the Markets in
- 140 Asset management disputes typically involve issues of repayment, misrepresentation, lack of consideration, mistake, false inducement, misappropriation, force majeure/*fait du prince*, unexpected change(s) in circumstances and a change in regulation(s). At the same time, tricky questions may be raised. For example, one may ask whether, on the basis of the plain meaning of the agreement read in conjunction with trade usage and/or special client instructions, the bank's actions in a given case were within the scope of the agreement between the institution and the client. If the mandate is restricted to "common bank investment instruments", which instruments are considered as such? Other questions that may arise are: when is an investment reasonable? Has there been sufficient monitoring of assets? Did the client agree to or provide valid instructions for a particular transaction or set of transactions? What were both the negative and positive implications of transactions incorrectly executed and what would have been the impact of those operations if the institution had carried them out diligently, or not carried them out at all?

- 141 These issues reinforce the idea that resolving disputes in asset management requires a decision-maker with a sufficient level of skill(s) and expertise, which may not be available in courts in many jurisdictions around the globe. Arbitration has the potential to provide a decision-maker who has the expertise the parties determine is desirable for a particular transaction or dispute. Arbitration also seeks to ensure that the decision-maker is neutral, which is particularly important for asset management disputes connected to two or more jurisdictions.
- 142 Arbitration is ideally suited to safeguarding the confidentiality of the proceedings and of the dispute itself, which is particularly important for asset management providers who do not wish to have their identities revealed, especially in the case of a breach or fault, and for clients who do not want to have their financial positions exposed. As discussed above, confidentiality can be protected and preserved through a careful analysis of the legal and institutional regulatory framework applicable to the arbitration proceedings, as well as through the drafting of arbitration clauses and other agreements to ensure that all stages of the proceedings and all participants comply with confidentiality duties and requirements.



## Annex I

### Questionnaire Submitted to the Financial Institutions Interviewed for the Purpose of the Report

#### INTRODUCTORY NOTES

The purpose of the survey/interview is not specifically to market ICC arbitration but instead to ascertain the financial institution's views on and experience of arbitration, for various types of agreements.

We recognise that the answers may be different for different lines of business and we hope that they can capture the various approaches.

#### A BACKGROUND/INTRODUCTION

- 1 Please provide the name of your institution, your name and role/function.
- (a) May your response be shared with Task Force members or must the response be anonymous?
- (b) May the name of your institution be listed in the report as having participated in the survey (without attribution regarding any specific comments)?

#### B GENERAL APPROACH TO INTERNATIONAL ARBITRATION

- 2 Does your institution have policies or guidelines regarding dispute resolution mechanisms for cross-border contracts? If so, what are they and are they recorded in a document that can be shared? Have the policies/guidelines changed over the last five years? Did the global financial crisis have any impact on them?
- 3 For multilateral/international/government-owned institutions: does your status as a multilateral/international/government-owned institution play a role in your choice for or against arbitration or particular jurisdictions?
- 4 In what circumstances is international arbitration used by your institution or proposed by your counterparty when dealing with your institution?
  - (a) If the choice of arbitration versus litigation depends on the nature of the contract, what factors are considered relevant to determine which dispute resolution method (litigation or arbitration) is more appropriate?

- (b) Is your decision to include an arbitration clause (or choose a particular arbitral institution or form of an arbitration clause) dependent on or influenced by third-parties playing a role in the transaction (guarantors, insurers, credit mitigation providers, etc.)?
- (c) What, in your view, are the key advantages of arbitration as opposed to litigation, and vice versa?

#### C. DRAFTING AN ARBITRATION CLAUSE

- 5 Do you favour institutional or ad hoc arbitration?
- 6 Does your internal policy provide for a particular arbitral institution to be chosen in priority? Why?
- 7 Do you have a preference for the method of selecting arbitrators: counsel recommendation, your own knowledge, firm-imposed roster, directories, etc.?
- 8 Do you think that arbitral institutions should be encouraged to keep lists of arbitrators with banking expertise?
- 9 Do you prefer one or three arbitrators?
- 10 How do you select a seat?
- 11 Do you use tiered dispute resolution clauses and, if so, what are the mechanisms that you choose prior to arbitration (e.g. mediation)?
- 12 Do you have any concerns about access to courts for interim measures if you were to choose arbitration?
- 13 Do you have a preference for asymmetrical clauses that give the financial institution the option of submitting disputes to arbitration or to the courts of a given state (assuming that the asymmetrical clause is enforceable in the relevant jurisdiction)?
- 14 Would you be interested in an appeal mechanism in arbitration?
- 15 Would your answers to the above questions change in the event that the contract in question was with a sovereign counterparty? If so, in what respects? In particular:

- 16 Would you be more or less inclined in such a case to choose arbitration as a dispute resolution mechanism?
- 17 Would you be likely to alter the content or nature of the arbitration clause in any respect on account of the fact that the contract was with a sovereign counterparty?
- 18 Any other comments on drafting a dispute resolution clause?

#### **D MANAGING/INVOLVEMENT IN ARBITRATION PROCEEDINGS**

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- 19 In how many arbitral proceedings has your institution been a party in the last three to five years? How does that compare to court litigation?
- 20 In your current position, have you had an opportunity to participate in an arbitration as a party representative? Have you ever acted as a witness or an expert? In prior positions, have you worked as counsel in an arbitration? If yes (to any of the above):
- (a) What have you learned from your experience with arbitration that might have an influence on the way you would draft an arbitration clause in the future?
- (b) If you are able to participate in the selection of an arbitrator, what are your expectations of that arbitrator?
- (c) In the cases in which you have been involved, was the procedure for the case tailored to the needs of the specific case (e.g. documentary disclosure, witness statements and oral hearings with cross-examination as a matter of course, or consideration given on each occasion to what was really necessary to resolve the particular dispute)?
- (d) What is your experience with the enforcement of arbitration awards?
- 21 Any other comments on managing the arbitration process?

#### **E FUTURE CONSIDERATIONS**

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- 22 What are the most significant hurdles which, in your view, could prevent your institution (or financial institutions generally) from using international arbitration?
- 23 In what ways might the arbitration process be changed/improved to make it more appealing to your institution?
- 24 Are there specific options that your institution would like to have available in arbitration proceedings (e.g. summary or expedited proceedings, mediation proceedings before an arbitral proceeding, rules on joinders of third parties/consolidation of cases) and which would increase the chances of your institution including an arbitration clause in an agreement or series of agreements?

- 25 Any further comments which you would view as being significant in recommending arbitration for resolving your institution's cross-border disputes?

#### **F TRADE FINANCE**

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- 26 In your collateral management agreements and storage agreements with third-party depositories, does your institution have a preference between arbitration and court proceedings? Why or why not?
- 27 Do you have any other comments that you feel might assist in understanding your institution's current attitude/awareness of arbitration as a dispute resolution mechanism in trade finance matters involving your institution?

#### **G INVESTMENT TREATY ARBITRATION (INCLUDING FREE TRADE AGREEMENTS)**

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- 28 Is your institution state-owned, or privately owned? Does it operate in one or more jurisdictions other than that of the nationality of its controlling shareholders?
- 29 In your institution's view, can (or should) the regulation of financial entities be affected by investment law protections granted to foreign investors?
- 30 In your institution's view, would it be beneficial or detrimental to the financial system in which it operates that certain disputes with foreign investors regarding financial regulations be submitted to international investment tribunals after a decision by local courts?
- 31 Would you consider that international investment tribunals dealing with financial regulation disputes are more prone to find in favour of foreign investors or in favour of sovereigns?
- 32 Would you consider that international investment tribunals are sufficiently sophisticated to reach fair and appropriate decisions on matters dealing with financial regulation? Would ICSID tribunals be better prepared than other tribunals to deal with those matters, given ICSID's position as part of the World Bank Group?
- 33 Please provide any comments or thoughts you may want to share on the desirability or inconvenience of submitting disputes between states and foreign investors involving financial regulatory matters to investment arbitration.

**H REGULATORY DISPUTES**

- 34 Do you see a role for arbitration in the resolution of disputes arising out of breaches (or alleged breaches) of regulatory provisions in the financial services sector?
- 35 If so, would this be restricted to dealing with the civil or financial consequences of a regulatory breach for a client or investor, or could it be broader than that?
- 36 Have you encountered issues of arbitrability in connection with disputes in the banking and financial services sector? If so, in relation to what subject areas?
- 37 Do you have any experience of arbitration in relation to such disputes?
- 38 If so, was the arbitration commenced on the basis of an arbitration clause in a contract or an agreement to arbitrate concluded after the dispute had arisen?
- 39 Was the arbitration institutional or ad hoc? If the arbitration was institutional, which institution administered the proceedings?
- 40 Was arbitration a satisfactory method of resolving this type of dispute?
- 41 What advantages and disadvantages were there in arbitration, as opposed to court litigation, in this context? (Please consider matters such as the level of expertise of the arbitrators, the adequacy and suitability of the procedure, time and costs, the availability of interim measures, the enforcement of the award.)

**I INTERBANK DISPUTES**

- 42 When your institution enters into a contract with another financial institution (another bank or investment fund, private equity fund, sovereign wealth fund, etc.), would you (or your colleagues) typically choose arbitration as a dispute resolution mechanism? If not, why? If yes:
- 43 Does your institution have in place an approved general policy of using arbitration in disputes with other financial institutions? Otherwise, are the decisions to use arbitration taken on a case-by-case basis?
- 44 What are the relevant factors that you consider in determining the appropriate mechanism for resolving disputes between financial institutions?
- 45 Would you typically choose institutional or ad hoc arbitration as a dispute resolution mechanism?
- 46 What are the most significant obstacles that prevent arbitration from being the preferred method of resolving disputes among financial institutions?
- 47 Would you consider bilateral or multilateral arbitration agreements between your institution and other financial institutions which provide that

all disputes between the signatory institutions shall be resolved by arbitration unless specifically opted-out of in a particular transaction?

- 48 Are there any disputes between financial institutions that you believe are not suitable for arbitration?
- 49 Any further considerations you view as being significant in recommending arbitration to resolve disputes between financial institutions?

**J DERIVATIVES AND STRUCTURED PRODUCTS**

- 50 Does your institution use the ISDA Master Agreements or other relevant domestic master agreements to engage in derivative and structured product transactions?
- 51 Do your institution's contractual documents for derivatives and structured products include a requirement or option for disputes to be resolved by arbitration? Why?
- 52 For which types of derivatives or structured products does your institution include arbitration clauses?
- 53 Is arbitration included in contracts only with specific categories of clients? If so, with what types of counterparties, including their location, do you sign arbitration clauses?
- 54 Is the clause based on a model arbitration clause (e.g. from the 2013 ISDA Model Arbitration Guide)?
- 55 How is the clause structured? Mandatory or optional? Tiered? The rules of which arbitral institution(s)? Seat?
- 56 Is there any specific factor or issue that would make your institution view arbitration as a favourable option?
- 57 Are you aware of the ISDA Model Arbitration Guide and the ISDA model optional arbitration clauses (replacing Section 13(b))?
- 58 Has your institution ever participated in arbitration proceedings relating to derivatives or similar structured products? In approximately how many cases?
- 59 What derivatives or structured products did the arbitration relate to? Under which rules did the arbitration take place? Where was it seated?
- 60 What was your opinion on the process (speed of the proceedings, expertise of the arbitrators, cost of the arbitration and any other aspect of the process)?
- 61 Would you arbitrate a dispute relating to a derivative or a structured product again?
- 62 Do you think arbitration proceedings are useful for solving disputes relating to derivatives and structured products in general?

- 63 What are the advantages and disadvantages of arbitration in such disputes?
- 64 Are there any specific derivatives or structured products for which you consider arbitration particularly useful (e.g. swaps, options, forwards, futures, credit derivatives)? If so, which ones, and why? Would you prefer your next dispute related to derivatives/structured finance to be resolved by arbitration or in court?

## **K SECURED LENDING AND PROJECT FINANCE**

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This section of the questionnaire focuses on secured lending and project finance (project finance and syndication, asset finance, secured commodity financing, leveraged acquisition finance (LBO), i.e. transactions taking the form of loan arrangements as opposed to debt instruments or money-market shares instruments).

- 65 In your experience, how much is arbitration actually used as a means of dispute resolution in:
- secured lending transactions
  - project finance transactions?
- 66 Are there any specific circumstances (nature of the transaction, location of the project or the parties, nature/location of the security provided, etc.) that you have seen or can imagine that would justify referring to arbitration disputes in:
- secured lending
  - project finance transactions?
- 67 In your view, what explains the resistance to using arbitration more widely in:
- secured lending transactions
  - project finance transactions (to the extent that there are any reasons that are specific to such transactions and have not been covered in the previous general discussion)?
- 68 In the context of syndicated lending, do you feel that the multiparty aspect of the syndicate could explain lenders' resistance to arbitration?
- 69 Would arbitration become more attractive in the context of (i) secured lending transactions and/or (ii) project finance transactions if certain features were developed (to the extent that there are any features specific to secured lending and project finance transactions that have not been covered in the previous general discussion), e.g.:
- (a) Pan-project arbitration agreement that would bind all players, or subsets of players, who are parties to the various agreements underlying the financing operation?
  - (b) Arbitration clauses providing for expedited arbitration?
  - (c) Arbitration clauses providing for an appeal of the arbitral award? If so, full appeal (fact and law), or appeal on the law only?

- (d) Arbitration clauses providing for the publication of the award?
- (e) Unilateral arbitration clauses?

## **L ASSET MANAGEMENT AND PRIVATE BANKING**

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- 70 Do you think that the special character and nature of asset management and private banking have a significant bearing on the type of dispute resolution selected, i.e. state court litigation or arbitration?
- 71 Do the advisory and discretionary services in asset management/private banking raise any special concerns, and do they play a role when deciding whether to use arbitration to solve disputes rather than litigation?
- 72 Would you recommend arbitration as an adequate dispute resolution system for an asset management/private banking dispute:
- among investment firms or with a professional client or an eligible counterparty
  - between an investment firm and a retail client?
- 73 Do you have any arbitration experience in relation to any of the following issues arising from the specificities of asset management/private banking:
- business units (or companies) managed separately from other banking activities (e.g. M&A);
  - "Chinese walls" to avoid conflicts of interests, or any other measures to ensure the confidentiality of the operations;
  - unbalanced powers and responsibilities in the negotiation, execution and performance of agreements between banks or other financial-sector companies on one side, and industrial or commercial companies (listed, large, or SMEs) on the other side?

Do concerns over the protection of the potentially disadvantaged party have any bearing on the inclusion of unilateral optional arbitration clauses or unilateral optional forum selection clauses?

## Annex II

### List of Financial Institutions Interviewed

ABN AMRO  
African Development Bank (AfDB)  
Asian Development Bank (ADB)  
Banco de Sabadell  
Bank of Tokyo - Mitsubishi UFJ  
BAWAG  
BNP Paribas Fortis  
Central American Bank for Economic Integration  
Commerzbank  
Corporación Andina de Fomento  
Crédit Agricole  
Crédit Suisse  
Deutsche Bank  
DZ Bank  
HSBC  
ING Belgium  
Islamic Finance Council UK Ltd (IFC)  
Japan Bank for International Cooperation (JBIC)  
JP Morgan Chase  
Lazard Frères  
MIGA  
Morgan Stanley  
Netherlands Development Finance Company (FMO)  
Nomura  
Oesterreichische Entwicklungsbank AG (OeEB, Development Bank of Austria)  
Overseas Private Investment Corporation (OPIC)  
Rabobank  
Rothschild Cie  
Société de Promotion et de Participation pour la Coopération Economique (Proparco)  
Société Générale  
Swedbank  
UniCredit SpA

Numerous other financial institutions were interviewed but wished to remain anonymous.

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Shadi Karam  
Marcus Keane  
David Kreider  
Herbert Kronke  
Michael Kutschera  
Christoph Liebscher  
Philip Linton  
Anthony Lo Surdo  
Gerardo Lozano Alarcón  
Ian Mahoney  
Roman V. Marchenko  
John Lorn McDougall  
Wendy Miles  
Albert Monichino  
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Simon Morgan  
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## **ICC COMMISSION ON ARBITRATION AND ADR**

The ICC Commission on Arbitration and ADR is the ICC's rule-making and research body for dispute resolution services and constitutes a unique think tank on international dispute resolution. The Commission drafts and revises the various ICC rules for dispute resolution, including arbitration, mediation, dispute boards, and the proposal and appointment of experts and neutrals and administration of expert proceedings. It also produces reports and guidelines on legal, procedural and practical aspects of dispute resolution. In its research capacity, it proposes new policies aimed at ensuring efficient and cost-effective dispute resolution, and provides useful resources for the conduct of dispute resolution. The Commission's products are published regularly in print and online.

The Commission brings together experts in the field of international dispute resolution from all over the globe and from numerous jurisdictions. It currently has over 600 members from some ninety countries. The Commission holds two plenary sessions each year, at which proposed rules and other products are discussed, debated and voted upon. Between these sessions, the Commission's work is often carried out in smaller task forces.

The Commission aims to:

- Promote on a worldwide scale the settlement of international disputes by means of arbitration, mediation, expertise, dispute boards and other forms of dispute resolution.
- Provide guidance on a range of topics of current relevance to the world of international dispute resolution, with a view to improving dispute resolution services.
- Create a link among arbitrators, counsel and users to enable ICC dispute resolution to respond effectively to users' needs.

### **ICC Commission on Arbitration and ADR**

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