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P.R.I.M.E. Finance: The Role and Function of the New Arbitral Institution for the Settlement of Financial Disputes in The Hague

By Dr. Eric De Brabandere



Introduction

On January 16, 2012, a new arbitral institution—Panel of Recognized International Market Experts in Finance (“P.R.I.M.E. Finance”)—was launched at an inaugural conference held at the Peace Palace in The Hague. The objective of P.R.I.M.E. Finance is to provide a dispute settlement mechanism

for disputes relating to financial products, in particular complex financial products such as derivatives.[1] P.R.I.M.E. Finance’s main aim is “facilitating dispute settlement, reducing legal uncertainty and fostering stability in the global financial markets.”[2] The idea is essentially to offer mediation and arbitration services to settle disputes between private entities (such as banks, insurance firms, and pension funds)[3] and institutions (such as clearinghouses, exchanges, and regulators), and possibly even customers.[4]

This tribunal grew from an individual initiative by Jeffrey Golden, a Visiting Professor at the Department of Law of the London School of Economics and a former Senior Partner in Allen & Overy’s global derivatives practice.

This *Insight* will describe the *raison d’être* and advantages of this new arbitral institution and the specific characteristics of the P.R.I.M.E. Finance Arbitration Rules.

Why The Hague?

P.R.I.M.E. Finance is established in The Hague. Although the city is host to the majority of international courts and tribunals—such as the International Court of Justice, the Permanent Court of Arbitration (“PCA”), and the International Criminal Court—it is not a financial center. Three factors made The Hague an attractive location: first, the presence of the PCA (which will have a cooperative relationship with P.R.I.M.E. Finance); second, The Hague’s perceived neutrality and attractiveness for financial actors from emerging countries;^[5] and third, the many highly trained and multilingual staff and experts available

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there.[6]

The Idea of a Financial Arbitral Institution

Jeffrey Golden first proposed establishment of a specialized financial arbitral institution in 2008.[7] Golden argued that national judges are not best equipped to settle disputes regarding the complex and transnational international financial transactions and that *ad hoc* arbitration is not optimal either because of its decentralized character and the lack of predictability or an authoritative body of law. Golden also claimed that there is a certain “public interest” in settling complex financial disputes efficiently, especially since “the market could have a greater interest in the outcome of a case than two private parties who are litigating it.”[8]

Backed by the Dutch Government and the Dutch Central Bank, the concept was further discussed and refined in a series of meetings with representatives from, *inter alia*, the European Central Bank, the U.S. Securities and Exchange Commission, the New York Federal Reserve, and among finance and financial law experts from the United States, Europe, Asia, Australia, and New Zealand,[9] hosted by the World Legal Forum, a Hague-based non-profit organization.

Specificity of the P.R.I.M.E. Finance Arbitration and Mediation Rules

The P.R.I.M.E. Finance Mediation Rules[10] are based on the 1980 United Nations Commission on International Trade Law (“UNCITRAL”) Conciliation Rules, but have been institutionalized and updated in view of subsequent developments in mediation.

The P.R.I.M.E. Finance Arbitration Rules[11] are a modified version of the 2010 UNCITRAL Arbitration Rules, which ensures that parties can rely on the available commentaries of the UNCITRAL Arbitration Rules and the extensive practice, wide acceptance, and use of these Rules in arbitral proceedings throughout the world. In addition to formalistic changes, which were necessary to institutionalize the UNCITRAL Rules originally drafted for *ad hoc* arbitration,[12] the P.R.I.M.E. Finance Arbitration Rules contain several specific features discussed below.

A) The Appointing Authority and the Panels

While the UNCITRAL Arbitration Rules provide for a variety of options to agree on an appointing authority,[13] the P.R.I.M.E. Finance Arbitration Rules provide that, unless the parties agree otherwise, the PCA Secretary-General will act as the appointing authority.[14]

Furthermore, in principle, only persons listed on the P.R.I.M.E. Finance’s list of approved arbitrators are eligible for appointment as arbitrators.[15] To this end, two lists of experts have been drafted and made public: a list of “Finance Experts” and a list of “Dispute Resolution Experts.”

As in traditional commercial arbitrations, parties can opt for a procedure to be overseen by a sole arbitrator (Article 8), who is appointed by agreement between the parties, or a three-member arbitral tribunal (Article 9). In the latter case, each party will appoint one arbitrator, and the party-appointed arbitrators will then appoint a presiding arbitrator from the list of approved arbitrators. In both scenarios, if there is no agreement between the parties, the PCA Secretary-General will appoint the presiding arbitrator.

B) Special Arbitral Proceedings

ORGANIZATIONS OF NOTE

[International Centre for the Settlement of Investment Disputes](#)

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A tribunal established under the P.R.I.M.E. Finance Arbitration Rules possesses regular competence to order provisional measures. The Arbitration Rules also contain three specific procedures not provided for by the UNCITRAL Arbitration Rules and meant to rapidly settle urgent outstanding disputes—“Expedited Proceedings,” “Emergency Arbitral Proceedings,” and “Referee Arbitral Proceedings.” All special procedures require the explicit consent of the parties.

Expedited Proceedings, regulated by Article 2a of the P.R.I.M.E. Finance Arbitration Rules, permit the parties to shorten the timelines set out in the Rules.

Emergency Arbitral Proceedings^[16] allow the parties to apply for “urgent provisional measure(s) that cannot await the constitution of the arbitral tribunal.”^[17] Under the Emergency Arbitral Proceedings, P.R.I.M.E. Finance can order the appointment of an “Emergency Arbitrator” from the approved list of experts within seventy-two hours of receipt of an application by one of the parties.^[18] The order issued by the “Emergency Arbitrator” cannot prejudice the final decision of the arbitral tribunal and is not binding on the arbitral tribunal finally established.^[19] Annex C contains several special procedural rules on, *inter alia*, the binding character and the temporal validity of the order to appoint.

“Referee Arbitral Proceedings” are relatively similar to the “Emergency Arbitral Proceedings”^[20] and allow for speedy proceedings resulting in an enforceable award within thirty to sixty days. Since this procedure is an application of the Dutch Code of Civil Procedure, Referee Arbitral Proceedings are only available to parties who have agreed that the seat of arbitration is in The Netherlands.^[21] The award may not prejudice the final decision of an arbitral tribunal on the merits of the case.^[22] Like Emergency Proceedings, Referee Proceedings are also conducted by a specially appointed tribunal, composed of a sole arbitrator appointed by P.R.I.M.E. Finance from the approved list of experts.^[23] Referee Proceedings have strict timelines for filing a claim, payment of costs, challenge of arbitrators, submission of counterclaims, and delivery of the award.^[24]

C) Transparency

Article 34(5) of the P.R.I.M.E. Finance Arbitration Rules explicitly permits that excerpts of an award be published without the consent of the parties. This is in line with the need for predictability and stability of the financial markets and the need to create a body of law in this area, as envisaged by the architects of P.R.I.M.E. Finance. Specifically, P.R.I.M.E. Finance has the right to publish an award if it has a legal duty to do so. P.R.I.M.E. Finance is also authorized to “include in its publications excerpts of the arbitral award or an order in anonymised form.” Finally, P.R.I.M.E. Finance has the right to publish an award or an order in its entirety, in anonymised form, provided that one of the parties does not “object to such publication within one month after receipt of the award.”

The publication of awards is a relative novelty in international commercial arbitration. With the exception of awards rendered under the International Convention on the Settlement of Investment Disputes (“ICSID”), international arbitration is usually confidential.^[25] This is precisely one of the reasons why parties traditionally choose arbitration over regular court proceedings, and it remains to be seen if parties will agree to the publication of awards. The publication of awards, or at least the relevant excerpts of an award, is crucial if the new institution is to develop a consistent body of law and ensure predictability. Arbitrators can only use and refer to previous awards if they are available to them.

Arbitration v. Domestic Litigation

There are multiple advantages to arbitration as compared to domestic litigation.^[26] The first advantage is the neutrality and specialization of the tribunal. Not only is an arbitral tribunal neutral towards both parties in a dispute, but the parties can choose arbitrators with specific expertise. The second advantage is the rapidity of the arbitral process and the finality of the award. In general, an arbitral award is final and binding and can be challenged only if procedural defect exists. Third, because of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), to which some 140 states are party, it is easier to enforce an arbitral award than a domestic court decision.^[27] Finally, the confidentiality of the proceedings and the award make arbitration attractive. In other words, parties to commercial contracts do not necessarily wish to disclose information regarding their business practices or the types of disputes they are engaged in.

Despite these advantages, financial disputes are rarely settled through arbitration.^[28] Several reasons for the traditional reluctance to settle financial disputes through arbitration have been advanced, the most important ones being the existence of summary procedures in domestic litigation and the predictability and legal certainty of domestic procedures. Recently, however, a renewed interest in arbitration has developed, both for general business disputes and for financial disputes. One of the reasons for the increased interest is the involvement of financial actors from emerging markets. Financial actors from developed countries probably prefer an international arbitration because it is more effective than national proceedings in emerging market countries, and because the awards are more likely to be enforced, while financial actors from emerging markets are reluctant to have disputes settled in the traditional venues such as London or New York.^[29] To reinforce this trend, several of the traditional concerns regarding the use of arbitration for the settlement of financial disputes have been remedied in the P.R.I.M.E. Finance Arbitration Rules. It remains to be seen, however, whether banks and financial institutions, the principal targeted clients of P.R.I.M.E. Finance, will use the new arbitration institution by inserting an arbitration clause to that effect in their contracts. The International Swaps and Derivatives Association, Inc., a New York based organization that groups participants in the derivatives market, has—in addition to the traditional venues such as the International Chamber of Commerce and the London Court of International Arbitration—included the possibility of opting for P.R.I.M.E. Finance arbitration in its memorandum on the use of arbitration.^[30]

The Advantages of a Specialized Arbitral Institution

Considering the specialized character of P.R.I.M.E. Finance, along with the increased trust in and resort to arbitration over the past decade, it is likely that the new facilities will attract the attention of the financial sector, especially in view of the growing complexity of financial instruments and disputes and the publicity given to the new arbitral institution. Moreover, the P.R.I.M.E. Finance lists of experts are composed of well-known specialists in the field of general international law, investment arbitration, international commercial arbitration, and business and financial law, and it is well-known that the quality and attractiveness of arbitration substantially depends on the characteristics of the party-selected arbitrators.^[31]

P.R.I.M.E. Finance has a clear advantage over *ad hoc* arbitration tribunals for several reasons. The existence of an administrator for the arbitral proceedings and the availability of a preexisting set of procedural rules will enhance the efficiency and speed of the proceedings. Moreover, P.R.I.M.E. Finance has the advantage of being specialized in international financial disputes, and other specialized arbitral institutions have already proven to be very efficient because of their specialization.^[32]

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Endnotes:

[1] Besides offering mediation and arbitration services, P.R.I.M.E. Finance would also conduct specialized training sessions.

[2] See Prime Finance, About Us, <http://www.primefinancedisputes.org/index.php/about-us> (last visited Jan. 24, 2011).

[3] Press Release, World Legal Forum, Call for the Establishment of an International Dispute Resolution Facility for the Financial Market in The Hague, http://www.worldlegalforum.org/cms/images/docs/WLF_20101025_Press_Financial_Roundtable.pdf (Oct. 25, 2010).

[4] *Id.*

[5] Daniella Strik, *Launch of P.R.I.M.E. Finance Arbitration Rules: Dispute Resolution in Global Financial Markets*, Kluwer Arb. Blog (Jan. 17, 2012), <http://kluwerarbitrationblog.com/blog/2012/01/17/launch-of-p-r-i-m-e-finance-arbitration-rules-dispute-resolution-in-global-financial-markets>.

[6] Jeffrey Golden, *Do We Need a World Court for the Financial Markets?*, in *The Hague Legal Capital? (Liber in Honorem W J Deetman)* 263-64 (David Vriesendorp, Frans A. Nelissen & Michail Wladimiroff eds., 2008), http://www.worldlegalforum.org/cms/images/docs/2008_WLF_Do%20we%20need%20a%20World%20Court%20for%20the%20Financial%20Markets.pdf.

[7] See *id.*; see also Jeffrey Golden, *We Need a World Financial Court with Specialist Judges*, *Fin. Times* (Sept. 9, 2009), <http://www.ft.com/cms/s/0/df5acd84-9cd8-11de-ab58-00144feabdc0.html#axzz1kSsWZFpL> (last visited Jan. 20, 2012).

[8] *Id.*

[9] *Id.*

[10] P.R.I.M.E. Finance Mediation Rules, *available at* <http://www.primefinancedisputes.org/images/pdf/mediation%20rules%20-%20prime%20format%20-.pdf>.

[11] P.R.I.M.E. Finance Arbitration Rules, *available at* <http://www.primefinancedisputes.org/images/pdf/arbitration%20rules%20-%20prime%20format%20-.pdf> [hereinafter P.R.I.M.E. Finance Arbitration Rules].

[12] Arbitration Rules have been added in respect of formalities regarding, *inter alia*, the filing of claims with the P.R.I.M.E. Finance Secretariat (art. 3(1)), payment of registration fees (arts. 3 (6-7), 40 (3-5), 43 & Annex E), and communication between the parties (art. 16).

[13] UNCITRAL Arbitration Rules art. 6 (1-4). *available*

[14] P.R.I.M.E. Finance Arbitration Rules art. 6 (1-4).

[15] *Id.* arts. 8(1) & 9(1).

[16] See *id.* art. 26a & Annex C of the Rules.

[17] P.R.I.M.E. Finance Arbitration Rules art. 26a(1).

[18] *Id.* Annex C of the Rules art. 4(1).

[19] P.R.I.M.E. Finance Arbitration Rules art. 26a(2-3).

[20] See *id.* art. 26b & Annex D of the Rules.

[21] P.R.I.M.E. Finance Arbitration Rules art. 26b(2).

[22] *Id.* art. 26b(3).

[23] *Id.* Annex D of the Rules art. 4(1-2).

[24] See *generally* Annex D.

[25] See, e.g., UNCITRAL Arbitration Rules art. 34(5) (“An award may be made public with the consent of all parties”). See also Mauro Rubino-Sammartano, *International Arbitration Law: Law and Practice* 804 (2d ed. 2001).

[26] See Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* ¶¶ 1-40 (5th ed. 2009); see also Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* 3 (2008).

[27] Convention on the Recognition and Enforcement of Foreign Arbitral Awards [New York Convention], June 10, 1958, 330 U.N.T.S. 38 (entered into force June 7, 1959), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

[28] See Audley Sheppard, *Arbitration of International Financial Disputes*, Kluwer Arb. Blog (Mar. 19, 2009), <http://kluwerarbitrationblog.com/blog/2009/03/19/arbitration-of-international-financial-disputes/>.

[29] International Swaps and Derivatives Association, Inc. [ISDA], *The Use of Arbitration Under an ISDA Master Agreement: Feedback and Policy Options*, (Nov. 10, 2011), available at <http://www2.isda.org/search?keyword=arbitration> (last visited Jan. 25, 2011).

[30] *Id.*

[31] See Yves Dezalay & Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* 8 (1996).

[32] The specialization of P.R.I.M.E. Finance is first of all visible from the list of experts which will act as arbitrators. Secondly, the P.R.I.M.E. Finance Arbitration Rules contain several specific features which may speed up the arbitral process in case of urgency and ensure a certain form of predictability and consistency, which is generally available in domestic litigation. See for example the WIPO Arbitration and Mediation Center of the World Intellectual Property Organisation (“WIPO”), another specialized tribunal, which has since its establishment in 1994 administered over 270 mediation and arbitration cases. See WIPO Arbitration and Mediation Center, <http://www.wipo.int/amc/en/>.