# HOW SHOULD WE RESOLVE DISPUTES IN COMPLEX INTERNATIONAL FINANCING TRANSACTIONS?

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## I Introduction[1]

### *The demand, the gap, and P.R.I.M.E.'s response*

*The demand*

Burgeoning demands of modern commerce require ever more sophisticated financial instruments to meet them, throughout what the European Central Bank has called "the huge universe of local jurisdictions"[2]. Vast sums are at stake. While derivatives are only one class of such financial instruments, extrapolation of a recent Bank of International Settlements estimate of over-the-counter derivatives suggests in the not too distant future a market of US$1 quadrillion.[3] Both the time value of money and the need to know one's position are crucial to the contracting parties, and the inevitable disputes need to be resolved not only justly but also rapidly.

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[1] I am grateful for the support of P.R.I.M.E. Finance and to the Netherlands Institute of Advanced Studies in the Humanities and Social Sciences (NIAS), especially its Rektor Dr Aafke Hulk. I owe a special debt to Professor Jeff Golden who provided expert advice, to Blazej Blazikiewicz, who laboured closely with me, to the many other members of P.R.I.M.E. who gave so freely of their valuable time both in setting up P.R.I.M.E. and also in responding patiently and illuminatingly to numerous questions, and finally to Jonathan Ross who exchanged his role as advisor from New Zealand for that as my successor at NIAS. He is critically examining the jurisprudence.

[2] Pers. comm.

[3] By Professor Golden in Gar (The International Journal of Private and Public Arbitration) 15 December 2011.

*The gap*

Yet those with experience as judges of state courts know that, with some few exceptions, they have neither expertise in such matters nor the time needed to acquire it. Much the same may be said of arbitrators. The result is an immense black hole of legal uncertainty. It crosses state borders; as yet there is no international regime that can deal with it. What is to be done?

*The P.R.I.M.E. response:*

*(1) The vision*

These concerns moved a small group of experts led by Professor Golden first to reflect on the problem and then to organize the Roundtable in October 2010, chaired by Lord Woolf in the Peace Palace, to consider the issues and possible means of response. The energetic work of the organizing committee and the support they secured from the Government of The Netherlands resulted in the foundation of Stichting P.R.I.M.E. Finance Disputes Center (P.R.I.M.E.), based in The Hague.

As a Stichting under the law of The Netherlands its functions are philanthropic; its purpose is to raise the quality of dispute resolution. It is therefore free of political and commercial biases. P.R.I.M.E. is concerned with the market place. But as a Stichting registered under the law of the Netherlands its role is not focused on profit for shareholders (it has none) or personnel (its Board and Advisory Board serve without fee). Its concern is to help bring order and quality into CFTs and the processes for resolution of disputes relating to them. It is not *parti pris* but independent of financiers and counterparties alike, so both know it and its conduct and advice can be trusted. It also has a major role in education and research.

P.R.I.M.E. asked me to undertake a project to identify what types of case P.R.I.M.E. should accept and how it should deal with them.

*(2) The NIAS project:*

- *its scope*

The award of a HUGO Fellowship was at Wassenaar, for three months from 1 September 2011, conjointly with my role as a judge of the Special Tribunal of Lebanon. It was a privilege to work on the present project in idyllic surroundings among stimulating company. Unhappily, half way through the project the sudden death of the President of the Lebanon Tribunal required me to take on that role exclusively. So this paper is confined to the concepts developed during that period. Fortunately Jonathan Ross is continuing research into specific classes of case, essential to future planning including the establishment of P.R.I.M.E.'s database. [4]

- *its conclusion*

I have concluded that the vision which led to the creation of P.R.I.M.E. was both on target and well timed. "Complex financial transactions" (CFTs) is a vast topic embracing not only immense sums of money but also a bewildering variety of techniques responding to ever-

[4] Its topics include:

1 jurisdiction
2 conflict of laws
3 interpretation
4 master and standard agreements
5 bespoke agreements
6 expert evidence
7 forensic enquiry into complex facts and issues
8 mis-selling
9 valuation
10 margin calls
11 business to business (b2b) transactions
12 business to customer (b2c)
13 (a topical subject) bankers behaving badly in derivatives
(14) repos, stock lending and securitization

evolving demands and responses of market participants of high ability and no less creativity. Its political and economic implications, which include some actual and more asserted disasters, have led to calls for regulation. But, whatever may happen on the political fronts, there is pressing need for greater professionalism and specialism in the way CFTs disputes are dealt with. P.R.I.M.E. is ideally placed to lead that change.

*(3) P.R.I.M.E.'s goals*

P.R.I.M.E. must identify and constantly focus on the vision of achieving particular goals.

*Henderson on Derivatives*[5] observes:

> 1.15 A…requirement for the efficiency of the dealing market is legal certainty. Legal uncertainty has been the wild card in the derivatives deck from the start…As derivatives are, in the larger scheme of things, new products, little understood and impossible to define with any precision, the task was not an easy one for the thousands of lawyers, regulators and judges involved…While one of the principal uses of derivatives has been the reduction of risk, legal uncertainty was itself an underlying risk factor in the derivatives market…It must…be controlled through proper systems, procedures and analyses or eliminated through changes to the law. A…principal contribution of ISDA has been its lobbying efforts in many countries to achieve greater legal certainty.

It is suggested that P.R.I.M.E.'s goals be:

(1) bringing more certainty into CFTs;

(2) resolving disputes arising from CFTs;

(3) education and other outreach concerning (1) and (2).

But how should it set about achieving these goals? That is the topic of this paper.

[5] (2 ed)

***The politics***

The political implications of CFTs need to be recognized and cleared away. It is clear, as The Financial Times of 22 September 2011 reported of Republican attitudes to Dodd-Frank, that in the US as well as Europe there is intense political controversy over regulating derivatives and CFTs. It is no less clear that CFTs are powerful instruments that can not only serve valid purposes but can also lend themselves to abuse. But politics is not P.R.I.M.E.'s business. If it were it would not be able to command the support of professional judges whose *raison d'être* is to be distanced from politics. PRIME's task must be to focus on building up its major asset: **independent and unbiased expertise in relation to complex financial transactions**. rather than taking sides in politically heated issues.

P.R.I.M.E. should apply that asset to contribute to improvement of processes, including but not limited to:

- Wider understanding of CFTs, their purpose and effect;
- Improving dispute resolution;
- Providing guidance and other forms of education.

***This project***

As more has been learned the project has changed perspective. It is now clear that P.R.I.M.E. must embrace four roles, each supportive of the others:

- **Dispute resolution** of the highest quality (arbitration/mediation/provision of expertise);

- **Creation of a centre of international excellence** equipped with a state of the art derivatives and CFTs-focused library, knowledge and database resource, and website;

- **Education** of **P.R.I.M.E. experts and arbitrators, judges and other decision-makers** to raise the institutional competence of those dealing with the resolution of

disputes involving CFTs;

- **Extension of P.R.I.M.E.'s activities** to help meet the requirements of participants and legal systems in less developed and sophisticated markets.

**II The questions**

The NIAS project began with a broad question:

> "what types of case would benefit from the establishment of a specialized international financial institute? The research would involve a more systematic analysis of the specific types of case that would benefit from the input of the institute".

That broad question led to research which began with reading texts and cases as well as discussions with experts. That resulted in the dispatch to P.R.I.M.E.'s experts, in advance of the term at NIAS, of a questionnaire raising this and other questions. The answers gave rise to further specific questions. Among them were:

(1) Where and what is the need?

(2) What is P.R.I.M.E.'s niche within the industry?

(3) How should P.R.I.M.E. go about establishing itself?

(4) Why should parties to a CFT use P.R.I.M.E. to resolve a dispute and perhaps forsake another contractually chosen jurisdiction(s) for an institute based in The Hague?

(5) What activities should be undertaken; when; by whom; and how?

This paper responds outlines to these specific questions with proposals for consideration by P.R.I.M.E. and its supporters. To answer the broad question will require a continuing process of refinement as P.R.I.M.E.'s research proceeds.

**III First question:**

**(1) Where and what is the need?**

The answer may be summarized:

> ***Because of the difficulty and importance of resolving CFT disputes we need an acceptable international forum***

The enormous volume of CFTs involves a rapidly increasing number of market participants, present and potential across the world. What are their needs? And what is wrong with the status quo?

Our questionnaire asked:

> What kinds of issue are of such current concern as to warrant reference to PRIME Finance?

One answer, typical of many, was:

> "Need for a specialized dispute resolution process, uniform interpretation of master agreements, publication of awards."

There is evident need to avoid narrow limits, even though some limits are required. What should they be? This paper opts for a broad scope, from which there should at least initially be exceptions. But in general:

**We need nothing less than a tribunal with the capacity to act as a world court for CFTs.**

Indeed P.R.I.M.E. might consider whether an acronym such as "CIFD" ("Centre for Complex International Financial Disputes" could aptly describe its global function.

***The reasons for the need:***

These are the reasons.

***Volume and complexity of litigation; the problem of adjudicating international transactions in local courts***

The volume and complexity of CFTs carries with it a proportionate share of the world's major civil disputes. But we face the dilemma so familiar in other contexts: in the absence of an acceptable international forum, recourse will be had to local courts and tribunals; yet these are of their nature influenced by local perceptions, as well as local law and regulation, and inevitably give differing answers to the same important questions. That is seen in every sphere one cares to mention where the same international convention is being litigated in the courts of various States that are parties to it. Self-evidently, judges should strive to reach a common interpretation of the same document. Yet interpretations vary remarkably, and in the absence of a single definitive tribunal that will continue to be the case.

Such differences are intelligible where the social values of states differ.[6] But in the case of CFTs there should be little or no scope for different interpretation of the contractual documentation.

[6] For one example, some States resist the operation of the Refugee Convention which compels them to accept refugees who satisfy its terms, by way of exception to the principle of public international law that it is for the government to decide who it will admit as residents; for another, some see child rights as vested exclusively in the parent, whereas others are moved by the Convention on the Rights of the Child to focus on what is best for the child.

The point warrants elaboration.

There are three broad classes of law which should be distinguished. These classes are laws dealing with:

- Individual human rights;
- The values of a particular community;
- International transactions.

Laws of the first class, not of present relevance, should in principle be similar but because of different social conditions tend to differ among States . Those of the second class, like the protection of indigenous language or other valued distinctive elements, must necessarily differ in order to perform their function. Laws of the third and present class, by contrast, should, of their nature, be closely similar and, to an ever-increasing extent, identical. Examples include such international treaties as the United Nations Convention on Contracts for the International Sale of Goods, where common obligations are given effect by state laws, and the World Trade Organisation agreements, imposing common obligations of subjection to common dispute resolution systems. For practical purposes, while the ISDA[7] documentation, including its enormously important Master Agreements, is not made by states and does not therefore constitute an international treaty as such, since functionally it serves a similar purpose it should be construed as falling within this third class.

For this class of laws there should in principle be a single ultimate international forum. [8] The reason is to provide a jurisprudence that brings clarity and certainty to the law, and hence to markets. The need for each is obvious; without clarity and certainty it is impossible to make the

[7] International Swaps and Derivatives Association Inc.
[8] As will appear, I fully support the contribution made by State courts, not least in London and New York. My proposal is to add to it.

informed assessment that minimizes risk and thus the cost of the transaction. That is required by the Rule of Law, stated by John Finnis:

> A legal system exemplifies the Rule of Law to the extent ... that ... its rules ... are promulgated ... clear [and] are sufficiently stable to allow people to be guided by their knowledge of the content of the rules. [9]

Moreover, as Jeremy Bentham showed, it is impossible for any legislator to draft laws with sufficient specificity to avoid the need for the judicial interpretation that is a form of delegated legislation. Although a great enthusiast for consolidation of law, he recognised:

> ... The legislator, who cannot pass judgment in particular cases, will give directions to the Tribunal in the form of general rules, and leave them with a certain amount of latitude in order that they may adjust their decision to the special circumstances. [10]

Yet, as division of opinion within an appellate court often reveals, there is commonly more than one rational answer to a legal problem.

***Need for an international view***

The truth is that while courts of each state jurisdiction are likely to be of very high quality, they are also subject to local social, cultural and historical factors, among them rules of precedent, which can tend to affect the answer to any problem. These factors, as well as differing standards of perceived competence, give rise to problems of forum shopping.

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[9] *Natural Law and Natural Rights* (Oxford University Press, Oxford, 1980) at 270.

[10] *Theory of Legislation* (Etienne Dumont edition translated and edited by CM Atkinson, 1914) at 62 reproduced in *Chief Executive of the Department of Labour v Yadegary* [2008] NZCA 295, [2009] 2 NZLR 495 at [33].

International adjudication requires a judge to focus on more than his or her own narrowly domestic focus. Roger Cotterrell has argued:

> What Émile Durkheim understood as moral individualism – universal respect for others as individual human beings – still remains the necessary basis for respecting (and communicating across) cultural differences, within a framework of complex solidarities appropriate to contemporary European societies.[11]

To take a truly international view can be a tall order, even within the limits of "European". Yet it is essential to both elements of the function of a court or tribunal, which in dealing with international transactions must perform the familiar tasks of both doing justice and also securing public confidence. To sustain and enhance the confidence of litigants and the community concerns both the manner and substance of decision-making. The challenge is the greater in an international context where, desirably, research will extend to the experience of the major legal systems. The debates among judges of international courts who come from different legal traditions reveal this tendency. But it can lead to a result that draws on what is best in each.

A carefully selected international tribunal is as free of such constraints as the ability and open-mindedness of its judges permits; it enjoys the advantage of being able to select the optimum answer without preconceptions. Because of its charitable status P.R.I.M.E. and the experience of its board, has been able to establish an arbitral tribunal whose members are carefully selected having extensive experience as judges with the ability to look across State borders, as market experts having close familiarity with both the documents at issue and relevant markets,, and as arbitral experts plus, in 5 member tribunals, either a second judge or a second arbitrator. That

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[11] In "Law and Culture – Inside and Beyond the Nation State" Queen Mary University of London, School of Law Legal studies Research Paper No 4 HYPERLINK "http://ssm.com/abstract=1330001" \t "_blank" http://ssm.com/abstract=1330001 at p10 citing . citing É. Durkheim, 'Individualism and the Intellectuals' [1898] transl. by S. and J. Lukes, in W. S. F. Pickering ed., *Durkheim on Religion: A Selection of Readings with Bibliographies* (1975); R.Cotterrell, *Émile Durkheim: Law in a Moral Domain* (1999) ch.7

tribunal can serve as the single international decision-maker which is essential to finality.

That is not to decry the value and importance of contributions from State courts. It would be impossible for a single international tribunal to manage the vast volume of disputes thrown up by CFTs worldwide. The careful process of argument at successive levels by experienced counsel and the considered opinion of experienced generalist judges is of great value. Their opinion will receive careful attention from the P.R.I.M.E. tribunal. But its decisions must be of such quality as to be accepted internationally as definitive.[12]

The fact that P.R.I.M.E. offers arbitration, not compulsory adjudication, carries with it the prospect that parties may elect to insist on confidentiality, which although an important advantage of arbitration carries with it the disadvantage of failing *pro tanto* to contribute to the international jurisprudence. That is a consideration with which P.R.I.M.E. and its litigants need to wrestle. There are various options, among them a self-denying acceptance by parties of the need for sound precedent and consequential waiver of confidentiality. Of less benefit is agreement on partial redaction which will allow the principle to be stated without detailed publication of the facts. But the Romans taught us that decisions are to be read *secundum subjectam materiam*: that context can be critical to the result. So it is highly desirable, as far as possible, that the reader should have the entire picture.

Another international facet is that, at present, arbitral awards are much more readily enforceable internationally, via the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral, than are judgments of State courts[13].

[12] This "quality" aspect cannot be too highly emphasized. One bad apple could cause grave damage to P.R.I.M.E.'s reputation.

[13] Whether by proceeding on the original judgment or under the the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters

***Need for greater market familiarity***

The work of the courts of general jurisdiction extends to the disputes which arise in almost every aspect of human activity in an ever more complex world. No judge can have expertise in every sphere requiring decision. There is a striking contrast with the judicial diet of even the 1960s, before the wide-bodied jet, the computer revolution and the consequential elevation of English into a new *lingua franca* contributed to the shrinking of the globe which has led to ever-increasing international dealings and their problems which need resolution.

Professor Berger's essay "The aftermath of the financial crisis: while arbitration makes sense for banks and financial institutions"[14] identifies past lack of faith in arbitration on the part of financial institutions, notably banks. He contrasts that with the increasing popularity of arbitration as a means of dispute resolution of the general international business community. Dealing with the objections commonly advanced he sets out ten reasons why banks and other financial institutions should now consider arbitration.

A further useful contribution is that of Quintanilla and Whytock *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law on SSRN* in which the authors state:

> Conventional wisdom suggests that the transnational litigation system is essentially unipolar, or perhaps bipolar, with the United States and the United Kingdom acting as the leading providers of courts and law for transnational disputes. Our overarching conjecture is that this unipolar (or bipolar) era – if it ever existed at all – has passed, and that transnational litigation is entering an era of ever increasing multipolarity. If this intuition is correct, then it will be increasingly important for U.S. judges and lawyers to

[14] Prof. K.P.Berger, *The aftermath of the financial crisis: why arbitration makes sense for banks and financial institutions*, Law and Financial Markets Review, Volume 3, Number 1, January 2009 , pp. 54-63(10).

be comfortable handling a wide range of conflict-of-laws problems, and prepared to consult closely with their colleagues abroad.

The experts who responded so helpfully to our questionnaire recognized that ever-evolving demands of ever-increasing kinds made it impracticable to draw any bright line limiting the jurisdiction and scope of the work of what is now "The Centre". On the contrary its role is to resolve disputes involving CFTs and more widely to respond to those demands. But we must remember AA Milne's Old Sailor who, shipwrecked on a desert island, found so many problems he was unable to resolve any. So while some argued there should be no jurisdictional limitation at all if the case arises out of a CFT, the predominant view was that P.R.I.M.E.'s focus should, at least for an initial period, be more tightly focused.

The major considerations are the areas of particular need within the spheres of particular expertise of P.R.I.M.E.'s experts. So, for instance, the question whether to include disputes arising from Bilateral Investment Treaties (BITs) met with a general, although not exclusive, response that such cases, which turn on interpretation and application of intergovernmental treaties between states and raise issues of public international law, are currently handled competently by specialist arbitrators and arbitral institutes and would not benefit from the specific expertise of most (although not all) members of the P.R.I.M.E. panels.

I propose that P.R.I.M.E. accept disputes relating to:

- OTC derivatives and the related topics of repos and stock lending (including short selling) transactions and other structured finance transactions such as collateralized transactions and securitized loans;
- Other cases that are of a broadly similar kind.

These conclusions result from considering both the options summarized in the Appendix and also the related questions (2) and (3) next discussed.

## IV Second question

### (2) What is P.R.I.M.E.'s niche within the industry?

Is there not such expertise in ISDA and among other existing participants in the market such that P.R.I.M.E.'s initiative is unnecessary as duplicating effort? The answer given by ISDA is no. ISDA is the international institution which represents, with great professionalism, the interests of market participants which buy, sell and generally deal in the great bulk of CFTs. ISDA represents participants that generally have ready access to expert advisors, among them those who have created CFTs and are still structuring new CFTs. Yet ISDA has made very clear, both in its helpful submissions and in discussion, that it is among P.R.I.M.E.'s leading supporters.

Of course, ISDA's members do not include all counterparties to all CFTs. Their interests, which can have an element of the consumer and all too often the amateur, need to be protected by a strong, expert, independent and just system of dispute resolution. The concerns which have led to Dodd-Frank in the USA and like initiatives elsewhere require a response that extends beyond both the industry and the leading markets and financial centres of London and New York, which ISDA's Master Agreement offers as alternative seats for determining the inevitable disputes arising under that Agreement. Yet the European Central Bank has spoken of the "huge universe of local jurisdictions" and advised that 70% of European derivatives disputes are dealt with in forums other than those in London or New York. There is a clear call for alternatives.

So what exactly is the need for P.R.I.M.E.? I believe it is because its potential contribution, when its elements are taken together, is uniquely valuable. It will enhance both the quality and the reputation of CFTs by benefiting both ISDA members, as well as counterparties generally to

a range of market standard agreements. The elements of that contribution include both what has been and what can be achieved.

***What has been achieved?***

***First, expertise***

P.R.I.M.E. can and should contribute to transparency and demystification within, so as to educate the community to a higher level of comfort in relation to, CFTs. Adjudicators must have, and be seen to have, the mastery of the topic which alone can give confidence to parties to the case and to the market which must be able to rely upon their jurisprudence. Although those engaged in CFTs have considerable knowledge of them and their implications, that knowledge is not widespread; indeed there is something of a closed shop. Within that closed shop arise actual or potential conflicts of interest. Moreover, some counterparties and participants wishing to sue or otherwise take on a large financial institution often turn to lawyers and others who are far from being expert; there are real problems with the unfamiliarity of judges, lawyers and others concerning them.[15]

Both P.R.I.M.E.'s initiators and its panels of experts comprise leaders in the three different, but overlapping, disciplines, that are crucial both to its performance and therefore to its credibility.

**The P.R.I.M.E. arbitration tripod: expert/judge/arbitration**

P.R.I.M.E. arbitration of CFT disputes is supported by a unique tripod combining expert, judge and arbitrator.

***Leg 1: the expert***

[15] One distinguished respondent mentioned a recent decision of an Administrative Court in which the judge held that the ISDA netting provisions did not conform with the law of his country; it was suggested that greater knowledge and confidence on the part of the court could have yielded a different result.

The first principle of adjudication is that the judge must have, and must be accepted by the parties as having, competence to determine the case. Since disputes arise in every sphere of human interaction, judges must often strive to qualify themselves ad hoc to be able with the help of counsel to understand not only the facts but also the context of the case. But in a field as complex and fast-moving as CFTs the cost of educating a judge, who may have no aptitude for or interest in the topic, is unacceptable. Professor Berger advises:

> The lightning speed of developments in national and international financial and capital market law, increasingly complex constructions of modern financing products and the dominant influence of contractual usages and international formulating agencies such as the LMA have caused such agreements to be handled by a small number of highly specialized transactions lawyers. Even national financial market transactions…are increasingly becoming internationalized. It is hardly conceivable that state court judges, when faced with the products of these processes, would be able to understand them without further ado even if they have special know-how (specialist benches) with regard to the standard terms and conditions of the banking sector or with regard to standard loan agreements. The specialization with regard to the negotiation and drafting of such transactions requires a corresponding expertise of the tribunal when it comes to the resolution of disputes arising out of such agreements.

Accordingly the basic precept holds good: no judge may give a decision before he or she has understood the case. Since disputes potentially embrace practically every kind of human activity, judges must, with the help of counsel, educate themselves as to the unfamiliar. So judges must learn new disciplines, ideally before the hearing but always complying with what civil lawyers and common lawyers both know as the principle *audi alteram partem*[16]. Hence, for instance, the Law Lords' decision to precede a complex patent hearing with a two-day chemistry

[16] and common lawyers know as one of the rules of natural justice, the other being *nemo judex in causa sua.*

seminar in Oxford.[17] Sometimes the education process occurs during the hearing, at considerable cost of time and money to the parties. After the hearing is too late; natural justice requires that judges understand the case in time in order to pose their questions to witnesses and counsel during the hearing.

Furthermore CFTs cases require a prompt as well as a correct decision. Markets may be in suspense while a case is argued and the decision reserved. So the judge must somehow understand the essence of the issues without any real opportunity for education. How is that to be achieved?

The answer can only be by including in the judicial panel a member or members with expertise in relation to the context, as happens in such other specialist cases as shipping and unlawful trade practices.

P.R.I.M.E. possesses many leading practitioners who understand what the market requires, how it responds to changing demands, and who have for years, often on a daily basis, dealt with and in CFTs. Their working tools are the ISDA and similar market sponsors' documents and agreements, including most importantly the ISDA Master Agreement, recently described by an English judge as "probably the most important standard market agreement used in the financial world"[18]. They include both non-lawyers and lawyers, not only experienced lawyers who advise on the day-by-day application of CFT documentation but also the even more experienced authors of those documents, their periodic amendments, and the commentaries on each.

***Leg 2 the judge***

[17] *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2005] 1 All ER 667, 703 [135] (HL).

[18] *Lomas v JFB Firth Rixson Inc* [2010] EWHC 3372 (Ch) (England, High Court, 21 December 2010)

### *Judicial experience and independence*

***First, unusual competence***

Because of the quality of the P.R.I.M.E. venture and its people, membership has been enthusiastically accepted by judges of special ability from a variety of jurisdictions. They are crucial for two reasons. The first is that ISDA's standard forms are, like multilateral treaties, international documents which must be interpreted in the same manner across the globe. Yet as Professor Golden has pointed out, there is currently a problem of differences of approach even on the two sides of the Atlantic, despite the common law tradition of each. That is both unsurprising and something that P.R.I.M.E. can help solve. Every judge is the product of his or her own upbringing within a particular domestic legal system affected by idiosyncrasies of history and culture, as well as local case law, statute and regulation. What thinking British have condemned as the "little Englander" attitude needs to be dispelled from international jurisprudence. The best professional judges have not only had long exposure to the human differences that present real challenges to international initiatives, but can look both at and beyond the limitations of their own experience, seeing the virtues of alternative approaches. What is needed is judges with an internationalist understanding and a large and generous view of what approach best serves the larger international market, sensitive to unfamiliar nuance,[19] informed by colleagues of a similar bent from other communities and legal systems, all determined to find the interpretation that best serves the global purpose of the standard form or bespoke document. P.R.I.M.E.'s selection processes must continue to preserve that quality.

***Second, probity***

Members of P.R.I.M.E. are accepted only if a high level of expertise is coupled with that of probity. The judicial members have adopted the ethical standards required by their own community. I have emphasised the importance of their being above (counter)party politics. They

[19] Guy Canivet, Premier Président of the France Cour de Cassation, observed "Il faut render justice les mains tremblantes".

know that their personal reputation, which must be maintained at all costs, will be safeguarded by P.R.I.M.E. whose Advisory Board is headed by a former English Chief Justice. The contribution of a reputation for integrity, essential to all members but a matter of public knowledge in the communities from which the professional judges come, marks P.R.I.M.E. out as an entity which can be trusted.

A powerful advantage provided by those who have served as judges in state courts is the guarantee both of worldly experience and of total independence. It is no coincidence that professional judges are selected to head commissions of enquiry where major issues are at stake. Despite the problem of shortcomings in expertise just mentioned, their reputation for reliability is fundamental to the credibility of their decision. That is a major reason for the general preference of banks and other financial institutions for litigation rather than arbitration of disputes.

***Leg 3: the arbitrator***

The third leg of the tripod is high competence and experience in law and arbitration. The point warrants emphasis. To deal competently and swiftly with such disputes requires more than usual legal skills. It has not yet been fully appreciated by some professional lawyers and also judges that, with contracts as with statutes, ability to read the language of the **text** is inadequate; what also is needed is immediate and comprehensive understanding of its **con**text. That is unavailable to the non-expert who cannot command credibility, and importantly confidence, in such cases which are complex and dynamic and where time literally is money.

The skills of an arbitrator overlap with those of a judge: ability to act fairly; rapidly to understand new concepts; to identify and apply legal principle; to write a succinct and clear decision. But judges are accustomed to working within the settled confines of a

domestic legal system; an international arbitrator is accustomed to creating ad hoc procedures that meet the needs of the particular case and to drawing on broader principles than are available to any state judge. Those skills are contributed by P.R.I.M.E.'s panel of arbitral experts.

**Corporate structure**

***Beneficence***

This has been mentioned.

***Management***

P.R.I.M.E. has:

A board and advisory board which cover its wider operations and activities;

A respected chairman of each known internationally as a market leader;

In The Hague the potential makings of a strong and experienced support team overseen by an experienced and respected Secretary-General;

Access to world leaders in relevant disciplines;

In consequence, the outstanding reputation which is already noted in international publications including ISDA's.

**What can be achieved:**

There is need to apply P.R.I.M.E.'s broad vision, of dealing with the present black hole of global uncertainty in relation to CFTs, to create an efficient and effective international legal system. To realize it will require sound planning, good systems, and access to adequate funding. If all the elements listed here are brought together concurrently, PRIME will emerge as the major answer to the black hole. Initial seed capital is required. Thereafter by attracting business there could be expected multiple streams of cash flow to P.R.I.M.E.:

- From fees charged by P.R.I.M.E. for administering cases and for access its databases and library;
- From education fees;

- From support of donors who share P.R.I.M.E.'s vision.

The practical need for professional services will be met by way of fees payable to members of the arbitral and mediation panels.

The educational outreach of P.R.I.M.E., within both developed and developing communities, assisted by the resources available from the centre of excellence in The Hague, is of particular importance in terms both of contribution of knowledge and of legitimate revenue by way of fees. In summary, whatever regulatory regimes may be established politically, the black hole needs to be filled by an international high-quality dispute resolution regime. That is P.R.I.M.E.'s niche.

**V question three**

**(3) How should P.R.I.M.E. go about establishing itself?**

***Need to secure market confidence and support *****

P.R.I.M.E.'s overall message should focus on its niche and its ability to fill it.

The message should be conveyed to:

- the market, broadly defined as those participants in CFTs in a wide range of jurisdictions, often but not necessarily using ISDA Master Agreement-type standard

agreements to document their dealings; that will be facilitated by ISDA's support of P.R.I.M.E. initiative;[20]

- policy-makers in governments and institutions in the US, the UK and Europe, including The Netherlands and beyond;

- Actual and potential consumers internationally;

- Potential educational audiences.

The means of doing so include:

Using this opening meeting to draw wider market attention to P.R.I.M.E.'s role and plans;

Progressively developing the P.R.I.M.E. website and CFTs resources and database; Engaging with practitioners, academics and the media in developed and developing markets.

It must, immediately upon today's launch, be, and be seen to be, the master of its niche. That requires both:

- Careful planning and sustained effort to develop from its current form into the major entity required to meet its goals; and
- Securing the market confidence needed to attract the support needed for that purpose.

[20] Evidenced both in its written submissions and at our meeting in London.

That requires a combination of:

- Quality of P.R.I.M.E. as an institution; and
- Communication of that quality.

***Creation of the institution***

*Categories of dispute*

Proposed categories of disputes to be accepted by P.R.I.M.E. have been noted at the conclusion of **(1)** above.

*Methods of dispute resolution*

Arbitration, mediation, expert decision and advice are among the methods of dispute resolution that P.R.I.M.E. can offer.

*Panel members*

The small group of founders of P.R.I.M.E. took great care with the admission of its experts to its panels. That role has been taken over by the board of P.R.I.M.E. Maintenance of panel quality and extending it to enrich its global range is pivotal to success. Of no less importance are the procedures for selection of panel members to:

- Serve on particular arbitral panels;
- Act as mediators;
- Act as experts;
- Take part in educational and other outreach activities.

*Appointments committee*

The board of P.R.I.M.E. should set up an appointments committee of international repute to match members to specific tasks. It will be the quality of prospective panel members which will form the initial attraction of P.R.I.M.E. within its niche. For example, care should be taken to ensure that selections of arbitrators result in well-balanced panels with the ability and experience to provide a prompt definitive response to each case presented. Likewise with mediator and expert appointments. As the panels produce appropriate awards and outcomes the reputation of P.R.I.M.E. will be enhanced.

Potential parties to arbitration, mediation or expert appointment may themselves propose panelists or leave the appointment to P.R.I.M.E. The appointments committee should control whether particular appointments should be recognized as under the auspices of P.R.I.M.E.

*Secretariat*

Administration will be performed by P.R.I.M.E.'s secretariat under the direction of the Secretary-General.

*Library, scholarship, database resources and web-site functions and personnel*

The proposed role of P.R.I.M.E. requires that it become the international resource centre for information and knowledge about CFTs. The research included preparation of a skeleton outline of a possible methodology for a database of cases, starting with the general topic of jurisdiction and moving to principles of interpretation, then to more specific topics. Following discussion with expert law librarians, they have given valuable preparatory advice as to methodology for setting up a database that can evolve into a world centre of knowledge. Beginning with library personnel, initially part-time, and a computer facility accessible only to those responsible for developing it, there would develop:

- A website, initially for use in-house, then for PRIME members and ultimately of international reach;

- A comprehensive electronic and hard copy library of case law, periodicals and other materials not confined to England and New York;

- An electronic journal with, as Editor, a distinguished scholar from a leading university assisted by other scholars in The Netherlands and beyond; correspondents from all CFTs jurisdictions reporting in English; hyperlinks to resources; links with major publishers;
- Research. The current links between P.R.I.M.E. and NIAS point the way. The inflow of cases; the presence in NIAS and other institutions (like the LSE) of scholars able to see the role of CFTs in the life of people in The Netherlands and the world beyond; the ever-increasing need for policy evaluation and advice within and beyond governments – all point to the need of a robust intellectual element of P.R.I.M.E.'s role.

*CEO*

At present, high-level policy, including ambassadorial functions, is performed by the Chairman and board. To ease their burden and facilitate the evolution of P.R.I.M.E. as the dispute resolution organization dealing with the world's major civil disputes, planning should provide for appointment of a CEO.

The CEO should develop close relationships with UNCITRAL and its state members; similar law reform bodies; judiciaries; bar associations; universities; ISDA and other sponsors of market standard agreements and documents; and market participants and exchanges. There is considerable potential for expanding P.R.I.M.E. to undertake broader activity as a world civil dispute resolution tribunal.

**(VI) question four**

**(4) Why should parties to a CFT use P.R.I.M.E. and perhaps forsake other jurisdictions for an institute based in The Hague?**

- The Netherlands authorities are keenly supportive of P.R.I.M.E. and the notion of The Hague adding, in terms of its own self-description, to its role as the centre for international dispute resolution. The need to fill the "black hole" provides a splendid opportunity to systematize The Hague's position in international civil tribunals, in relation at least to a good share of CFTs, in parallel to its role in international criminal tribunals, against the history and traditions of the Permanent Court of Arbitration and the ICJ. The following are among potential topics:
  The vision of The Hague as **the** international centre, operating in default of selection of another site;

- Adaption of Dutch law and processes to facilitate CFTs dispute resolution such as
  - Submissions on the Arbitration bill at present before the Dutch Parliament to allow it to perform the international function, which could include English language versions of legislation;
  - Consideration by the courts of The Netherlands of the precedents elsewhere for use of English in pleadings and hearings;
  - Generally, across all aspects of law and procedure, opening The Hague to CFTs dispute resolution;
  - Using the Peace Palace to symbolize the reality that CFTs disputes are a dominant feature of international finance, requiring international dispute resolution of like capacity, focused on P.R.I.M.E.'s role.

**(VII) question five**

**(5) What specific activities should be undertaken?**

- Triggering the start of P.R.I.M.E.'s operation as outlined in this paper;
  Publicizing both the challenge and the answers, including the role of The

Netherlands, The Hague, and P.R.I.M.E.;

- Drawing on the initiatives of the Bingham Centre in London and seeking joint sessions with it and its New York counterparts to spread the word;

- Making submissions both to the Dutch Parliament on the Act and to the EU on the currently proposed exclusion of arbitration from the pending regime for Europe-wide summary freezing orders;
- Preparing and providing access to analyses of leading cases;

- Progressively developing all of the above and more into a major international centre, thereby contributing in a major way to the development of the rule of law; facilitating arbitration, etc., in seats other than in The Netherlands, although focusing on The Netherlands and in particular The Hague as default seat.

**Appendix: summary of Questionnaire responses concerning scope of P.R.I.M.E.'s activities**

There was general agreement among the respondents to the initial questionnaire that P.R.I.M.E.'s focus should be on dispute resolution, notably arbitration but also mediation, in relation to certain categories of case. Possible classifications of case can cut in a variety of ways, which overlap.

*(i)Any category of claim arising between participants in the global financial markets, subject to proper oversight*

These would include in addition to the commonest classes of case described under (iv) such less familiar categories as Bilateral Investment Treaties, which involve adjudication on issues of public international law.

*(ii) All specialist financial transactions, particularly those agreed in standard form*

*(iii) Functional: areas of expertise of P.R.I.M.E. panelists*

One respondent proposed that P.R.I.M.E. should consider as wide a range of transactions as its panel of experts is competent, and known to be competent, to handle. That seems, at least for the initial period, a sensible broad test which provides much of the answer to the second and third questions as well. It also bears on the desirable policy for the board of P.R.I.M.E. in selecting panelists. It raises the question of what classes of CFTs it covers.

*(iv) The most common classes of case*

There was virtual unanimity that the Centre should deal at least with OTC derivatives and the related topics of repos and stock lending (including short selling) transactions and other structured finance transactions.

*(v) Specifically designated CFTs issues*

Derivatives and CFTs cover a large number of underlying asset classes documented under ISDA and similar-type documentation. These range from rates, currencies, credit, equities, bonds and commodities to such new and developing asset classes and products such as emissions allowances, property, inflation, weather, freight and

Islamic finance. P.R.I.M.E. should focus on issues arising at ISDA-type Master Agreement level as well as those related to credit support. Other product-related issues are generally handled by different mechanisms of dispute resolution, such as for credit default swaps determinations under the ISDA Determinations Committee.

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