International Law

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The Chair's Comments


Markus Daniels

We have just completed a great year for the International Law & Practice Section, and are gearing up for an even more exciting one in 2012-2013. We are planning three newsletters in addition to this one, so watch for more news, announcements and informational articles than you have received in past years.

Since our last newsletter, a delegation from the N.C. Bar Association visited Lithuania at the invitation of the Lithuanian Lawyers Society and Latvia at the invitation of the Latvian Council of Sworn Advocates. Delegates met with attorneys, judges, law faculty and elected and appointed government officials to exchange ideas about their respective legal systems. Of special interest was whether they should adopt the jury system, a Constitutional amendment on the definition of "family," and issues in state-sponsored healthcare. Photos from the exchange are attached at the end of this newsletter. A return delegation from these countries is being planned for 2013.

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The Top Five Tips to Help Your Clients Do Business Internationally

By Shiau Yen Chin-Dennis & John Erwin

The recent economic downturn has made our U.S. clients look to foreign markets to make or sell their goods and services. This movement is happening for even small to mid-sized companies. It is not just Fortune 500 companies venturing into business in foreign lands. As more and more North Carolina companies eye the global markets, we have highlighted five key guiding principles to assist your clients' entry or expansion into the international markets:

Be Patient.

The process for entering or expanding into international markets requires careful planning and patience. In some countries it takes several months to secure the necessary filings before a company can conduct business there. For example, in China, formation of an entity and capital injection can take months, as China regulates the inflow and outflow of foreign currency through the Chinese State Administration of Foreign Exchange ("SAFE"). The company must receive approval from SAFE before any funds can be wired to or from China. The World Bank views China as not an easy place to do business and ranks it at 91.[1] In comparison, the World Bank ranks Singapore as the easiest place to do business and the USA at fourth place. A number of other Asian countries

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Hague Finance Tribunal Launches

By David A. Shuford

The Panel of Recognized International Market Experts in Finance (PRIME Finance) foundation, a non-profit, non-governmental organization based in The Hague, The Netherlands, introduced its arbitration and mediation rules at the institution's inaugural conference in The Hague on Jan. 16, 2012. PRIME Finance, which was formally launched in June of last year following a series of exploratory conferences and meetings, will provide specialized dispute resolution mechanisms, including arbitration and mediation, as well as other services relating to complex financial products like derivatives. These are intended to be used to resolve disputes between financial institutions (such as banks, insurance companies, and funds), and between such institutions (as well as clearinghouses and exchanges) and their customers.[1] PRIME Finance has the objective of "facilitating dispute settlement, reducing legal uncertainty [relating to complex financial instruments] and fostering stability in the global financial markets."[2]

Importantly, however, PRIME Finance is not a court, in the usual sense, with the power to bind litigants absent their consent. It is an arbitral institution to which the parties to financial transactions may choose to submit their disputes for adjudication and which administers proceedings before a panel of arbitrators assembled for the particular case. But unlike most systems of arbitration, PRIME Finance arbitrations are heard by panels of arbitrators selected from a limited pool of subject matter experts.

Need for a Specialized Dispute Resolution Mechanism for Complex Financial Disputes

In recent years, practitioners and scholars have identified a number of problems with national court resolution of disputes relating to swaps, derivatives, and other complex financial instruments.

According to those who have advocated for an international financial tribunal, national court judges too frequently have had insufficient familiarity with these complex products and related market practices and have not had ready access to training, specialized advice, or other needed resources. One practitioner active in PRIME Finance illustrated some of the complexities in this global market with the following hypothetical:

> "Imagine that someone on the trading floor of the Hong Kong branch of a Swiss bank agrees to a derivatives trade by telephone with someone on the trading floor of the London branch of a Japanese bank. The deal is done 'up there in the airwaves'. The parties also agree on a collateral arrangement to secure the trade. Let us assume that the collateral is shares that clear through Euroclear. Euroclear's books and records are in Brussels and the relevant entries will be made there, but Euroclear is operated by the Euroclear Group from a number of countries. Let us further assume that the collateral consists of shares of a French company and the certificates are warehoused in Euroclear's French subdepositary, a Paris branch of a German bank."[3]

He noted separately that "The world's biggest financial cases are too serious, too complicated and too important for most ordinary courts to cope with."[4] Judicial inexperience or unfamiliarity has led to holdings that were at odds with established practice and to inconsistent results across jurisdictions. With respect to the former, commentators have cited the 2000 decision of a Belgian court interpreting the *pari passu* clause of a Peruvian debt instrument governed by New York law.[5] The court's interpretation meant "that the bond holders must, even outside an insolvency event, be paid pro rata with other unsecured debt of the issuer," notwithstanding that the clause ordinarily is understood to mean only that the claims of bond holders will have equal priority with the claims of other unsecured creditors in the event of insolvency.[6] As to the latter, the 2008 case between Metavante and Lehman Brothers is a prominent example.[7] There, U.S. and U.K. courts came to opposite interpretations of a key right of the parties under the agreement relating to the timing of the decision to terminate the swap. Similar problems exist for ad hoc – i.e., non-institutional – arbitration, where the pool of potential arbitrators is not limited to individuals with subject matter expertise.

The consequences of misapplication of law or misinterpretation of agreements are potentially enormous in large part because of the financial value of these instruments. Some have estimated that the notional value of the worldwide derivatives market is in excess of one quadrillion dollars.[8] Additionally, there is the possibility that an erroneous court decision could trigger a "domino effect" of defaults "exacerbating systemic risk in the global financial markets."[9]

In addition to concerns about the complexity of these types of transactions and the consequences of bad decisions, some market participants from developing countries increasingly have become hesitant to submit disputes to the courts in New York and London, which has been the traditional practice, because of concerns about the neutrality of such venues.[10] And financial institutions do not want to be subject to domestic court jurisdiction in developing countries.

To address these concerns (and following a variety of publications highlighting the problems, their possible negative consequences, and potential solutions), the World Legal Forum sponsored an October 2010 roundtable to consider whether there was a need for an independent institution located in a neutral location that could assemble subject matter experts to provide specialized dispute resolution services. Participants included "some 60 representatives from high courts, commercial banks, regulators, supervisors, private practice, academia and government institutions."[11] Their answer was a resounding "yes." As one participant, Jeffrey Golden, put it: "This tribunal would have the expertise and authority to help the world establish a settled and watertight body of law in the financial sector."[12]

PRIME Finance Arbitration

PRIME Finance's goal of fostering stability in financial markets by creating a settled body of law is reflected in its institutional structure. First, it has a standing Secretariat that will provide administrative and legal support to arbitrators and parties during proceedings. It will also manage the provision of other services, including training for national court judges, coordinating expert witness and advisory services, and managing library and database resources. Second, the institution is governed by a Management Board and Advisory Board consisting of leaders in the financial markets and international dispute resolution fields. Perhaps most importantly, PRIME Finance has assembled lists of 64 Finance Experts[13] and Dispute Resolution Experts,[14] who, unless the parties to a dispute choose otherwise, will serve as arbitrators in proceedings under the PRIME Finance rules. They also are available for service as mediator, trainer, and advisor, for example, by opining on documentation.

The experts include lawyers in private practice, judges, and others responsible for development of market practices.[15] In an effort to establish a truly neutral and international mechanism, the group is intentionally diverse in terms of professional background, gender, and nationality.[16] PRIME Finance's location in The Hague, the leading center for international adjudication, likewise helps to make it a attractive venue to a wide cross-section of market participants.

The PRIME Finance Arbitration Rules also are designed to foster stability by creating solid case law. As an initial matter, the rules are based on the 2010 UNCITRAL arbitration rules, which are familiar and widely utilized for ad hoc commercial arbitration. While changes were kept to a minimum because of the wide use and acceptance of the UNCITRAL rules,[17] a number of important changes have been made, consistent with PRIME Finance's overarching objectives.

First, the rules require that arbitrators be appointed from the lists of experts, whether there are three arbitrators (the default rule) or one, and whether appointed by the parties or the Secretary General of the Permanent Court of Arbitration, also located in The Hague, as Appointing Authority.[18] Second, the rules provide for mechanisms for expediting the procedure or providing provisional relief. Article 2a essentially provides for shortened deadlines for various procedural steps, which the parties to a dispute may opt into. Article 26a and Annex C provide different mechanisms for obtaining preliminary, provisional relief before the arbitral tribunal, which will finally resolve the dispute, has been constituted.

But perhaps most importantly, given PRIME Finance's mission, the rules alter the usual arbitration practice of confidentiality of the resulting award.[19] The provisions establish three default rules for disclosure, the latter two of which are key. First, the award may be made public in its entirety (non-anonymized) if the parties consent or there is a legal requirement. This is the rule in most arbitrations. Second, anonymized excerpts may be published whether or not the parties consent and, presumably, even if they object. Finally, the entire award may be published in anonymized form in the absence of an objection by a party. Such publication of the legal analysis underlying an award, with or without the names of the parties, will lead to the development of meaningful case law. Similar practices by the International Centre for Settlement of Investment Disputes in investor-state arbitration has resulted in just such a body of oft-cited case law.

The PRIME Finance rules maintain the other customary benefits of arbitration, including efficiency, procedural control, confidentiality (subject to the rules), neutrality of venue and decision-maker, and ease of enforceability under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which generally is far easier than enforcing a foreign court judgment. PRIME Finance has provided model arbitration clauses for those who wish to provide for PRIME Finance arbitration in their agreements.

PRIME Finance anticipates reviewing and revising the rules within the next six to twelve months to a year. It actively seeks comments and suggestions to the rules by market participants before April 15, 2012.[20]

Mediation

The PRIME Finance mediation rules are based on the UNCITRAL Conciliation Rules of 1980.[21] They have been updated to reflect "many developments in the mediation techniques and trends" and to take advantage of the existence of the PRIME Finance Secretariat.[22] PRIME Finance will provide mediation model clauses. It also seeks comments on the mediation rules from market participants until April 15, 2012.[23]

Conclusion

Ultimately, the proof for PRIME Finance will be the extent to which it is adopted by financial industry participants as the preferred method of dispute resolution. Given the substantive concerns about national court adjudication and ad hoc arbitration, the potential for success appears good. PRIME Finance has created an institutional framework and has developed arbitration rules that can encourage stability and predictability of financial markets by developing a usable body of law, while at the same time preserving the flexibility and procedural control that makes arbitration attractive to many sophisticated businesses. It likewise has assembled a diverse group of recognized finance and dispute resolution experts to serve as arbitrators, which should provide comfort to litigants that their disputes will be resolved in a manner consistent with the applicable law and industry practice. •

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Hague Finance, *continued from page 9*

End Notes

1. ***http://www.asil.org/pdfs/insights/insight120208.pdf***
2. ***http://kluwerarbitrationblog.com/blog/2012/01/17/launch-of-p-r-i-m-e-finance-arbitration-rules-dispute-resolution-in-global-financial-markets/***
3. ***http://www.worldlegalforum.org/cms/images/docs/2008_WLF_Do%20we%20need%20a%20World%20Court%20for%20the%20Financial%20Markets.pdf***
4. ***http://www.worldlegalforum.org/cms/images/docs/WLF20101025_Press_Financial_Roundtable.pdf***
5. ***http://www.iflr.com/Article/2740351/New-tribunal-for-financial-disputes.html***
6. ***http://www.iflr.com/Article/2740351/New-tribunal-for-financial-disputes.html***
7. ***http://online.wsj.com/article/SB10001424052702304447804576414031189559392.html***
8. ***http://www.dailyfinance.com/2010/06/09/risk-quadrillion-derivatives-market-gdp/***
9. ***http://www.worldlegalforum.org/cms/images/docs/2008_WLF_Do%20we%20need%20a%20World%20Court% 20for%20the%20Financial%20Markets.pdf***
10. ***http://kluwerarbitrationblog.com/blog/2012/01/17/launch-of-p-r-i-m-e-finance-arbitration-rules-dispute-resolution-in-global-financial-markets/***
11. ***http://www.primefinancedisputes.org/index.php/about-us/history***
12. ***http://www.worldlegalforum.org/cms/images/docs/WLF_20101025_Press_Financial_Roundtable.pdf***
13. ***http://www.primefinancedisputes.org/index.php/expert-list/financial-experts***
14. ***http://www.primefinancedisputes.org/index.php/expert-list/arbitrationmediation-experts***
15. ***http://online.wsj.com/article/SB10001424052702304447804576414031189559392.html***
16. ***http://online.wsj.com/article/SB10001424052702304447804576414031189559392.html***
17. ***http://www.primefinancedisputes.org/index.php/arbitration***
18. *See* rules 6-10 and 14. As in all arbitral procedures, the parties to a dispute may agree to alter these procedures.
19. *See* rule 34.5.
20. ***http://www.primefinancedisputes.org/index.php/arbitration***. Comments may be addressed to ***secretary@princefinancedisputes.org***.
21. ***http://www.primefinancedisputes.org/index.php/mediation***
22. ***http://www.primefinancedisputes.org/index.php/mediation***
23. ***http://www.primefinancedisputes.org/index.php/mediation***. Comments may be addressed to ***secretary@princefinancedisputes.org***.