

The aftermath of the financial crisis: why arbitration makes sense for banks and financial institutions

KLAUS PETER BERGER

Banking Law Institute, University of Cologne, Germany

The financial crisis is changing the litigation culture in the banking and financial industry. This change will have a significant impact on the way in which these disputes will be settled in the future. Banks and other financial institutions should consider an alternative means of dispute resolution through arbitration which allows them to have their disputes decided by party-appointed expert judges in confidential and speedy proceedings.

A. Introduction

The worldwide financial crisis is likely to have a significant impact on the litigation culture in the banking and finance sector. Before the crisis, a bank or other financial institution sued another bank or commercial customer only under exceptional circumstances. Most disputes that arose out of loan agreements, derivative contracts, contracts for the sale of loan portfolios and similar business-to-business (b2b) transactions were settled out of court. Under the current economic constraints of the financial crisis and general cost pressures, it is likely that banks will sue other banks more often and will be sued more often by their commercial customers.

The choice of the right dispute-resolution mechanism therefore becomes more important for banks and financial institutions. For many decades, banking practitioners have shown a marked lack of faith in arbitration.¹ Dispute resolution by domestic courts – primarily by London or New York courts – is often accepted as a given fact and seldom questioned – for lack of time – in daily banking business.² The absence of arbitration clauses in banking and finance contracts is astonishing for three reasons. First, the unpopularity of arbitration in this context stands in marked contrast to the prevailing dispute-resolution practice of the general international business community. According to a recent survey, 88% of all contacted companies have used arbitration at least once as the preferred means of dispute resolution.³ Secondly, securities arbitration at stock exchanges, as an expression of the autonomy of stock trading, is one of the oldest forms of arbitration.⁴ Thirdly, certain leading cases of the US Supreme Court in 1974⁵ and 1987⁶ on the arbitrability of disputes resulting from national and international securities transactions under the US Securities & Exchange Acts of 1933 and 1934 have played a crucial role in the worldwide liberalisation of arbitration witnessed in recent decades. In this context the Supreme Court has stressed that the lack of faith in arbitration and in the competence of arbitrators expressed in previous decisions (“the old judicial hostility to arbitration”⁷) was incompatible with the changed

perception of the advantages and the integrity of the arbitration process.

Given this clear preference of the commercial sector for arbitration as well as a fundamentally changed and more contentious market environment caused by the worldwide financial crisis, the time has come for banks and other financial institutions to reconsider their litigation policy and to make use of the obvious advantages of arbitration for the resolution of their b2b disputes.

B. Ten reasons why banks and other financial institutions should consider arbitration

The long list of alleged reasons why arbitration has no place in international banking and financial transactions is constantly reiterated by academics and banking practitioners alike.⁸ In particular, those characteristics of arbitration which are normally considered to speak in favour of this dispute-resolution process⁹ are perceived to be major disadvantages in this specific industry sector.¹⁰ With some surprise one encounters objections against arbitration believed to have been long laid to rest. Ten of the most important reasons why banks should consider dispute resolution through arbitration in the aftermath of the financial crisis are discussed below.

1. Arbitration is suitable for “one-shot money disputes”

Typically, financial disputes involve straightforward payment claims, thus involving simple legal questions, not complex technical or fact-finding issues. In light of this specific nature of most financial disputes, a major reason cited by banks and other financial institutions for avoiding arbitration is that the effort of constituting an arbitral tribunal is wasted:

“The banker, especially the commercial banker, makes his case crystal clear: I have extended a loan, I expect full reimbursement. At all times, in all countries, the law has

supported this commonsense rule . . . the banker will generally view his borrower's repayment obligation as an absolute undertaking, exigible whatever are the circumstances outside the loan agreement."¹¹

Bankers argue that there is no need to submit such "one-shot money disputes" to an arbitral tribunal whose constitution necessarily takes some time. For such disputes, dispute resolution by existing state courts is considered to be better, swifter and simpler by far.¹²

The rationale underlying this "simplicity argument"¹³ is correct only to the extent that financial disputes *at the outset* often appear to be uncomplicated and therefore "simple". But, as in many instances, this is only true at first glance. Complex legal issues may be raised in a dispute arising out of a loan agreement by a respondent-borrower, such as the compatibility of the grounds for termination embodied in the representations and warranties or covenants – eg default and cross-default clauses or material adverse change (MAC) clauses – with the applicable substantive law. The same is true of the complex legal issues arising out of the notion of lender liability¹⁴ rooted in US law. The question whether mandatory public policy norms such as Article VIII 2(b) of the Bretton Woods Agreement¹⁵ or domestic bankruptcy statutes apply can render a simple "one-shot money dispute" into a complicated conflict-of-laws case.

From this perspective, and bearing in mind that such contracts typically contain a vast number of technical and complex financial terms,¹⁶ the "simplicity argument" takes on a wholly different dimension:

" . . . it is a simplistic vision of reality to assume that loan agreements only give rise to unilateral and unconditional obligations to repay moneys only on the borrower's side, and that because of the relative lack of legal complexity of such obligations as well as because they would automatically and immediately become due and payable in event of default situations, it is better to resort to court rather than to arbitration for their enforcement."¹⁷

Banks must understand that at the time of concluding an agreement it is often difficult to predict with some certainty whether only a factually and legally "simple" dispute about mere repayment of a loan will arise.¹⁸ Therefore, as a wholesale argument against arbitration, the simplicity aspect is to be discarded for modern financial markets.

2. Arbitration leaves room for the "need for speed"

Closely connected with the "simplicity argument" is the argument that arbitration does not allow for the speed of decision-making that is required to resolve financial disputes.¹⁹ It is of course correct that arbitral proceedings in legally and/or factually complex cases can take as long as state court proceedings. Since arbitral proceedings often deal with complex issues, the duration of proceedings is increasingly cited as a disadvantage of arbitration.²⁰ It is also true that arbitral tribunals first have to be constituted, which in the case of a three-member arbitral tribunal, is inevitably time consuming. Furthermore, if a respondent does not participate in the proceedings, the arbitral tribunal may not

render a summary judgment. Instead, the arbitral tribunal must "continue the proceedings without treating such failure [to communicate his statement of defence within the set time-limit] in itself as an admission of the claimant's allegations".²¹ Even if the respondent is in default, the arbitral tribunal must evaluate the dispute on the basis of the legal arguments and documents submitted by the claimant before rendering an award.

At first glance, if the dispute does in fact concern the simple matter of a loan repayment or a similar straightforward payment obligation, the time aspect appears to be a valid argument against the use of arbitration in banking and finance matters. However, upon closer inspection the argument that arbitration is time consuming is nowadays only true to a limited extent. This is due to the flexibility of modern arbitration rules. They allow parties to agree on the abbreviation of all time limits contained therein. However, once the dispute arises, the respondent will hardly (if he seeks to procrastinate) or not at all (if he is in default) provide such agreement. In such cases, as in other cases, the timeline of the arbitration will depend to a great extent on the proactive case-management skills of the tribunal and the "time awareness" of the arbitrator(s).²²

It is therefore substantially more important that international arbitration institutions have recently developed new solutions to address the topic of time and costs in arbitration.²³ Thus, the Arbitration Rules of the International Chamber of Commerce (ICC) contain an – albeit rather rudimentary – provision on fast-track proceedings.²⁴ The Swiss International Arbitration Rules of 2004 contain a substantially more elaborate section on expediting proceedings.²⁵ The German Institution of Arbitration (DIS) has recently adopted the "Supplementary Rules for Expedited Proceedings". These new Rules supplement the standard DIS Arbitration Rules.²⁶ The salient features of the new Supplementary Rules are:

- restriction of the duration of proceedings to six months (Sole Arbitrator) resp. nine months (three member arbitral tribunal) since filing of the statement of claim;
- obligation of the arbitral tribunal to explain in writing any extension of this time-limit;
- decision by a Sole Arbitrator unless the parties have decided on a three-member arbitral tribunal;
- reduction of the time-limit for the nomination of the arbitrators by the respondent and by the DIS (substitute nomination) to 14 days;
- obligation of the arbitral tribunal to draw up a time-table which ensures the observation of the time-limits laid down for the conduct of the proceedings;
- default time-limit for the submission of written briefs of 4 weeks;
- arbitral tribunal is to exercise its procedural discretion in the light of the parties' interest in expediting proceedings;
- early indications by the arbitral tribunal to the parties as to the legal issues it considers to be relevant and material to the outcome;

- admissibility of counterclaims and set-off subject to the consent of all parties and the arbitral tribunal;
- the arbitral tribunal may abstain from stating the facts of the case in the arbitral award unless the parties have agreed otherwise.²⁷

The Supplementary Rules of the DIS thus provide a compact and feasible system to substantially expedite arbitral proceedings. The timeline of an arbitration under the DIS Supplementary Rules may look like this:²⁸

X	=	Filing of statement of claim
X + 3 days	=	Receipt of statement of claim by respondent
X + 31 days	=	Submission of statement of defence
X + 59 days	=	Submission of claimant's second brief
X + 87 days	=	Submission of respondent's second brief
X + 115 days	=	Hearing
X + 143 days	=	Final award

Since at the time of the conclusion of the agreement the possibility or need for expedited proceedings is often not yet predictable,²⁹ banks and other financial institutions are advised to adapt the arbitration agreement by including a right of choice. Under such a clause, a claimant bank could choose, after the dispute has arisen, to pursue its claim in “standard” or in “expedited” arbitration proceedings, both being administered by the same arbitral institution.

3. Preliminary disputes about the tribunal's jurisdiction can be avoided

In the same vein as the time argument, it is often suggested that arbitration is ill suited for financial disputes because the final decision on the merits is often delayed by preliminary disputes on the jurisdiction of the arbitral tribunal. The drafting of the arbitration agreement is perceived to make substantial demands on the know-how of the drafter in respect of determining the desired arbitration institution and the scope of the arbitration agreement. The drafting of a forum-selection clause is considered to be much simpler.³⁰

It is correct that in view of the consensual nature of arbitration clauses arbitral tribunals sometimes have to deal with preliminary disputes about the validity and extent of the arbitration agreement before they can address the actual merits of the dispute before it. A poorly drafted “ad hoc” arbitration clause, inserted into the contract as a “midnight clause” at the very last moment of the contract negotiations, can quickly turn into a boomerang causing unnecessary costs and delays once a dispute arises.³¹ However, this problem does not stem from an inherent disadvantage of arbitration but rather from the parties' inattention or negligence at the drafting stage. They often want to avoid clouding the good atmosphere of their successful contract negotiations by protracted discussions about arbitration clauses (and the potential disputes to which these clauses refer).³²

The solution for this dilemma is simple: by using practice-proven “boilerplate” model clauses of recognised arbitration institutions, parties can easily avoid such problems.³³ These model arbitration clauses perform two

important functions. They do away with the necessity to enter into lengthy discussions on the formulation of the arbitration clause at the drafting stage. At the same time, they save money and time by providing the required legal certainty with respect to potential disputes about the tribunal's jurisdiction that may arise during the arbitration.

4. Arbitrators do not tend to render equitable decisions

Apart from the time argument, the banking sector criticises arbitrators for being more inclined than state court judges to render equitable decisions instead of decisions based strictly on legal principles and contractual terms. Therefore a debtor, in the event of an arbitration initiated against him by the lender, could seek to “solve” his payment problems by means of obtaining an equitable solution from an arbitral tribunal.³⁴ Such a scenario would not be compatible with the need for legal certainty and predictability, so essential for banks and other financial institutions. Decisions in this field must be based on the four corners of the law. Settlements or remedial actions, such as suspending repayment or interest obligations, should not be laid down in an arbitral award but should rather be agreed upon by the parties in settlement negotiations.³⁵

This objection seems to rely on a fundamental misunderstanding of the decision-making process in arbitration.³⁶ Arbitrators do not generally tend to strive heedlessly for a “splitting of the difference”. The equitableness of a decision plays a greater part in arbitration than in state court proceedings only to the extent that arbitrators have a natural tendency to take into account the underlying economic interests of the parties as well as the usages, customs and business practices of the relevant commercial or industrial sector.³⁷ The UNCITRAL Model Law on International Commercial Arbitration and many national arbitration laws require arbitrators expressly to do so.³⁸ This is one of the crucial advantages of arbitration *vis-à-vis* state proceedings before domestic courts. This pragmatic approach to decision-making, however, must not be confused with decisions solely based on fairness and detached from the law. According to most modern arbitration rules, an arbitral tribunal is entitled to render such decisions as *amiable compositeur* (*ex aequo et bono*) only with the express consent of the parties.³⁹

This aspect must be distinguished from the fact that the informal atmosphere in an arbitration lends itself more to the search for a negotiated settlement of the dispute and the resulting preservation of the business relationship between the parties than that before state courts.⁴⁰ However, even in arbitrations under the DIS Arbitration Rules, where section 32 (1) – inspired by section 278(1) German Code of Civil Procedure – invites arbitral tribunals to “seek an amicable settlement of the dispute at every stage of the proceedings”, arbitrators will preserve the consensual nature of arbitration. They will engage in the search for a settlement of the dispute only if *both(!)* parties have expressly authorised them to do so.

5. *The flexibility of the arbitration process is no cause for legal uncertainty*

In respect of arbitration in financial and capital market transactions it is often argued that its procedural flexibility – elsewhere recognised to be an essential advantage of the arbitration process⁴¹ – may lead to an unacceptable degree of legal uncertainty, allowing recalcitrant parties many possibilities to delay the proceedings.⁴²

It is true that in international arbitration the potential disadvantages of the wide procedural discretion granted to the arbitral tribunals are at issue.⁴³ However, there currently exist several sets of rules elaborated by international “formulating agencies” which reflect globally recognised “best practice standards”. Such rules can be incorporated by the parties into their procedural agreements or can be used by arbitral tribunals as guidelines for the exercise of their procedural discretion. Pivotal are the IBA Rules on the Taking of Evidence in International Commercial Arbitration of 1999.⁴⁴ They ensure the taking of evidence in (international) arbitrations in an efficient manner and at the same time are acceptable for representatives from both civil and common law countries. This is particularly evident with regard to the provisions on the production of documents by the parties.⁴⁵ The IBA Guidelines on Conflicts of Interest in International Arbitration⁴⁶ strive to create a supranational framework for the evaluation of arbitrators’ independence and impartiality. The IBA Rules of Ethics⁴⁷ play the same role for additional “professional” ethical obligations of arbitrators. In November 2007, the Chartered Institute of Arbitrators (London) published “Practice Guideline 16: The Interviewing of Prospective Arbitrators”,⁴⁸ which contains rules for the conduct of interviews with potential arbitrators as is sometimes done in connection with large-scale proceedings. The UNCITRAL Notes on Organizing Arbitral Proceedings⁴⁹ contain checklists and guidelines for the organisation of international arbitration proceedings.

The number of such rules has increased to such an extent that one may well ask if their seemingly normative character will lead to a far-reaching restriction of the procedural discretion and will approximate arbitration to proceedings before state courts, which are, to a far greater extent than arbitration proceedings, subject to mandatory procedural law.⁵⁰ Eventually much will depend – also in this respect – on the individual arbitrators selected by the parties. In any event, procedural flexibility is not an inherent weakness of arbitral proceedings but has always been considered as one of its strengths.

6. *The finality of arbitral awards leads to early legal certainty*

Banking practitioners sometimes express concern that the “finality” of arbitral awards – their final and binding nature – may be an advantage consciously preferred for complex plant construction projects but not suitable for disputes arising out of financial and capital market transactions.⁵¹

It is true that the finality of the arbitral decision precludes a review of the “correctness” of the arbitral tribunal’s applica-

tion of the law by a state court in the context of an annulment action.⁵² Only a violation of essential principles of arbitral due process, such as the parties’ fundamental right to be heard, or of public policy can lead to the annulment of an arbitral award:

“Arbitration rules, such as those of UNCITRAL, the LCIA, and the ICC, provide unequivocally that an arbitral award is final and binding. These are not intended to be mere empty words. One of the advantages of arbitration is that it is meant to result in the final determination of the dispute between the parties. If the parties want a compromise solution to be proposed, they should opt for mediation. If they are prepared to fight the case to the highest court in the land, they should opt for litigation. By choosing arbitration, the parties choose a system of dispute resolution that results in a decision that is, in principle, final and binding. It is not intended to be a proposal as to how the dispute might be resolved; nor is it intended to be the first step in a ladder of appeals through national courts.”⁵³

However, the finality of the award promotes a speedy clarification of the legal issues at stake and resolution of the conflict between the parties. This advantage of arbitral decision-making is today unanimously recognised in international business:

“... 91% of the online respondents and an overwhelming majority of those interviewed reject the idea of including an appeal mechanism in international arbitration. According to those interviewed, the advantages of the finality of an award outweigh the need for an appeal mechanism. The ability to appeal is seen as a disadvantage because it makes arbitration more cumbersome and litigation-like and essentially negates a key attribute of the arbitral process.”⁵⁴

This advantage of the finality of arbitral decision making also applies to the financial and capital market sector:

“The right to appeal can work against the bank that has prevailed in what may have been a long and hotly contested trial. The judgement debtor, through its lawyers’ skilful manipulations of the appellate process, can extend the time of repayment for many more months – and possibly years.”⁵⁵

However, one argument in favour of state court jurisdiction – with its multi-tier review system – remains: in those rare instances⁵⁶ in which banks and other financial institutions take a legal issue to court, they wish to have it determined definitively, if necessary by the highest court, and with effect for the entire sector. On a national level this makes sense for disputes which banks have with their private customers (b2c disputes), in particular if the dispute concerns the interpretation and validity of certain clauses of the standard terms and conditions used by all banks in that country. However, arbitral awards which have the same effect between parties as state court judgments, may, to a certain extent, also serve as precedents.⁵⁷ This presupposes, however, that such awards are published (in a “sanitised” form and without reference to the parties involved) in a specific collection.⁵⁸ This is also

true for the international banking and financial sector. In view of the model contracts used on a world-wide level by the Loan Market Association (LMA) or the International Swaps and Derivatives Association (ISDA) there is a strong need for uniform decision-making and publication of such decisions. The ICC is going in the same direction through publication of the decisions of its Banking Commission on the interpretation of the ICC Uniform Customs and Practices for Documentary Credits (UCP).⁵⁹

7. *International arbitration does not involve US-style “discovery”*

International commercial arbitration is sometimes criticised, not only by financial and capital market circles, for permitting parties to make use of discovery mechanisms, burdening the affected party with their time- and cost-consuming consequences and the threat to its proprietary information. This criticism, too, is based on a fundamental misunderstanding of the functioning of international arbitration. It must be stressed that outside the United States, there is no discovery in international arbitration!⁶⁰ International arbitral tribunals may well order the production of documents, but only under very restrictive circumstances. The current widely accepted best practice standard is contained in Article 3(3) of the IBA Rules on the Taking of Evidence.⁶¹ Pursuant to this provision, a “Request to Produce” will only be granted by the arbitral tribunal if the following conditions are complied with cumulatively:

1. the requested document or a narrow and specific category of documents is described in sufficient detail;
2. the requesting party has shown the relevance and materiality of the document or documents for the outcome of the dispute;
3. the document or documents are in possession of the other party and not in possession of a third party not subject to the jurisdiction of the arbitral tribunal;
4. the requesting party must show grounds why it assumes the document or documents to be in possession or control of the other party;
5. the requesting party must assure the arbitral tribunal that it has taken all possible means to obtain possession of the relevant document or documents;
6. the relevant document or documents are not subject to privilege.

In particular, the restriction reflected in condition 1 shows clearly that any form of US-style discovery, and the danger of “fishing expeditions” commonly associated with it, have no place in international arbitration.⁶² The absence of such US-style discovery proceedings must be considered as one of the most compelling reasons for banks to consider the insertion of arbitration clauses into their contractual agreements.⁶³

8. *Arbitration can involve more than two parties*

Concerns are sometimes raised that it is not possible to conduct arbitrations in a multiparty context. It is true that

the consensual basis of arbitration – otherwise one of its strong points – is shown to be a major weakness when it comes to multiparty proceedings⁶⁴ and is perceived as such in practice.⁶⁵ Few laws contain provisions on the “coerced” inclusion of third parties in arbitral proceedings. The notion of including a party in an arbitration against its will is completely incompatible with the consensual nature of arbitration. This quality of the arbitral process also provides the key to the solution of the multiparty problem. If all parties have agreed to multiparty proceedings, the consensual nature of arbitration is preserved. To achieve this goal, the arbitration clauses contained in the various contracts have to be harmonised accordingly in respect of the agreed arbitration. Furthermore, parties can agree on a “consolidation” of different arbitrations, filed individually under these arbitration clauses, in the structure of a single multiparty proceeding. The parties can agree on such consolidation in advance or expressly in the arbitration clauses. Most institutional arbitration rules nowadays contain provisions which allow an arbitral tribunal to be constituted even if the side consisting of more than one party fails to agree on an arbitrator. In order to safeguard the notion of procedural equality – as part of procedural public policy⁶⁶ – the entire arbitral tribunal⁶⁷ or at least both co-arbitrators⁶⁸ are then nominated by the institution administering the proceeding.

Eventually, securing an effective multiparty proceeding depends on the careful harmonisation of the arbitration clauses contained in different but interlinked contracts. This can be done, for example, by forming a single contractual network consisting of various construction and finance agreements for the purpose of project financing,⁶⁹ or by including an appropriate arbitration clause in a multiparty contract such as the “terms of agreement” or an intercreditor agreement in the context of a loan consortium. As is the case with other clauses, the problem does not lie in agreeing on arbitration, but rather on the careful drafting of the appropriate arbitration clause.⁷⁰

9. *Arbitration is confidential*

Banking practitioners sometimes argue that the confidentiality of arbitral proceedings deprives banks of the option of exerting additional pressure on defaulting debtors by means of unpleasant publicity.⁷¹

However, it is questionable if this pressure by publicity plays any role at all in the context of the overall circumstances that determine whether a debtor honours its payment obligations.⁷² Furthermore, the publicity of a court proceeding can turn back on the lender if the debtor presents facts in the course of the proceeding causing in turn (political) pressure on the lending bank.⁷³ From a more general perspective, banks which are confronted with a deteriorating litigation culture in the aftermath of the financial crisis will be eager to conduct their b2b disputes in a confidential manner in order to maintain customer confidence and their general standing in the banking business. The worst that can happen to them is having their disputes in the daily newspapers. The tremendously damaging effect of such news in a business environment that is so vulnerable to a negative public opinion could be witnessed throughout

recent months. Therefore, confidentiality is a major advantage of international commercial arbitration, an advantage from which banks and financial institutions can benefit.⁷⁴

10. Arbitration agreements preclude access to state courts

Practitioners in the financial and capital market sector very often criticise the exclusive competence of arbitral tribunals resulting from the conclusion of an arbitration agreement. In fact, banks like to keep their dispute-resolution options open until the dispute has arisen.⁷⁵ Therefore, they often agree cumulatively that actions can be brought before courts at the seat of the debtor, the place of contract performance or at other places where the debtor has assets. In particular, the correlation between the forum and the location of assets serves to prevent the debtor, after the arbitration, from misusing the ensuing enforcement proceeding before the state court to cause additional delays.⁷⁶ For this reason, even banks which are in principle open for arbitration often conclude agreements granting them the option between filing a claim before an arbitral tribunal or before a state court.⁷⁷

While it is true that an arbitration agreement precludes access to the state courts and that by raising the arbitration objection a claim filed before the state courts is rendered inadmissible, this criticism is largely due to incorrect assumptions about the efficiency and practicality of dispute resolution by state courts. In many international financial transactions, a submission to the jurisdiction of the state courts of the debtor is out of the question. This may be due to the “quality” of the judiciary in certain emerging markets or simply to the “home town justice” phenomenon.⁷⁸ On the other hand, if the case is brought before the courts in the country of the lender or in a third country, the lender has to rely on the courts in the country of the debtor for enforcement of the judgment. While no multilateral convention for the enforcement of court judgments exists outside Europe,⁷⁹ the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, ratified by 142 countries, has proven to be one of the most successful instruments of international uniform law and one of the essential advantages of arbitration.⁸⁰ Although the prevailing party has to rely too on the courts in the country of the respondent, the procedure for recognition and enforcement is uniform and is based on an international convention with a corresponding international obligation of the enforcing state and its courts to recognise foreign arbitral awards. Enforcement can only be denied on a limited number of grounds, listed exhaustively in Article V of the New York Convention. It is particularly due to this possibility of world-wide enforcement that arbitration clauses as primary mechanism of dispute resolution have been included for many years in the loan agreements of international banks such as the World Bank or the European Bank for Reconstruction and Development.⁸¹ Of course, not even the New York Convention can get round the problem that in countries such as Saudi Arabia arbitral awards can only be enforced, if at all, with great difficulty or are even ignored if

their contents violates Islamic law (*sharia*), eg if the awarding of interest by the arbitral tribunal is perceived as a violation of the Koran-based prohibition on the taking of interest (*riba*).⁸² This situation, however, is not due to a weakness of the arbitral process but rather of the applicable legal system.

C. Financial markets disputes require expert judges

The arguments presented in section B above show that there is nowadays no reason for banks to avoid arbitration in favour of state court jurisdiction as a matter of principle. In many instances arbitration has shown itself even as a superior method of dispute resolution.

In few other areas is the classical advantage of arbitration, ie the opportunity to select arbitrators with relevant expert knowledge, as evident as in the field of national and international banking and capital market law. It seems hardly possible to explain to a domestic judge terms such as “back-stop facility”, “convertible preferred equity certificates”, “collateralised debt obligation”, “MAC-clause”, “parallel debt”, “senior facilities agreement”, “*pari passu* clause”, “gun jumping” or “contractual subordination”⁸³ within a reasonable period of time. It even seems an understatement to say that in “complex technical and legal issues of capital market transactions the expertise of arbitrators selected specifically for this reason is on average higher than that of state court judges”.⁸⁴ Also, international arbitrators will have greater intercultural skills and understanding for a dispute-resolution process that typically involves participants (parties, lawyers, witnesses) not only from different jurisdictions but also from different cultural backgrounds.⁸⁵

This view is not intended to pass judgment on the quality and expertise of the state judiciary. 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 LMA⁸⁶ have caused such agreements to be handled by a small number of highly specialised transaction lawyers. Even national financial market transactions, eg loan agreements or derivative contracts in the b2b sector, are increasingly becoming internationalised. 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 specific know-how (specialist benches) with regard to the standard terms and conditions of the banking sector or with regard to standard loan agreements. The specialisation 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 agreement. This can be ensured by the selection of financial and capital market experts as arbitrators.⁸⁷ It is for this reason that a number of arbitral institutions offer specialised arbitration rules for disputes that arise out of financial market transactions. The American Arbitration Association (AAA) offers special “Arbitration Rules for Commercial Financial Disputes”.⁸⁸ The arbitration

rules of the London City Disputes Panel⁸⁹ have the express aim of resolving the dispute fairly and, having regard to the nature of the dispute and the wishes of the parties, in the shortest possible time. The same applies to the “Financial Disputes Arbitration Rules” of the China International Economic and Trade Arbitration Commission (CIETAC).⁹⁰ The “European Centre for Financial Dispute Resolution” (“EuroArbitration”),⁹¹ founded in 2000, offers specialised arbitration rules for financial b2b disputes.

All these rules are used only infrequently by banks and other financial institutions. The disadvantages of state court jurisdiction have been perceived as such, if at all, only to a limited extent by banking practitioners. However, this may be due to the fact that only a few disputes are actually brought before the courts. Up to now, banks and bankers rather seek to avoid court proceedings, eg by restructuring agreements, extension agreements, debt/equity swap agreements or other finance market solutions. Instead of initiating a protracted court proceeding, the irretrievable loan claim is written off in a worst-case scenario. However, the yardstick for arbitration as a means of dispute resolution also in banking and finance transactions must be the contentious case and not the case of a negotiated settlement, even if contentious proceedings are very exceptional. Also, it is most likely that the number of such contentious disputes will rise substantially in the aftermath of the worldwide financial crisis.

D. Conclusion

In view of the overwhelming advantages of arbitration and

its general acceptance in international business, this alternative means of dispute resolution should be considered by banks and financial institutions, especially under the increasing economic pressures in the aftermath of the world financial crisis. These pressures will almost certainly have a significant impact on the litigation culture in the financial sector. In light of this new situation, an objective, informed approach that does not rehash long-standing, unexamined prejudices against this form of dispute resolution is required.⁹² It is only through such an open-minded discussion that arbitration will gain acceptance also in this field of business. It must be understood by all those who participate in this discussion that, very often, the fear of arbitration turns out to be also a fear of responsibility. In view of the prejudices discussed above and the long-standing tradition of preferring to opt for choice-of-forum clauses, a person proposing an arbitration agreement in the financial sector is necessarily on the defensive. He or she must justify this decision, in particular if problems arise. A person who has proposed arbitration will have no particular benefit from it when no problems ensue. But what general counsel would risk breaking new ground if the outcome could either be neutral (if his company wins, he would have also prevailed before the state courts) or even negative (if his company loses, it will be argued that the outcome before the state courts might have been better)? The solution of the problem lies in promoting arbitration among bankers, board members of banks and other financial institutions and business leaders in the field, so that they will turn to their legal advisers to ask them why, in a particular financial transaction, an arbitration agreement was *not* concluded. ■

Klaus Peter Berger, LL.M. is professor of law and director of the Banking Law Institute and the Center for Transnational Law (CENTRAL) at the University of Cologne, Germany. He can be reached at kp.berger@uni-koeln.de

¹ See L Shore, “The Advantages of Arbitration for Banking Institutions” (1999) 14(11) *Journal of International Banking Law* 347, 348; G Affaki, “A Banker’s Approach to Arbitration”, in G Kaufmann-Kohler and V Frossard (eds), *Arbitration in Banking and Financial Matters* (Basel, Kluwer Law International, 2003), 63: “The world of arbitration and the world of banking are apart. Arbitration practitioners consider bankers as being most ungrateful for not showing more gratitude to the many advantages that arbitration offers. One of the ways for bankers to tangibly do so, arbitration practitioners argue, would be for example to provide systematically for an arbitration clause in all bank loans! Conversely, bankers reproach arbitrators for not understanding the basics of a banker’s business.” See also M Boeglin, “The Use of Arbitration Clauses in the Field of Banking and Finance” (1998) 15(3) *Journal of International Arbitration* 19ff; O Sandrock “Internationale Kredite und die Internationale Schiedsgerichtsbarkeit – Teil II”, (1994) 48(11) *Wertpapier-Mitteilungen* 445, 446.

² P Wood, *International Loans, Bonds and Securities Regulation* (London, Sweet & Maxwell, 1995), margin no 5-57: “Arbi-

tration as a method of settling disputes is not generally favoured by commercial financiers and this section does no more than indicate why this should be so.”

³ “International Arbitration: Corporate Attitudes and Practices 2008”, Survey by School of Arbitration (Queen Mary College, London) and PricewaterhouseCoopers (2008), 5.

⁴ Cf H Kronke, “International Loans, Bonds and Securities Regulation” in *Air and Space Law in the 21st Century – Liber Amicorum Böckstiegel* (Cologne, Carl Heymanns Verlag, 2001), 431, 436ff; P Nobel, “Arbitration in Banking and Financial Matters – Some General Reflections on Arbitration in Banking and Finance”, in Kaufmann-Kohler and Frossard (eds), *supra* n 1, 11, 22ff.

⁵ *Scherk v Alberto Culver*, 417 US 506, 518 (1974).

⁶ *Shearson/American Express, Inc v McMahon*, 482 US 220 (1987); *Rodriguez de Quijas et al v Shearson/American Express Inc*, 490 US 477, 481 (1989).

⁷ Cf Judge Jerome Frank, in *Kulukundis Shipping Co v Amtorg Trading Corp*, 126 F 2nd 978, 985 (CA 2 1942).

⁸ Wood, *supra* n 2, margin nos 5-58ff; D Scott, “Of Banks, Boats and the Arbitration Act 1996” (1997) 13(4) *Arbitration International* 399; U Bosch, “Vertragliche Regelungen in internationalen Kreditverträgen als risikopolitisches Instrument“, in H-J Krümmel (ed), *Internationales Bankgeschäft* (Berlin, Duncker & Humblot, 1985), 117, 136ff; A Connerty, “Documentary Credits: A Dispute Resolution System from

- the ICC” (1999) 14(3) *Journal of International Banking Law* 65.
- ⁹ Cf “International Arbitration: Corporate Attitudes and Practices 2006”, Survey by School of Arbitration (Queen Mary College, London) and PricewaterhouseCoopers (2006), 5ff.
- ¹⁰ Affaki, *supra* n 1, 69ff.
- ¹¹ Affaki, *supra* n 1, 68; cf also Connerty, *supra* n 8, 65: “If we are owed money we sue. Why bother with arbitration?”
- ¹² Wood, *supra* n 2, margin no 5–59.
- ¹³ Sandrock, *supra* n 1, 408ff.
- ¹⁴ Alleged claims arising out of lender liability are even used by inexperienced debtors as means to avoid legitimate claims of lenders – see cf JD Berchild and JJ Norton, “The Evolving United States Experience with Alternative Dispute Resolution Respecting Financial Institution Disputes”, in N Horn and JJ Norton (eds), *Non-Judicial Dispute Settlement in International Financial Transactions* (The Hague, Kluwer Law International, 2000), 179, 191; W Park “Arbitration in Banking and Finance” (1998) 17 *Annual Review of Banking Law* 213, 220: “chameleon catch word with several meanings”.
- ¹⁵ See, from the perspective of arbitration, KP Berger, “Acts of State and Arbitration: Exchange Control Regulations”, in K-H Böckstiegel (ed), *Acts of State and Arbitration* (Cologne, Carl Heymanns Verlag, 1997), 99, 118ff.
- ¹⁶ See on this point, section C *infra*.
- ¹⁷ Grigera Naón, “ICC Dispute Resolution and International Finance”, in: Horn and Norton, *supra* n 14, 73, 75; cf also Sandrock, *supra* n 1, 414: “Die sog. Einfachheits-These, nach welcher Streitigkeiten über Forderungen aus internationalen Kreditverträgen keine komplizierten Tat- und Rechtsfragen provozieren, sondern nach dem Motto, Zahle oder es ergeht ein vollstreckbares Urteil’ einfach gelöst werden können, ist eine Chimäre.” [The so-called simplicity rule by which disputes over claims arising out of international loan agreements do not give rise to complicated factual or legal issues, but can instead be solved simply along the lines of “pay up or an enforceable judgement will be rendered”, is a myth.]
- ¹⁸ S Kröll, “Schiedsverfahren bei Finanzgeschäften – Mehr Chancen als Risiken” (1999) 11(6) *Zeitschrift für Bankrecht und Bankwirtschaft* 367, 370.
- ¹⁹ Connerty, *supra* n 8, 65.
- ²⁰ Cf Survey “International Arbitration: Corporate Attitudes and Practices 2006”, *supra* n 9, 7: “A related concern is the time the arbitration process takes from filing to award, which was the second most commonly expressed concern”; see also Survey “International Arbitration: Corporate Attitudes and Practices 2008”, *supra* n 3, 7, stating that 17% of the interviewees indicated their desire “to avoid excessive delay” as the major reason to settle a dispute during arbitration.
- ²¹ S 30 sub 1 DIS Arbitration Rules; S 1048 sub 2 Code of Civil Procedure (ZPO); Art 25(b) UNCITRAL Model Law; cf also Art 28(2) UNCITRAL Arbitration Rules.
- ²² Cf K-H Böckstiegel, “Case Management by Arbitrators: Experiences and Suggestions”, in Aksent, Böckstiegel, Mustill, Patocchi and Whitesell (eds), *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner* (Paris, ICC Publishing, 2005), 115ff.
- ²³ Cf Final Report of ICC Task Force on Reducing Time and Costs in Arbitration “Techniques for Controlling Time and Costs in Arbitration”, ICC International Court of Arbitration Bulletin (2007), no 1, 23ff.
- ²⁴ Art 32 ICC Arbitration Rules (possibility to reduce all time limits contained in ICC Arbitration Rules by party agreement); cf on this point Y Derains and E Schwartz, *A Guide to the New ICC Rules of Arbitration* (The Hague, Kluwer Law International, 1998), 345ff, according to whom the provision rather serves as a reminder.
- ²⁵ Art 42 Swiss Rules (reduced time limits for nomination of arbitrators, six-month period for arbitral award, one oral hearing, summary reasoning of award, appointment of sole arbitrator for disputes of less than 1m Swiss francs); cf on this point M Scherer “Acceleration of Arbitration Proceedings – The Swiss Way: The Expedited Procedure under the Swiss Rules of International Arbitration” (2005) 3(5) *Zeitschrift für Schiedsverfahren* 229ff.
- ²⁶ The Rules are available at www.dis-arb.de; see for a commentary on the DIS Rules K Böckstiegel, S Kröll and P Nacimiento (eds), *Arbitration in Germany, The Model Law in Practice* (The Hague, Verlag Recht und Wirtschaft, 2007), 655ff.
- ²⁷ Text can be downloaded at www.dis-arb.de; see generally KP Berger, “The Need for Speed in International Arbitration – Supplementary Rules for Expedited Proceedings of the German Institution for Arbitration (DIS)” (2008) 25(5) *Journal of International Arbitration* 595.
- ²⁸ See Berger, *ibid*, 605ff.
- ²⁹ Cf Report of the ICC Task Force on Reducing Time and Costs in Arbitration, *supra* n 23, 30: “. . . experience shows that in practice it is difficult at the time of drafting the clause to predict with a reasonable degree of certainty the nature of disputes and the procedures that will be suitable for those disputes.”
- ³⁰ Wood, *supra* n 2, margin no 5–62; Connerty, *supra* n 8, 66.
- ³¹ Park, *supra* n 14, 247: “The cardinal rule of drafting an international arbitration agreement is to avoid ambiguity and equivocation. Uncertainty about whether, where and how the parties wished to arbitrate will delight only the party wishing to drag its feet, and will often render the clause unenforceable”; cf also N Horn, “Außergerichtliche Streitbeilegung bei internationalen Finanzgeschäften. Eine Bestandsaufnahme”, in K P Berger *et al* (eds), *Festschrift für Otto Sandrock* (Heidelberg, Verlag Recht und Wirtschaft, 2000), 385, 396.
- ³² Cf M Kerr, “Arbitration Law Relevant to English–German Business Relations”, in K-H Böckstiegel (ed), *Commercial Arbitration in the Federal Republic of Germany and in England* (Cologne, Carl Heymanns Verlag, 1987), 5, 14: “In practice both parties tend to be exhausted by the time the negotiations have reached the stage of the arbitration clause. They will rarely get beyond the applicable rules (if any) and the venue. For the rest they just hope for the best.”
- ³³ Cf P Friedland, *Arbitration Clauses for International Contracts* (2nd edn, Huntington, NY, JurisNet, 2007).
- ³⁴ Bosch, *supra* n 8, 136; Connerty, *supra* n 8, 66; Park, *supra* n 14, 216: “Arbitration . . . may appear as an unnecessary invitation to a ‘split the difference’ award, reminiscent of King Solomon’s famous threat to cut the baby in two.”

- ³⁵ Bosch, *supra* n 8, 136.
- ³⁶ Kröll, *supra* n 18, 372.
- ³⁷ Shore, *supra* n 1, 349.
- ³⁸ Art 28 Abs 4 UNCITRAL Model Law; s 1051 sub 4 ZPO.
- ³⁹ Cf eg Art 28 sub 3 UNCITRAL Model Law; s 1051 sub 3 ZPO; Art 1054 sub 3 Dutch Code of Civil Procedure.
- ⁴⁰ See International Arbitration: Corporate Attitudes and Practices 2008, *supra* n 3, 6.
- ⁴¹ Cf Böckstiegel, *supra* n 22, 120; cf also Survey “International Arbitration: Corporate Attitudes and Practices”, *supra* n 9, 6: “Flexibility of procedure was the most widely recognized advantage [of arbitration]. The active participation of the parties in determining and shaping the procedure inspires confidence in the process.”
- ⁴² Wood, *supra* n 2, margin no 5–60; Connerty, *supra* n 8, 65.
- ⁴³ Cf W Park, “Arbitration’s Protean Nature: The Value of Rules and the Risks of Discretion” (2003) 19(3) *Arbitration International* 279, 283.
- ⁴⁴ IBA (ed), *IBA Rules on the Taking of Evidence in International Commercial Arbitration* (London, IBA, 1999).
- ⁴⁵ Cf *infra*, section B.7.
- ⁴⁶ IBA (ed), *IBA Guidelines on Conflicts of Interest in International Arbitration* (2004); see on this point O de Witt Wijnen, N Voser and N Rao, “Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration” (2004) 5(3) *Business Law International* 433ff.
- ⁴⁷ IBA Rules of Ethics for International Arbitrators, 1987 (12) *Yearbook Commercial Arbitration* 199ff.
- ⁴⁸ Cf www.arbitrators.org/Institute/PR_CIA027.asp.
- ⁴⁹ UN (ed), *UNCITRAL Notes on Organizing Arbitral Proceedings* (1996).
- ⁵⁰ Cf KP Berger, “Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion” (2006) 22(4) *Arbitration International* 513ff.
- ⁵¹ Wood, *supra* n 2, margin no 5–58; Connerty, *supra* n 8, 65; Shore, *supra* n 1, 348.
- ⁵² Cf W Voit in H-J Musielak (ed), *Kommentar zur Zivilprozessordnung* (5th edn, Munich, CH Beck, 2007), s 1059 margin no 1.
- ⁵³ A Redfern and M Hunter, *Law and Practice of International Commercial Arbitration*, (4th edn, London, Kluwer Law International, 2004), margin no 9-06; margin no 9-34: “There is a belief that, so far as international arbitrations are concerned, the parties should be prepared to accept the decision of the arbitral tribunal even if it is wrong, so long as the correct procedures are observed.”
- ⁵⁴ Cf “International Arbitration: Corporate Attitudes and Practices 2006”, *supra* n 9, 15.
- ⁵⁵ Shore, *supra* n 1, 348.
- ⁵⁶ See on this point *infra*, section C after n 87.
- ⁵⁷ See in general on this point KP Berger, “The International Arbitrators’ Application of Precedents” (1992) 9(4) *Journal of International Arbitration* 5, 19ff.
- ⁵⁸ See on the parallel issue of decisions by arbitral tribunals in mergers and acquisitions disputes, C Duve and M Keller, “Privatisierung der Justiz – bleibt die Rechtsfortbildung auf der Strecke?” (2005) 3(4) *Zeitschrift für Schiedsverfahren* 169, 176ff.
- ⁵⁹ See ICC (ed), *ICC Banking Commission Collected Opinions 1995–2001*, ICC Publ No 632 (Paris, ICC Publishing, 2002); ICC (ed), *Unpublished Opinions of the ICC Banking Commission 1995–2004*, ICC Publ No 660 (Paris, ICC, Publishing, 2005).
- ⁶⁰ Cf K Lionnet, “Once Again: Is Discovery of Documents Appropriate in International Arbitration?”, in Aksen *et al* (eds), *supra* n 22, 491, 499: “. . . the answer to the question of whether discovery of documents can be ordered by arbitrators in international proceedings . . . must be no”.
- ⁶¹ Cf *supra* n 47.
- ⁶² Cf H Raeschke-Kessler, “The IBA Rules of Evidence”, in CENTRAL (ed), *Understanding Transnational Commercial Arbitration* (Münster, Quadis, 2000), 75, 85.
- ⁶³ Shore, *supra* n 1, 348.
- ⁶⁴ Cf F von Schlabrendorff, “Parallele Verfahren, Aufnahme von Dritten, Verbindung von Verfahren: Erfahrungen aus der Praxis der ICC“, in K-H Böckstiegel, KP Berger and J Bredow (eds), *Die Beteiligung Dritter an Schiedsverfahren* (Cologne, Carl Heymanns Verlag, 2005), 55ff.
- ⁶⁵ Cf “International Arbitration: Corporate Attitudes and Practices”, *supra* n 9, 7: “The lack of a third party mechanism was another widely recognized concern.”
- ⁶⁶ This notion was first developed by the French Cour de Cassation in the case *Siemens v Dutco Construction*, Cour de Cassation, 7 January 1992, cf KP Berger, “Schiedsrichterbestellung im Mehrparteischiedsverfahren” (1993) 39(9) *Recht der Internationalen Wirtschaft* 702ff.
- ⁶⁷ Art 10(2) ICC Arbitration Rules; Art 8.1 LCIA Arbitration Rules.
- ⁶⁸ Cf s 13.2 DIS Arbitration Rules.
- ⁶⁹ See on this point J Lew “Project Financing”, in Horn and Norton, *supra* n 14, 289, 298ff.
- ⁷⁰ Cf Park, *supra* n 14, 273ff: “Financial lawyers will need to learn to relish a substantial amount of nuance in crafting dispute resolution clauses appropriate to the contours of each particular type of transaction.”
- ⁷¹ Wood, *supra* n 2, margin no 5–59; Connerty, *supra* n 8, 65.
- ⁷² Sandrock, *supra* n 1, 447.
- ⁷³ Cf Kröll, *supra* n 18, 373; see also Shore, *supra* n 1, 349.
- ⁷⁴ Cf “International Arbitration: Corporate Attitudes and Practices 2006”, *supra* n 9, 6: “Privacy, perhaps unsurprisingly, was also ranked highly. International arbitration is considered by many as an effective way to keep business practices, trade secrets, industrial property, as well as proceedings with a possible negative impact on the brand, private.”
- ⁷⁵ Cf Connerty, *supra* n 8: “A lender will choose the forum for litigation which suits that lender.”
- ⁷⁶ Bosch, *supra* n 8, 137.
- ⁷⁷ Park, *supra* n 14, 251ff.
- ⁷⁸ Cf N Horn, “Non-Judicial Dispute Settlement in International Financial Transactions”, in Horn and Norton, *supra* n 14, 1, 2ff; Park, *supra* n 14, 215.
- ⁷⁹ The Hague Convention on Choice of Court Agreements has so far only been ratified by Mexico and has not yet entered in force. Furthermore, in deviation from the original intentions of its initiators, the convention only contains rudimentary provisions on the cross-border recognition of court judgements; cf G Rühl, “Das Haager Übereinkommen über die Vereinbarung gerichtlicher Zuständigkeiten: Rückschritt oder Fortschritt” (2005) 25(5) *Praxis des Internationalen*

Privat- und Verfahrensrechts 410; www.hcch.net/index_en.php?act=conventions.text&cid=98.

- ⁸⁰ Cf “International Arbitration: Corporate Attitudes and Practices 2006”, *supra* n 9, 6: “Enforceability of awards was ranked as the single most important advantage by the highest number of respondents . . .”; cf also Horn, *supra* n 31, 406: “Die Gründe, die früher gegen Schiedsverfahren im internationalen Wirtschaftsbereich sprachen, sind zu einem guten Teil schon seit gut fünfzig Jahren durch die New York Convention erledigt.” [The reasons advanced previously against arbitration in international economic relations have been largely laid to rest already 50 years ago by the New York Convention.]
- ⁸¹ Horn, *supra* n 31, 393.
- ⁸² Cf on this point KP Berger “Die Einwirkung drittstaatlicher Eingriffsnormen auf internationale Verträge am Beispiel islamischer Zinsverbote”, in H Hermann, KP Berger and U Wackerbarth (eds) *Deutsches und Internationales Bank- und Wirtschaftsrecht im Wandel* (Berlin, De Gruyter, 1997), 322ff; cf also A Gemmill, “Commercial Arbitration in the Islamic Middle East” (2006) 5 *Santa Clara Journal of International Law* 169, 188.
- ⁸³ See explanations of terms in J Risse, F Kästle and O Gebler, *M&A und Corporate Finance von A–Z* (Munich, 2006).
- ⁸⁴ Kronke, *supra* n 4, 437; K-G Loritz, “Schiedsgerichtsbarkeit bei Kapitalanlagen”, in R Schütze (ed), *Einheit und Vielfalt des Rechts – Festschrift für Geimer* (Munich, CH Beck, 2002), 569, 574; see also Shore, *supra* n 1, 347: “A national court judge (and certainly not a jury) will not necessarily have any useful education in the field of banking and finance and may not be especially interested in understanding the particulars of the field.”
- ⁸⁵ Shore, *supra* n 1, 347ff.
- ⁸⁶ Cf www.loan-market-assoc.com; see on this point J Wenzel, *Rechtsfragen internationaler Konsortialkreditverträge* (Munich, 2006), 41.
- ⁸⁷ Cf Park, *supra* n 14, 272: “The identity of the person who will decide a financial controversy often matters as much as, or more than, the legal standards that purport to govern the merits of the dispute.”
- ⁸⁸ www.adr.org/sp.asp?id=31994#a28.
- ⁸⁹ See on this point A Crossfield, “Arbitration for UK Financial Services” [1994] *International Financial Law Review* July, 28ff.
- ⁹⁰ Cf www.cietac.org; J Zimmerman and D O’Brian, “CIETAC Financial Dispute Arbitration Rules: Practice and Problems” (2004) *Asian Dispute Review* 69ff; see in general on CIETAC Arbitration, L Kniprath, “Neue Schiedsordnung der Chinese International Economic and Trade Arbitration Commission (CIETAC)” (2005) 3(4) *Zeitschrift für Schiedsverfahren* 197ff.
- ⁹¹ Cf www.euroarb.org; A Hirsch, “Presentation of ‘Euro-arbitration’: European Center for Financial Resolution”, in Kaufmann-Kohler and Frossard (eds), *supra* n 1, 55ff.
- ⁹² Grigera Naón, *supra* n 17, 83.