

# ARBITRATING FINANCIAL DISPUTES – ARE THEY DIFFERENT AND WHAT LIES AHEAD?

15<sup>th</sup> Kaplan Lecture, HKIAC, 6 pm, 1 December 2021

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1. It is indeed an honour and pleasure to give the Annual Kaplan Lecture, 2021<sup>1</sup>. In 2020, the lecture in this distinguished series was given virtually for the first time by Professor Jan Paulsson. I doubt anyone anticipated that at the end of 2021 we would still be in the midst of the coronavirus crisis, with its multiple effects on things that we have taken for granted, not least the seamless mobility that we have enjoyed for so long, and the personal interactions that mean so much to us as humans.

2. In his inaugural lecture in this series, Neil Kaplan referred to the difficult problems faced at that time – the end of 2007 – including a gathering financial crisis. But he spoke of the continuing success of HKIAC – to which he personally has greatly contributed – and which he described as “*booming and popular*”. The same applies at the end of 2021. Whatever 2022 may hold, HKIAC goes into it with a successful track record and the facilities and experience needed to function in the very different environment that we have now. I thank it for organising this lecture, and thank the British Institute of International and Comparative Law (BIICL) for generously sponsoring it, and particularly its Director, Professor Spyros Maniatis.

3. My subject is arbitrating financial disputes. Experience of this differs from

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<sup>1</sup> I am most grateful to Gökçe Uyar, Deputy Counsel, Hong Kong International Arbitration Centre; Grace Cheng, barrister, Field Court Chambers, and Yang Zhao, associate, Kirkland & Ellis, for their kind research assistance. All views expressed here are my own.

country to country, and includes a potentially vast area of economic activity. My remarks are limited to the kind of disputes that arise from financings and financial products, usually in the *international* context, and typically of higher value. There are some handy definitions – see those set out in CIETAC’s Financial Disputes Arbitration Rules 2015<sup>2</sup>, in the Financial List established in the courts of England and Wales in 2015<sup>3</sup>, and in the 2016 ICC Commission Report on Financial Institutions and International Arbitration<sup>4</sup>. It is noteworthy, that though comparatively recent, these definitions are already out of date – such is the pace of innovation in finance, that new markets have sprung up since then, such as the crypto markets. Arbitration plays an a significant role in consumer disputes<sup>5</sup> where very different considerations may apply. But I am not going to deal with this important subject on this occasion.

4. My intent in these remarks is to address what I think are a number of key questions. The first is whether financial disputes are different from other commercial disputes, because that has implications for how we deal with them. On the way, I shall attempt to review how widely arbitration is used in financial disputes and where opportunities may lie for broadening its use. I will then consider some practical issues which arise from the introduction of rules as to “*early determination*” by many arbitral institutions. A potentiality of these is to make arbitration more “*finance friendly*”. Finally, I shall offer some personal views on what may lie ahead.

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<sup>2</sup> Article 2 <http://www.cietac.org/index.php?m=Page&a=index&id=108&l=en>

<sup>3</sup> Part 63A <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/financial-list>

<sup>4</sup> The Task Force Co-Chairs were Georges Affaki and Claudia Salomon: <https://iccwbo.org/content/uploads/sites/3/2016/11/icc-financial-institutions-and-international-arbitration-icc-arbitration-adr-commission-report.pdf>

<sup>5</sup> For example through Hong Kong’s Financial Dispute Resolution Centre, and through FINRA in the United States.

5. As someone who has sat as a judge and as an arbitrator I emphasise this point. Both the courts and arbitration have an essential role to play in adjudicating the kind of financial disputes I am discussing in these remarks. As ever, courts which understand and support arbitration are the bedrock of its success, a point made by Chief Justice Andrew Cheung at the Hong Kong Arbitration Week on 27 October 2021<sup>6</sup>. Along with the increasing interest in mediation<sup>7</sup>, and other informal means of avoiding disputes<sup>8</sup>, both the courts and arbitration strive to provide a coherent and interconnected system of dispute resolution. This is much needed. Finance in all its forms is a formidable force in our world, for good, and unfortunately sometimes for not so good. In dispute resolution, there are sometimes delicate balances to be made in upholding the parties' contractual arrangements, whilst recognising the overarching importance of financial stability and the wider public interest.

### **Are financial disputes different from other disputes?**

6. Are financial disputes any different from other disputes in the commercial sphere? In some respects, they are clearly not. Financial contracts are in principle no different from other commercial contracts, and interpreting and applying them requires no special expertise beyond what is required for commercial disputes generally. Yet a point that has been made on many occasions is that the operation of particular financial markets can be very technical, and an understanding of how they work, and the applicable legal rules, can be very useful for decision makers, who are

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<sup>6</sup> <https://www.hkcfca.hk/filemanager/speech/en/upload/2273/2021.10.27%20-%20Hong%20Kong%20Arbitration%20Week%20-%20ADR%20in%20Asia%20Conference.pdf>

<sup>7</sup> As for example through the 2018 UN Convention on *International Settlement Agreements Resulting from Mediation*, known as the Singapore Convention on Mediation.

<sup>8</sup> Such as the BIICL Principles which propose a set of practical guidelines which might be adopted to encourage a more conciliatory approach to contractual disputes that may arise (for example) out of the pandemic <https://www.biicl.org/publications/breathing-space-concept-note-3-on-guidelines-for-the-resolution-of-disputes-following-the-2020-pandemic>

otherwise dependent on expert evidence of varying quality.

7. Professor Georges Affaki has recently drawn attention to the potential impact of financial regulation on disputes. Most financial institutions and markets are regulated to a high degree – in fact, they are among the most highly regulated businesses in the world<sup>9</sup>. Lessons were learned the hard way in the global financial crisis which nearly brought the whole system down. As he pointed out, in deciding financial disputes, regulatory compliance may need to be taken into account in a number of ways, including potential breaches of contract<sup>10</sup>.

8. Much of what is happening in finance today is taking place in the form of *fintech* – this is one of the most active areas over the whole tech field. There is a constant drive for innovation with digital technologies<sup>11</sup>. We are in the early stages of a transformation<sup>12</sup>. Tech companies such as Facebook (now Meta) aspire to, and in China have for nearly two decades, entered the finance space as key players<sup>13</sup>. Central banks are considering, and in some cases such as the People’s Bank of China

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<sup>9</sup> Rules promulgated by States are increasingly harmonised based on international standards developed by international bodies Such as the Basel Committee on Banking Supervision in respect of banks. China joined the Bank for International Settlements which hosts the Basel Committee in 1996 (<https://www.wsj.com/articles/SB843593891920807500>) and the Committee itself in 2009.

<sup>10</sup> In a blog post dated 20 January 2021 on the revamping of the P.R.I.M.E. Finance Arbitration Rules, he wrote: “What makes disputes in banking and finance different? After all, like most commercial disputes, their determination often requires the interpretation of contracts, deciding whether a party is liable in contract or tort, and quantifying damages. Furthermore, financial institutions are, in many respects, no different from other commercial parties to disputes. Yet, in practice banking and finance disputes require special expertise to resolve them. Amongst other things: banking and financial markets are strictly regulated sectors, and regulatory compliance may need to be taken into account when determining potential breaches of contract; perceived risks may trigger bank runs; statutory duties of secrecy may prevent financial institutions from disclosing customer information, affecting evidence-gathering; and minimum capital and asset ring-fencing on local bank branches may present challenges to enforcement.”(Georges Affaki, ‘Revamping of P.R.I.M.E. Finance Arbitration Rules Underway’, Kluwer Arbitration Blog, January 20 2021)

<sup>11</sup> Including DLT (distributed ledger technology), AI and cloud computing.

<sup>12</sup> Examples are not hard to come by. Crypto assets are one. Payment systems are another.

<sup>13</sup> <https://www.cnbc.com/2021/10/19/facebook-taps-coinbase-for-digital-wallet-novi.html>

(PBOC), already issuing<sup>14</sup>, their own currency in digital form (CBDC). This is not somehow restricted to a small group of countries. In October 2021, Nigeria launched its own central bank-backed digital currency, called eNaira<sup>15</sup>. At the international level, there has been fierce competition for the title of global fintech hub<sup>16</sup>. Yet, what has been to date the light touch regulation of the fintech space seems to be coming to an end – a well-publicised end in China – but in many other countries also.

9. How have the courts and arbitration reacted to these changes? So far, developments are valuable but relatively limited. In China, specialist rules have been issued for example by CIETAC and the Shenzhen Court of International Arbitration<sup>17</sup>. HKIAC's Panel of Arbitrators for Financial Services Disputes was set up in 2018, the same year as the specialist Financial Court was established in Shanghai<sup>18</sup>. Outside China, examples are the establishment of P.R.I.M.E. Finance in The Hague, and the specialist Financial List in the English courts.

10. Experts are always in heavy demand in the more specialist areas of financial disputes, and it is not always easy for parties to find them. As Chief Justice Sundaresh Menon of Singapore put it in his Goff lecture on 9 November 2021, our increasing reliance on expert witnesses is a sure sign of the technical complexification of disputes, a problem on which he gave far reaching insights. As to who actually has this expertise, among other sources, P.R.I.M.E. has a panel of financial experts who

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<sup>14</sup> At present, China's CBDC, known as the e-CNY, is designed mainly for domestic retail payments: Governor YI Gang speaking at the 2021 G30 International Banking Seminar:

<http://www.pbc.gov.cn/en/3688110/3688175/4364815/index.html>

<sup>15</sup> <https://www.enaira.gov.ng/>

<sup>16</sup> Fintech Regulation in China, 26 Oct 2021, <https://www.law.ox.ac.uk/business-law-blog/blog/2021/10/fintech-regulation-china>.

<sup>17</sup> The 2015 CIETAC Rules, and the 2019 Shenzhen Court of International Arbitration (SCIA) Rules for Financial Loan Disputes.

<sup>18</sup> From which appeals go to the Shanghai High People's Court.

are evaluated by a Selection Committee before going on the list<sup>19</sup>.

11. Lastly, I mention the field of Free Trade Agreements, which is another current hot topic. A number of the FTAs the UK is currently negotiating contain provisions for specialised rosters of arbitrators for disputes related to financial services, because of the economic importance of these. These specialised resources join the wealth of financial and commercial expertise already existing in the courts and arbitral institutions of many countries<sup>20</sup>.

12. Technology is a recurrent theme and over time it is bound to have a profound effect on the resolution of financial disputes. The Covid-19 pandemic has accelerated the move to a digital world already. This will involve much more fundamental rethinking than seen to date. In April 2021, the UK Jurisdiction Taskforce published its Digital Dispute Resolution Rules (DDRR)<sup>21</sup> to be used to facilitate the resolution of commercial disputes in this field. The rules allow for arbitral or expert dispute resolution in very short periods, for arbitrators to implement decisions directly on-chain using a private key, and for optional anonymity of the parties. These rules may be particularly useful for parties that have ongoing dealing in digital markets, and mutually concerned to see the swift resolution of disputes. The use of the DDRR, and other rules that will surely come, will not only encourage but require a high level of technical

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<sup>19</sup> As regards expert arbitrators, the American Arbitration Association (AAA) maintains a National Roster of arbitrators for Commercial Financial Disputes, but this list is not publicly available.

<sup>20</sup> Such as the Commercial List in the Hong Kong courts, to which complex commercial cases involving substantial amounts are directed, the Singapore International Commercial Court, the London Commercial Court, and many others. See further the Standing International Forum of Commercial Courts: <https://sifocc.org/>.

<sup>21</sup> [https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-content/uploads/2021/04/Lawtech\\_DRR\\_Final.pdf](https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-content/uploads/2021/04/Lawtech_DRR_Final.pdf). A feature of these rules is the support of the judiciary. The Chair of the UK Jurisdiction Taskforce, Sir Geoffrey Vos, is the senior civil judge in England & Wales.

sophistication from the arbitrators and adjudicators of the future. Young practitioners in arbitration from countries round the globe are very well placed to provide this expertise.

## **How widely is arbitration used in financial disputes?**

13. There is an oft repeated proposition in international arbitration that historically financial institutions have used the courts for resolving their disputes, but that the use of arbitration is growing. To make clear at the beginning – this does not necessarily apply to domestic arbitration. The Shanghai International Arbitration Center (SHIAC) has quoted data released by the Ministry of Justice showing that 544,535 arbitration cases were accepted by the 255 Chinese arbitration institutions in 2018, and of these roughly 22.1% were financial disputes<sup>22</sup>.

14. But, internationally, the 2016 ICC Commission Report<sup>23</sup> conducted an extensive consultation and concluded that generally financial institutions *do* expect to litigate their disputes in court rather than arbitrate – the report also emphasises that there is little opposition to, and the recognition of considerable potential for, arbitration. A project at the University of Cologne on Arbitration in Banking and Finance chaired by Professor Klaus Peter Berger, a long-standing advocate of arbitration considers that such disputes require both industry-specific know-how and specialised legal knowledge: the project is well placed to provide evidence of trends<sup>24</sup>.

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<sup>22</sup> In a 2019 blog: <http://arbitrationblog.kluwerarbitration.com/2019/07/21/developments-in-financial-services-arbitrations-in-shanghai/>

<sup>23</sup> The ICC Commission Report on Financial Institutions and International Arbitration (see above): this is valuable as an evidence based survey. Whilst emphasising its increasing potential, the survey found that most financial institutions did not have substantial experience of international arbitration: 70% of interviewees were not aware of whether their financial institutions had participated in any international arbitration proceedings in the previous five years.

<sup>24</sup> [http://arbinfinanz.uni-koeln.de/arbitration-in-banking-and-finance\\_ID1](http://arbinfinanz.uni-koeln.de/arbitration-in-banking-and-finance_ID1) The project explores the potential of Alternative Dispute Resolution (ADR), especially arbitration and mediation, as instruments

15. One reason may be historical. Today's financial markets, revolutionised by information technology from the 1960s on, never had the tradition of arbitration that developed in international trade<sup>25</sup>. Another more prosaic reason is customer satisfaction. Courts in the major financial centres are seen by financial actors as reliable and predictable, a point made by Inka Hanefeld in writing on this subject<sup>26</sup>.

16. The overall picture, though, makes clear the widespread use of arbitration in particular contexts, such as emerging markets. There is evidence that backs this up. For example, in 2020 the banking and financial services sectors accounted for 13.5% of HKIAC registered cases, and 20% of those of the LCIA. Further, the number of arbitrations that make it into the statistics does not necessarily reflect the frequency of use of arbitration clauses. In December 2020, after considerable reflection, the Beijing based Asian Infrastructure Investment Bank (AIIB) issued General Conditions for Sovereign-backed Loans. These provide for arbitration in accordance with the UNCITRAL Arbitration Rules<sup>27</sup>. However, speaking in Hong Kong, Mr Gerard

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for a more cost- and time-efficient resolution of b2b-disputes in international banking and finance. The resolution of such disputes, Professor Berger says, requires both industry-specific know-how and specialised legal knowledge.

<sup>25</sup> In his book *Making Commercial Law Through Practice 1830-1970* (Cambridge University Press, 2021, pp 361 et seq) Professor Ross Cranston cogently describes the development of arbitration in the international commodity markets.

<sup>26</sup> Inka Hanefeld, 'Arbitration in Banking and Finance' (2013) 9(3) *New York University Journal of Law and Business* 917 at 939: "Ultimately, however, the future of banking and finance arbitration will depend upon the expertise and commitment of the arbitrators and the competitiveness of state courts. As long as state courts are responsive to the needs of the market participants, the banking and finance industries are unlikely to rely on arbitration for dispute resolution. Nevertheless, in certain settings, arbitration is already becoming a preferable method of dispute resolution in the banking and finance industries."

<sup>27</sup> Compare World Bank: General Conditions 8.04 (c) "The Arbitral Tribunal shall consist of three arbitrators appointed as follows: (i) one arbitrator shall be appointed by the Bank; (ii) a second arbitrator shall be appointed by the Loan Parties or, if they do not agree, by the Guarantor; and (iii) the third arbitrator ("Umpire") shall be appointed by agreement of the parties or, if they do not agree, by the President of the International Court of Justice or, failing appointment by said President, by the Secretary-General of the United Nations." By way of comparison, in the case of the IMF, the underlying contract that gives rise to the repayment obligation in respect of financial assistance to a State is the IMF Articles of Agreement itself. With respect to dispute resolution, there is no arbitration agreement. The Articles give the IMF Executive Board and Board of Governors exclusive jurisdiction. I am grateful to Sean Hagan, former general counsel of the IMF, for this information.



Sanders, the then General Counsel of AIIB, explained that, “*These disputes are rarely, if ever, resolved through formal adjudicative processes. ... The problem is almost invariably an economic and political one*”<sup>28</sup>.

17. The OTC<sup>29</sup> derivatives markets are another case in point. The vast majority of cross-border OTC derivatives transactions are governed by the terms of the Master Agreements published by ISDA<sup>30</sup>. The standard terms of ISDA Master Agreements, which have generally provided for disputes to go to the courts of New York or London, have since 2013 had an arbitration option which was expanded in 2018 to include a larger number of arbitration institutions and seats. Although, anecdotally, it seems that use of arbitration is seen more as a feature of emerging markets, the fact that the option is now available is significant in itself.

18. Financial institutions are sophisticated users of legal services, and will use arbitration where it suits them to do so. In project finance, hybrid clauses are common, which include the courts of the host country (where the project is physically situated), commercial arbitration clauses, and potentially giving the courts of leading financial centres jurisdiction under the financing documents<sup>31</sup>. I understand that in M&A transactions transacted in Hong Kong, arbitration is par for the course.

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<sup>28</sup> In 2017 <http://www.hk-lawyer.org/content/face-face-gerard-sanders-general-counsel-asian-infrastructure-investment-bank>

<sup>29</sup> Over the counter derivatives (i.e., those entered into in bilateral and other contractual arrangements) as opposed to exchange traded derivatives.

<sup>30</sup> International Swaps and Derivatives Association.

<sup>31</sup> See e.g. Freshfields, The Project Finance Law Review: Dispute Resolution and Conflict of Laws Risks, 23 June 2021, <https://thelawreviews.co.uk/title/the-project-finance-law-review/dispute-resolution-and-conflict-of-laws-risks>. The Panama canal disputes are an example of a project where guarantees were issued by the contractor with jurisdiction clauses sometimes in favour of arbitration and sometimes in favour of the courts: see *Autoridad del Canal de Panama v Sacyr SA* [2017] 2 Lloyd's Rep. 351 <https://www.bailii.org/ew/cases/EWHC/Comm/2017/2228.html>

## The introduction of new rules in arbitral institutions

19. I turn now to the introduction of new rules in arbitral institutions. In 2018, the International Arbitration Survey carried out by the School of International Arbitration at Queen Mary University of London and White & Case<sup>32</sup> found that ‘expedited procedures for claims’ and ‘summary determination procedures’ were considered the most favoured improvements and innovations to arbitration procedure for the banking and finance industry. The same point had been made by the 2016 ICC Commission<sup>33</sup>. Since then, a number of arbitral institutions have successfully introduced expedited procedures, particularly for lower value claims<sup>34</sup>. This is a very useful development<sup>35</sup>. Since the subject of these remarks is higher value claims, I will concentrate on the other objection – the absence in arbitration of summary determination procedures such as those available in the courts of common law jurisdictions, including of course Hong Kong.

20. Starting with SIAC in 2016, there have been notable developments in this area with the introduction into institutional rules of “*early determination*” provisions. In my view, this is significant. But it does raise some fundamental issues. These have been discussed for some years by leading arbitration practitioners, and I pay respectful

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<sup>32</sup> 2018 International Arbitration Survey by the School of International Arbitration at Queen Mary University of London with White & Case LLP:

<http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf>

<sup>33</sup> See above. In paras 15 and 59.

<sup>34</sup> Expedited Procedure (EP) was introduced in HKIAC’s Arbitration rules in 2013. Since then, HKIAC has received 131 EP applications of which 7.6% were in banking and finance related disputes. The majority of applicants used the ‘amount in dispute is under the threshold’ ground of Article 42.1(a) of the Rules, the threshold being HK\$25million.

<sup>35</sup> See generally, Constantine Partasides QC and Ben Prewett, “Chapter 5: Rediscovering the Lost Promise of International Arbitration” in Laurent Levy and Michael Polkinghorne eds, *Expedited Procedures in International Arbitration*, Dossiers of the ICC Institute of World Business Law, vol 16 (Kluwer Law International; ICC, 2017).

tribute to their analyses.

21. Let me begin with some personal experience. In the United States, section 15(b) of the 2000 Revised Uniform Arbitration Act provides that “[a]n arbitrator may decide a request for summary disposition of a claim or particular issue”. There is no comparable provision in English law, but in a case called *Travis Coal Restructured Holdings v Essar Global Fund*<sup>36</sup> the holder of an award in an ICC arbitration seated in New York was seeking to enforce it in the UK. Enforcement was challenged on the grounds that the tribunal had adopted a summary process. The case involved a claim under a guarantee, so this was a financial case. The tribunal<sup>37</sup> had dismissed certain fraud-based defences, adopting a procedure that fell short of a full hearing on the merits. The respondents objected to enforcement on this ground, but this was rejected by the court, partly on the basis that the terms of the arbitration agreement were wide enough to cover the course taken by the tribunal, but also because the respondent’s submission that a summary process by arbitrators necessarily amounts to a denial of due process was wrong. This conclusion is in accord with decisions reached by courts in the United States<sup>38</sup>.

22. But it has to be admitted that the term “*summary*” can grate on the ears because it has connotations of summary justice, in a pejorative sense, whereas the reality is that in an appropriate case, these procedures provide rather than deny due process.

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<sup>36</sup> [2014] EWHC 2510 (Comm) <https://www.bailii.org/ew/cases/EWHC/Comm/2014/2510.html>

<sup>37</sup> Chaired by Professor William W Park.

<sup>38</sup>E.g., *Weirton Med. Center, Inc. v. Community. Health Systems, Inc.*, US District Court, Civil Action No. 5:15CV132 (N.D.W. Va. Jun. 27, 2017) <https://cases.justia.com/federal/district-courts/west-virginia/wvndce/5:2015cv00132/37511/93/0.pdf?ts=1517261977>

This may explain why in changing their rules, many arbitral institutions have tended to avoid the term “*summary*” and refer to “*early determination*” or “*early disposition*”, which seems a better fit with practice in the international arbitration context.

23. Whatever it is called, the significance of this to FIs, that is, financial institutions, should not be underestimated. It is true that in dispute terms there may be no real comparison between a “simple” claim for repayment under (say) a loan agreement, and a more complicated claim under a complex financial product. Still, financial institutions tend to approach many of their claims on the basis that they are founded on clear counterparty liability, save perhaps for quantification after close outs and the like – but certainly nothing that would justify a full merits hearing. To state the obvious, a default is not the equivalent of a dispute.

24. It should also be borne in mind that although the power to dismiss meritless *claims* is significant, the more significant power from the perspective of FIs is the power to dismiss meritless *defences*, and so enable the claim to proceed to an early conclusion. This can be important in a number of contexts, including the realisation of security.

25. But the benefits of early determination, where appropriate, are not limited to FIs, but apply equally to their counterparties from outside the financial sector. Where the counterparty has a strong claim against a financial institution, it should not be held up. Likewise, if it has a valid defence, it should not be disadvantaged by omitting a full merits hearing. These points are not limited to finance in any way. The reason for early determination rules is to save time and expense – and so seek to address a pervasive criticism of contemporary commercial arbitration – where this is justified for

the case in question. It is true that this requires earlier consideration of the issues in the case than would otherwise happen, but an advantage of arbitration is its flexibility when it comes to procedure.

26. The changes introduced by arbitral institutions are summarised in an article by David L Wallach which has recently been published in *Arbitration International*<sup>39</sup>. He points out that early disposition rules vary significantly in scope and content, and many rules – both institutional and non-institutional – have not yet adopted them. Still, an impressive cohort of institutions have adopted them, including roughly in chronological order SIAC, JAMS, SCC, HKIAC, LCIA, ICC (the latter by way of a Note issued on 1 January 2021<sup>40</sup>) and ICDR. To these should be added investment arbitration rules issued by CIETAC<sup>41</sup> and the Beijing Arbitration Commission<sup>42</sup> and the revised P.R.I.M.E. Finance Arbitration Rules which come into force on 1 January 2022<sup>43</sup>.

27. Yet it seems clear from the available evidence<sup>44</sup> that, so far, the actual *application* by tribunals of such procedures is very much the exception in international

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<sup>39</sup> *The Emergence of Early Disposition Procedures in International Arbitration*, David L. Wallach, *Arbitration International*, 2021, 00, 1–16.

<sup>40</sup> Para 109 et seq <https://iccwbo.org/content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf>

<sup>41</sup> Article 26 of the CIETAC IA Rules 2017 allows the parties to “apply to the arbitration tribunal for early dismissal of claims or counterclaims in whole or in part on the basis that such a claim or a counterclaim is manifestly without legal merit, or is manifestly outside the jurisdiction of the arbitral tribunal”.

<sup>42</sup> 2019 Rules for International Investment Arbitration, Art 34.

<sup>43</sup> Professor Georges Affaki was Chair of the P.R.I.M.E. Finance Rules Review Drafting Group.

<sup>44</sup> The HKIAC ED procedure has been used by the parties in 2 cases in 2020, and in 3 cases in 2021 (as of November 2021). 2 of these cases had banking and finance aspects. The tribunal proceeded with 1 of the applications based on the parties’ agreement but issued an award dismissing the claim subsequently. 4 applications were rejected. According to the SIAC Annual Report 2020, it received 5 ED applications in 2020. 2 applications were allowed to proceed, 1 application was not allowed to proceed and 2 applications were pending under Rule 29.3 of the 2016 SIAC Rules. Of the 2 applications that were allowed to proceed, both were rejected. ICSID statistics are given in a 2021 document (*Objections that a Claim Manifestly Lacks Legal Merit (ICSID Convention Arbitration Rule 41(5))*): <https://icsid.worldbank.org/sites/default/files/publications/In%20Focus%20-%20Rule%2041.5%20final%284.1%29.pdf> .

arbitration<sup>45</sup>. Whilst there are weighty reasons for this, in suitable cases, there are a number of reasons that go the other way. First, these rules having been adopted, applications for early disposition will be and are being made under them. Second, the possibility of early resolution encourages settlement which is as important in the financial field as any other. Third, if conventional procedures cannot provide expedition, then the trend in finance is towards more radical change as in fintech – see the 2021 Digital Dispute Resolution Rules I have already referred to. Fourth, the effects of the ongoing pandemic seem set to change many aspects of arbitral procedures in the long run. Ultimately, of course, the market will decide.

28. But the practical issues that distinguished and experienced arbitrators and practitioners perceive with such procedures are real and need to be addressed. I shall now seek to address a number of the ones that seem most important. A prior question is as to scope: in other words, what are the parameters of a tribunal's powers of early disposition? Subject to the terms of the arbitration agreement, this depends on the scope of the institutional rules. There seems to be no reason of substance why (at least in commercial arbitration) they should not cover the same ground. But the rules do differ, and clearly need to be carefully applied in every case. To keep the present discussion within bounds I shall make an assumption, and treat the institutional rules as broadly covering both claims and defences and individual issues of law and fact arising therein. (There are exceptions such as ICSID Rule 41(5) which is limited to

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<sup>45</sup> “But while parties continue to bring these motions, they are still rarely granted in arbitration, as in reality it can be difficult for a tribunal to unanimously agree, at a relatively early stage in the proceeding, that one or more issues can be definitively determined without a merits hearing. Through the remainder of 2020 and in 2021, however, we may see dispositive motions gain significantly greater acceptance in arbitration procedure. But are these motions prevailing? In recent years, anecdotally, the most common perception among arbitrators and practitioners is that they are more often made but still not often granted.”  
<http://arbitrationblog.kluwerarbitration.com/2020/08/12/dispositive-motions-a-step-change/>

claims, but this is perhaps understandable in investor state arbitration.)

29. The first question is, when does a request, or application, for early disposition have to be made? The ICSID rules prescribe that it has to be made at the outset of the arbitration, but institutional rules seem generally to be relatively unspecific in this respect<sup>46</sup>. This contrasts with rules of court in common law jurisdictions, at least those with which I am familiar. For example, an application for summary judgment can be made as soon as the defendant joins the proceedings, e.g., by giving notice of intention to defend the action. A claimant can thus frame the proceedings at the outset as fit for early determination. This works in practice, because as we all know most disputes begin with lengthy exchanges between lawyers. The parties go into the proceedings knowing perfectly well what the issues are likely to be. In arbitration, likewise, it seems reasonable for tribunals to expect a request by a party for early determination to be made at the earliest point at which it can be made. Otherwise, there will not be the saving in time and costs that this procedure is intended to achieve.

30. Second, what procedure applies to the making of an application? This is again an important question, and again it varies, with some rules providing an outline procedure, with or without time periods, and others, such as the LCIA in its 2020 rules, leaving it largely to the parties and the tribunal. The SIAC rules make clear that the applicant must provide a detailed statement of the facts and legal arguments supporting the application. The responding party then has an opportunity to respond.

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<sup>46</sup> By way of exception, Art 43.3 of the 2018 HKIAC Administered Arbitration Rules provides that it shall be made as promptly as possible; para 101 of the ICC Note to Parties and Arbitral Tribunals on the Conduct of Arbitration dated 1 January 2021 states that the application must be made as promptly as possible after the filing of the relevant claims or defences; Art 35 of the 2022 P.R.I.M.E Arbitration Rules provides that it must be made within 30 days of the date on which the relevant claim or defence is raised or within such other time as may be directed by the arbitral tribunal.

The time frames within the SIAC and HKIAC rules for the tribunal to make a decision on the request and issue an award, if the application is accepted, are important, and in practice in cases of any complexity an extension may well be needed. But subject to the applicable rules, and what is said if anything in the arbitration agreement, it seems generally to be for the tribunal to adopt a procedure<sup>47</sup>. This requires considerable thought, because there is always the risk that weak applications are made for strategic reasons bogging the whole arbitration down.

31. For this reason, some institutional rules<sup>48</sup> expressly provide for a process by which the tribunal first reaches a preliminary decision on whether to allow the application to proceed. If it does, then it goes on to decide the outcome of the application after further submissions and potentially a hearing. This is different from court procedures, under which a party has a right to proceed with a summary judgment application. But it seems sensible in the arbitration context, since if the tribunal feels, having received a request, that it is unlikely to go down that road, time will not be taken up on the application. Even where this is not explicitly provided for in institution rules, there is no reason why a tribunal should not adopt this course.

32. Because of the depth of experience in the United States of dealing with such procedures, it is illuminating to see how this issue is dealt with in Article 23(1) of AAA's 2021 ICDR International Dispute Resolution Procedures. Under this rule, a party has to seek the tribunal's permission to submit an application for early disposition.

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<sup>47</sup> In the 2021 ICC Note, para 112 states that if the arbitral tribunal allows the application to proceed, it shall promptly adopt the procedural measures it considers appropriate, after consulting the parties. The responding party or parties shall be given a fair opportunity to answer the application. Further presentation of evidence will only be allowed in exceptional circumstances.

<sup>48</sup> E.g. SIAC, HKIAC, ICC, and P.R.I.M.E. rules.



Permission will be given if the tribunal determines that the application (a) has a reasonable possibility of succeeding, (b) will dispose of, or narrow, one or more issues in the case, and (c) that consideration of the application is likely to be more efficient or economical than leaving the issue to be determined with the merits. These are useful criteria under any rules. Making a formal *determination* at the preliminary stage as to whether or not an application has a reasonable possibility of succeeding seems to be tricky and unnecessary, and reading the rest of the rule, this does not seem to be required<sup>49</sup>. The tribunal's role at this stage is only that of gatekeeper – it is deciding whether allowing the application to go ahead is the efficient course, or whether time and resources are better spent in allowing the matter to proceed to a merits hearing.

33. That brings me to the critical question, that is, the threshold test. The experience of the common law and other courts can offer insights, but the test is an international one. However, it is fair to say that whether in court, or in arbitration, deciding these issues necessarily involves questions of judgment, dependent on the facts and the applicable law and the overall shape of the case. However the most important point is that this procedure is only for clear cases.

34. In the ISDS context, the test for early dismissal under ICSID rule 41(5) is that the claim in question is “*manifestly without legal merit*”. This use of the word “manifestly” has been stated by tribunals<sup>50</sup> as requiring the applying party “*to establish*

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<sup>49</sup> By Art 23(2), each party shall have the right to be heard and a fair opportunity to present its case regarding whether or not such application should be heard and, if permission to make the application is given, whether early disposition should be granted. By Art 23(3), The arbitral tribunal shall have the power to make any order or award in connection with the early disposition of any issue presented by any claim or counterclaim that the tribunal deems necessary or appropriate. The tribunal shall provide reasoning for any award.

<sup>50</sup> *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, para 88, [http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C254/DC750\\_En.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C254/DC750_En.pdf), applied in

*its objection clearly and obviously, with relative ease and despatch. The standard is thus set high*". The test as stated does however go on to make it clear that the mere fact that the issues are complicated is no bar – this is an important consideration in financial cases. The import of it is that a reasonable investigation to determine the weight of the issues is in order, but it should not be so lengthy as to amount to a merits hearing in all but name without the rights that parties have at such a hearing. Since the word "*manifestly*" is commonly found in institutional rules, this test is likely to be persuasive.

35. In the courts of common law jurisdictions, if summary judgment is not granted it is standard practice to give directions after considering the application. This may be a good course for a tribunal as well. If it is of the view that the applicant's case is substantial, but not quite up to the requisite standard, the opportunity is there to consider whether to apply expedition. Crucially, the making of the application may give the tribunal a better understanding of the issues than it may often have at the time of the first procedural meeting.

36. Many other practical points will occur to arbitral practitioners. These will be worked out by tribunals over time. But given that in 2021 alone, at least three arbitral bodies have introduced early disposition provisions, there should be ample opportunity to do so. Confidence on the part of FIs that procedures allow for the rapid adjudication of what the 2016 ICC Commission described as open-and-shut cases<sup>51</sup> are (as anticipated in its report) an effective way of attracting financial claims that

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*Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25 Award 9 March 2017, para 62 <https://www.italaw.com/sites/default/files/case-documents/italaw8538.pdf>

<sup>51</sup> Ibid para 59.

would otherwise not come to arbitration.

## **What may lie ahead?**

37. It is difficult at the best of times to predict even the near future, and the midst of a pandemic is (to adapt Charles Dickens' famous phrase) the worst of times<sup>52</sup>. I have discussed the centrality of fintech already, and there are three other points that I would venture to mention which seem relevant to financial disputes, and how we resolve them.

38. The first goes to encouraging conciliation at an early stage, allowing commercial life to continue. This is not unique to finance of course, but it is important to highlight it, particularly in a pandemic. We are working on this in BIICL's breathing space project, and have produced guidelines<sup>53</sup> on how to encourage a conciliatory approach, trying to avoid or minimise legal proceedings, without altering the parties' legal rights should conciliation fail.

39. The second is about the role of arbitration in China's vast financial sector. Because the sector is so big, it seems probable that an increasing number of disputes will require formal adjudication, which in turn, will lead to developments in financial law<sup>54</sup>. The role of the law was emphasised in remarks given by Governor Yi Gang of the Peoples Bank of China at the 2021 G30 International Banking Seminar in the context of the problems of Evergrande, which have been much publicised, and which

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<sup>52</sup> Charles Dickens, *A Tale of Two Cities*, first published in 1859.

<sup>53</sup> The BIICL Guidelines <https://www.biicl.org/publications/breathing-space-concept-note-3-on-guidelines-for-the-resolution-of-disputes-following-the-2020-pandemic>

<sup>54</sup> See generally Wang Fu, *Corporate bond defaults in China: legal issues and possible solutions*, *Capital Markets Law Journal*, Volume 16, Issue 2, April 2021, Pages 117–140. Judge Wang Fu heads up the No.2 Trial Division of the Shanghai Financial Court.

he said would be dealt with in strict accordance with the law<sup>55</sup>. The probable increase in the role of adjudication takes place against the background of proposed reforms to China's arbitration law, including a proposal which may open its market to foreign arbitration institutions<sup>56</sup>.

40. There is a further important practical point to make. In any arbitration, resolving disputes effectively can be thwarted by the perennial problem of assets disappearing in advance. For financial institutions, as with other claimants, the availability of interim relief whereby assets are preserved is potentially a game changer. Here Hong Kong has an advantage, as the only arbitration venue outside of Mainland China where parties to arbitrations may obtain interim relief from the courts there. The Mutual Assistance Arrangement in Court-Ordered Interim Measures in Aid of Arbitral Proceedings was concluded in 2019<sup>57</sup>. As of 18 November 2021, according to the statistics HKIAC has provided, the institution has assisted in 56 applications by way of a letter of acceptance. 53 applications were made for the preservation of assets, two were for the preservation of evidence, and one was for the preservation of conduct. I understand that so far as HKIAC is aware there have been 40 decisions of the Mainland Courts, of which 37 granted interim relief, in sums totalling RMB12.4 billion (approximately USD1.9 billion)<sup>58</sup>.

41. I am happy to close with the third point. It is about the growing need for sustainable finance. As regards climate change, the United Nations has described

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<sup>55</sup> <http://www.pbc.gov.cn/en/3688110/3688175/4364815/index.html>

<sup>56</sup> <https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2022/article/china>

<sup>57</sup> <https://www.hkiac.org/content/interim-measures-arrangement-one-year>

<sup>58</sup> HKIAC PRC-HK INTERIM MEASURES ARRANGEMENT: FREQUENTLY ASKED QUESTIONS, para. 5, available at: <https://www.hkiac.org/Arbitration/interim-measures-arrangement-faqs>

climate finance for both mitigation and adaptation to climate change as a key pillar to achieving the goals of the Paris Agreement. This has long term implications for the incidence and resolution of financial disputes, as was noted in a 2019 ICC Report on Resolving Climate Change Related Disputes through Arbitration and ADR<sup>59</sup>. In advocating early resolution, this report points out that “Climate change action is universally acknowledged to be urgent; arbitration of climate change related disputes must be able meaningfully to accommodate that urgency”<sup>60</sup>.

42. Sustainability is on everyone’s minds and rightly so. And in the conduct of arbitrations, the Campaign for Greener Arbitrations has had an impressive uptake of the Green Pledge<sup>61</sup>. As an increasing number of arbitration practitioners sign up to it, it would be good to think that we can all make a difference.

43. Thank you for listening to these remarks.

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<sup>59</sup> <https://iccwbo.org/publication/icc-arbitration-and-adr-commission-report-on-resolving-climate-change-related-disputes-through-arbitration-and-adr/>

<sup>60</sup> Ibid at 5.34.

<sup>61</sup> <https://www.greenerarbitrations.com/institutional-supporters>