

INTERNATIONAL FINANCE ARBITRATION

Barcelona, 20 October 2012

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LALIVE

OVERVIEW

- I. Examples of finance disputes submitted to international arbitration
- II. Widespread arguments against the use of international arbitration for resolving finance disputes
- III. Organizations dedicated to administering arbitrations involving complex financial transactions
- IV. A new type of international finance arbitration ?

I. Examples of finance disputes submitted to international arbitration

- A. Project finance
- B. Financing of international trade
- C. International loans to State and private borrowers

I. Examples of finance disputes submitted to international arbitration

A. Project finance disputes

1. Private and public funding
2. Complex interrelated contracts
3. Between multiple parties of different nationalities
4. Governed by multiple laws

I. Examples of finance disputes submitted to international arbitration

B. Financing of international trade

1. The ICC's Uniform Customs and Practice for Documentary Credits
2. ICC's Documentary Credit Dispute Resolution Expertise (DOCDEX)
3. Export Credit Agencies

I. Examples of finance disputes submitted to international arbitration

C. International loans to State and private borrowers

1. Issues of sovereign immunity
2. Disparity between economic growth and rule of law
3. The compromise of arbitration

II. Arguments against the use of international arbitration in finance disputes

- A. Arbitration is protracted and more expensive than state court proceedings
- B. Important areas of banking and finance are excluded from arbitration
- C. Unpredictable awards

II. Arguments against the use of international arbitration in finance disputes

A. Arbitration is costly and lengthy

1. Compared to what?
2. Reasons for costs and delays
3. Ultimately within the control of the parties

II. Arguments against the use of international arbitration in finance disputes

B. Arbitrability of finance disputes

1. The arbitrability of finance disputes is widely accepted, including in the U.S., England, Switzerland, and Germany
2. Tribunals must apply rules of public policy and must draw the consequences of their violation
3. However, some public policy rules are so fundamental that they render some categories of disputes inarbitrable

II. Arguments against the use of international arbitration in finance disputes

C. Predictability of arbitration awards

1. Arbitrators cannot decide *ex aequo et bono* or as *amiable compositeur* unless the parties agree
2. It is true that awards are not published and there is no precedent
3. Administering institutions such as the ICC ensure greater consistency in awards
4. Arbitrators' experience in finance disputes may be limited in some cases

III. Organizations dedicated to administering finance arbitrations

- A. City Disputes Panel
- B. International Center for Letter of Credit Arbitration
- C. European Centre for Financial Dispute Resolution (“Euroarbitration”)
- D. Panel of Recognized International Market Experts in Finance (“P.R.I.M.E. Finance”)

IV. A new type of finance arbitration?

- A. Some investment tribunals had previously established that government debts can qualify as an investment in the sense of Article 25 ICSID Convention
 - 1. *Fedax N.V. v. Republic of Venezuela* (ICSID Case No. ARB/96/3), Decision of the Tribunal on Objections to Jurisdiction of 11 July 1997, §§ 37-42
 - 2. *Ceskoslovenska Obchodni Banka, A.S. v. the Slovak Republic* (ARB/97/4), Decision of the Tribunal on Objections to Jurisdiction, §§ 88-91

IV. A new type of finance arbitration?

- B. There still remained doubts whether bonds traded on secondary markets could constitute an investment

- C. *Abaclat and Others (Case formerly known as Giovanna A Beccara and Others) v. the Argentine Republic* (ICSID Case No. ARB/07/5), Decision on of the Tribunal on Jurisdiction and Admissibility of 4 August 2011
 - 1. Tribunal held that bonds traded on secondary markets could constitute an investment

 - 2. Tribunal accepted mass claims

 - 3. Strong dissent by Prof. Abi-Saab

IV. A new type of finance arbitration?

D. Implications for sovereign debt defaults: the Greek case

1. Greece's sovereign debt was restructured in March 2012
2. 10% of bond holders refused the "voluntary" bond restructuring
3. Retroactive Collective Action Clauses
4. In March 2012 Greece enacted a law which automatically amends all domestic bonds to include RCACs
5. Expropriation?