The Use of Arbitration Clauses in the Field of Banking and Finance

Current Status and Preliminary Conclusion

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This article is not meant to be a scientific paper. Nor is its purpose to clarify geographically and in detail the cases and reasons for which banks are willing to submit to arbitration disputes arising in connection with business activities between themselves or with customers. Any analysis must differentiate according to the nature of the underlying business. The following article investigates the fields of modern banking and finance in which arbitration clauses are used. The readers of The Journal of International Arbitration are invited to communicate their own ideas, opinions and practical experience on this subject to the author.

I. RELATIONSHIPS AMONG BANKS

In the case of mergers or acquisitions (M & A), banks differ little from companies without banking status. Although this field nowadays is largely determined by national public law (stock exchange laws and take-over regulations), arbitration clauses for the settlement of disputes arising out of the implementation and interpretation of such transactions can be found in M & A agreements. Thus, for example, the merger contract between Union Bank of Switzerland and Swiss Bank Corporation contains an arbitration clause. Moreover, arbitration clauses can be found in co-operation and outsourcing agreements, for example in the fields of information technology and real estate. The main motives for choosing arbitration clauses in these cases are for the swift settlement of disputes and for the secrecy preserved by the procedure. The rules of the Swiss stock exchange and the rules and regulations of the Swiss Options and Financial Futures Exchange (Soffex) also provide for the settlement of disputes between the Elektronische Börse Schweiz (Ebs) and Soffex banks by way of arbitration. The procedure follows the Swiss inter-cantonal agreement on domestic arbitration (Konkordat über die Schiedsgerichtsbarkeit) of 1969 and/or the mini-trial procedure of the Zurich Chamber of Commerce. In traditional inter-bank business (payment services, money-market trading, documentary credit operations, etc.), documentation of agreements is either rudimentary or largely standardised. In this business area,

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arbitration clauses are practically non-existent. Although the Uniform Rules and Practice of the International Chamber of Commerce, upon which documentary credit operations are usually based, provide for arbitration clauses for the settlement of disputes concerning the interpretation of uniform rules, use of these rules is, so far as the author is aware, the exception. Nonetheless, to reduce costs and delays in documentary credit litigation, parties to letters of credit sometimes agree to submit their controversies to arbitration under the rules of an institution that has developed experience in documentary credit disputes.

II. Relationships among the Banks within the Framework of their Professional Associations

In numerous countries, banks are organised into professional associations (bankers' associations, stock exchange associations, etc.). These associations usually oblige their members to comply with certain codes of conduct. Infringement of such codes often entails drastic sanctions for the member concerned. In most cases, committees of these professional associations, or arbitral tribunals, pronounce judgments on rule infringements. An example of such a code in Switzerland is the Convention relative à l'obligation de diligence des banques (CD8 92) between the Swiss Bankers Association and its associated banks. If the penalty decreed by the Supervisory Commission is not paid on time, an arbitral tribunal is empowered to handle the case upon request of the Swiss Bankers Association, and can make a final award concerning the existence of an infringement of rules and a possible contractual penalty.

III. The Underwriting of Securities Issues

The underwriting and placement of securities issues is a legally complex subject. There are not only different agreements which govern the relationship between the issuer, the underwriter and the placing syndicate, but also a number of statutes and regulations (some of them compulsory) to comply with (e.g. prospectus requirements and stock exchange and investment laws). In addition, most issues are almost invariably combined with derivative transactions in order to minimise costs and limit risks.

It is true that international arbitral tribunals have frequently dealt with legal aspects of the underwriting business. In most of these cases, the questions raised were related to the impact of territorial and monetary changes on foreign public debt issues. In spite of the positive experience gathered with arbitration, arbitration clauses are still the exception in the international securities underwriting business. Usually, ordinary court

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1 Uniform Rules and Practice for Documentary Letters of Credit, ICC 500, 1994. Moreover, the International Chamber of Commerce (ICC) has recently developed a procedure in which expert opinions on letters of credit can be delivered (ICC Rules for Documentary Credit Expertise—DOCDEX). The dispute resolution process will be administered by the ICC Centre for Expertise in conjunction with the ICC Banking Commission. See also C. Vélez-Rodríguez, Alternative Dispute Resolution System for Documentary Credits, Bulletin ASA 2, 1996, at pp. 232 et seq.

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jurisdiction is agreed upon, regardless of whether the issuer is a State, an international organisation, or a legal person under public or private law.³

IV. FINANCIAL DERIVATIVES

Most financial derivatives are traded through specialised stock exchanges or well co-ordinated over-the-counter (OTC) markets. Of great significance in this field are tailor-made and yield attractive OTC transactions that schematically can be divided into futures, swaps and options. They are subject to swift market developments and are usually structured in a complex and combined form. OTC derivatives are concluded mainly to hedge interest and exchange rate risks. Nowadays, they are an indispensable financial instrument in fund raising, trading and asset management for customers, as well as in asset and liability management of banks, large companies and institutional investors. Professional risk management within the framework of international capital market transactions is no longer conceivable without financial derivatives.

Due to its dynamic risk, which is influenced by market conditions, globalisation of markets and correlation between market makers, the loss potential connected with these products (in particular, counterparty, settlement and liquidity risks) may assume considerable proportions. Consequently, market participants must submit to a multitude of provisions under public law, stock exchange regulations and basic (master) agreements. The fast development of these markets has rendered harmonisation of the operational and risk-control procedures not only desirable but, against the background of market and legal security, absolutely necessary. In credit-sensitive OTC trading, professional associations and “market makers” (i.e. primarily commercial and investment banks) have drawn up basic agreements (so-called “master agreements”) for market participants in order to limit the risks. Among the more important are:

- the 1992 Cross-border Multi-branch ISDA Master Agreement;
- the International Currency Options Market (ICOM) Agreement;
- the International Foreign Exchange Master Agreement (IFEMA);
- the International Bullion Master Agreement;
- the PSA Global Master Repurchase Agreement; and
- the PSA Master Securities Loan Agreement.

Due to their close relationship with the financial centres of London and New York, most of these international master agreements⁴ provide for the jurisdiction of the courts


⁴ For many banks (especially foreign banks operating in the most important financial centres), these master agreements are the legal basis for derivative transactions.
of England or the United States, depending on the choice of applicable law. On the other hand, basic agreements have also been drawn up for local markets. In Japan, for instance, an ISDA Single Branch Agreement is used with Japanese counterparties. It is subject to Japanese law and ordinary Tokyo court jurisdiction. In Switzerland, the large banks introduced a master agreement for OTC derivatives for their Swiss customers in 1994. It was originally designed for professional counterparties (such as banks and insurance companies), but in the meantime has also been used for major institutional and private clients. It is subject to Swiss law and also provides for ordinary court jurisdiction.

An analogous regulation is implied by the German Rahmenvertrag für Finanztermingeschäfte and by the French Convention-Cadre relative aux Opérations de Marché à Terme. With respect to the reasons for preferring ordinary court jurisdiction in the field of OTC derivatives, a partner in a prominent New York law firm, commented in a letter dated July 1997 to the author that:

“We see little evidence of arbitration being used to settle derivative disputes. The nature of derivatives transactions, especially the amounts at issue and potential impact of individual disputes on other transactions, greatly reduces any dealer’s interest to submit individual disputes to third parties for resolution, although it matters little to the contracting parties whether the third party is an arbitrator or even a tribunal. There seems to be a general perception that the less formal a dispute resolution process, the greater the risk of an incorrect legal result. As a result, derivatives markets place a premium on negotiated settlements; the perception is that an adverse decision of any type of ruling in a litigation or arbitration may well have consequences far beyond the particular dispute.

Disputes involving contracts between financial institutions and individual derivative traders, on the other hand, are as frequently arbitrated as other employment matters. In fact, we have seen large financial institutions agree to arbitration in disputes between themselves involving the movement of groups of traders from one institution to another in order to avoid the risk of disclosure of proprietary information that normal discovery and litigation entail. Accordingly, with the proliferation of modelling and the like in all structured financial products, including derivatives, one might expect an increase in the attractiveness of arbitration in disputes where the downside risks of the disclosure of proprietary information are deemed substantial.”

With respect to exchange traded derivatives, the situation is different. In this case, the individual stock exchange determines the procedure and method of dispute settlement, and arbitration is common practice here. As already mentioned above, the Swiss Soffex provides for arbitration proceedings.

V. SECURITIES BROKERAGE AND ASSET MANAGEMENT

In the case of securities transactions between investors and banks or brokers, as well as in the case of “inter-industry claims” between firms operating in the securities business, arbitration clauses can be found relatively often. This applies above all to the

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5 Nevertheless, in the United States arbitration clauses can occasionally be found in this field of business. To the author’s knowledge, these clauses are used by a few major US banks, including the now merged Bank of America and Nationsbank, as well as Chase Manhattan.
United States and a number of European States. Individual legal systems, however, use different criteria for their application. In the United States, where securities arbitration has been common since 1989, the Securities Industries Conference of Arbitration has developed a Uniform Code of Arbitration. Claims against brokerage firms usually relate to misbehaviour such as "churning" (needless buying and selling of securities to generate commissions), unauthorised or unsuitable trading, and misrepresentations.

In the case of cross-border transactions, arbitration clauses can also be found. If they have been stipulated, corresponding procedures are carried out at the domicile of the bank or the broker, or at the place where the securities were sold. The choice of a neutral place of arbitration, so far as the author is aware, is extremely rare.

In Swiss banking practice concerning asset management, the banks general business conditions and special agreements (e.g. an asset management mandate) govern the legal relationship between banks and private or institutional investors. In all cases, the domicile of the bank is regularly stipulated as the place of jurisdiction. In the author's professional practice, he is not aware of any asset management case where an arbitral tribunal was requested to settle a legal dispute. To the author's knowledge, most internationally operating European banks apply similar regulations. Theoretically, exceptions are conceivable, for example in cases where an interest in maintaining or protecting the confidentiality of an important customer relationship or of proprietary information (significant in institutional asset management) requires a different way of settling disputes.

VI. INTERNATIONAL SYNDICATED LOANS AND OTHER FORMS OF FINANCING, INCLUDING BANK GUARANTEES

International credits are usually established in the form of syndicated loans. Thus, legal disputes may come into existence at two levels: at the first level, in the relationship between syndicate members, and at the second level, in the relationship between the bank syndicate and the borrower. Disputes within the syndicate are, in the interest of contractual performance, usually settled by mutual consent under the leadership of the agent. Should litigation become unavoidable, then courts at the agents' seat are usually turned to for dispute settlement. As far as the author is aware, arbitration clauses for the settlement of disputes within the syndicate are the exception. As to the actual credit agreement between the bank syndicate and the borrower, the following observation can be made. Courts are usually designated for the handling of disputes (depending on the choice of applicable law) either at the seat of the agent or the borrower. On the other

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6 Compare H. van Houtte, Arbitration involving securities transactions, Arbitration International, 1996, Vol. 12, No. 4, at p. 405: "At present, arbitration over securities transactions appears to be flourishing and well structured in the US. A survey undertaken a few years ago revealed that over ten million contracts contained arbitration clauses. Moreover, over 95 per cent of margin agreements and of option agreements contained such clauses... Arbitration seems to be the accepted way to settle disputes between customers and firms in relation to securities transactions.”

7 As note 2, above, at p. 233.
hand, considerations related to business policy and/or judicial enforcement may in some cases make the use of an arbitration clause necessary.

Thus, arbitration clauses can be found when:

- neither party is ready to accept court jurisdiction, either at the seat of the agent or at the seat of the borrower;\(^9\)
- there is no stable constitutional and legal system at the seat of the borrower;
- a court judgment pronounced at the seat of the agent is difficult to enforce at the seat of the borrower; or
- the borrower owns considerable assets in third countries.

In these cases, arbitration clauses provide an adequate solution for the settlement of disputes. Nevertheless, such clauses are still an exception in the field of international commercial financing, at least in Western Europe and the United States.\(^9\) Interesting in this respect is the following information communicated to the author by London and New York attorneys. The New York colleague commented in a letter dated October 1987 as follows:

"The observation that [United States] banks generally are reluctant to agree to arbitration is consistent with our experience. As you know, we [our law firm] have represented banks and borrowers in numerous international loan syndications and straight loans. In none of these transactions has the bank or bank group agreed to submit disputes to binding arbitration. [The statement then refers to numerous advantages of arbitration in international financing.] In light of the above-discussed benefits of using arbitration to resolve disputes between lenders and borrowers, it is surprising that no more use is made of the procedure. In fact, we do not discern a lasting trend in the US-banking community toward the use of arbitration to resolve loan agreement disputes. In our view, one reason for this lack of arbitration is the bank’s unwillingness to relinquish what they perceive to be the greater predictability of results available through judicial resolution of legal disputes. Another reason is the very limited ability to appeal an arbitration decision. Further, most banks select the law of a commercially friendly jurisdiction, such as the New York tribunals, to govern the loan documents and dispute resolution. They also frequently require the borrowers to waive the right to a jury trial—and hope that such a waiver is enforceable. Another factor that tends to make arbitration less appealing to banks is, surprisingly enough, its efficiency. Banks in the US are advantaged in court litigation by their 'deeper pockets' and their ability to drag out ordinary litigation by motion practice, discovery requests, etc. Since the cost of litigation here can be prohibitive for economically weaker litigants, the party with financial resources is generally advantaged in court proceedings as distinguished from arbitration.\(^10\)"

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\(^8\) This happens above all in agreements with government or government-owned entities that, because of their sovereignty, are often not willing to submit to a foreign State court jurisdiction.

\(^9\) The Bank of America, Nationsbank and Chase Manhattan use arbitration clauses increasingly both in local and international credit agreements.

\(^10\) That arbitration may well be justified from an US legal point of view is confirmed by William W. Park in L'arbitrage et le recouvrement des prêts consentis à des débiteurs étrangers, McGill Law Journal, Vol. 37(2), 1992, at p. 394: "A dispute settlement provision providing for arbitration, included in a loan agreement, may permit the banks to overcome at least two obstacles: the State doctrine and the doctrine of sovereign immunity. Moreover, an arbitration judgment will sometimes be easier to enforce than a court judgment. More than 85 countries have ratified the New York Convention on the Recognition and Enforcement of Arbitral Awards. However, no country, not one, has concluded a bilateral agreement with the United States on the enforcement of judgments. Lastly, arbitration can soften the result of an action brought by a debtor that invokes lender liability when a bank refuses to loan new funds." (Translated from French.)
The London colleague said the following in early December 1997:

“We have not seen much evidence of the use by banks or financial institutions of arbitration. Historically in England, arbitration has had several major problems. Unless you have had a strong arbitral institution and panel of arbitrators and unless the parties co-operated, arbitration could be as slow as litigation. In addition, parties who were not included in the original arbitration agreement might not be joined in the arbitration, with the result that you could have concurrent litigation and arbitration on the same matter and involving extra costs. Another difficulty was that the (former) Arbitration Act was somewhat inaccessible to the lay man and that people feared the intervention of the tribunals in the arbitral process. There have, however, been two major changes as of late. First, there seems to be a general move to involve ADR [alternative dispute resolution] more and more in disputes. The trend towards ADR is being matched by the arrival of various ADR institutions. Second, the law of arbitration has been overhauled by the Arbitration Act of 1996 that involved a major effort to re-write the old law of arbitration to make it understandable to the business world. It will be interesting to see if this results in the greater use of arbitration to settle financial disputes.”

There are some signs that relative difficulties in the enforcement of court judgments versus arbitral awards have led to changes in certain jurisdictions. A colleague in Vienna reported that it is now quite common for arbitral clauses to be included in loan syndication agreements involving facilities for banks and corporations in Russia and some other Eastern European countries. The reasons are practical. Austrian court judgments may sometimes be enforceable only with great difficulty. Documentation may be in English, incorporate concepts from neither the jurisdiction of the borrower nor lenders, and impartiality may be required. An Austrian court, applying Austrian law, with its procedure and judgment in German, may have difficulty coping with this situation.

The observations on syndicated loan agreements can also be applied to bank guarantees or stand-by letters of credit. Although arbitral clauses are rarely found in this field of business, they are sometimes included both in the basic agreements between principal and beneficiary and in the bank guarantee agreement or stand-by letters of credit themselves.

In the case of international public sector financing, however, where one of the numerous multilateral financial institutions (World Bank, Asian Development Bank, ...
Inter-American Bank, African Development Bank, European Bank for Reconstruction and Development, etc.) acts as a lender, arbitration clauses are the rule. The Standard Terms and Conditions of the European Bank for Reconstruction and Development adopt the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules, and designate the International Court of Justice as the appointing authority. The World Bank's general conditions applicable to loan and guarantee agreements provide for arbitration under an ad hoc procedure. With respect to the applicable law, the general conditions (for loan agreements) of most of these institutions are based on the rather vaguely worded model of the general conditions of the World Bank.13

Moreover, arbitration clauses can be found relatively often within the framework of the financing of international projects, co-financings of banks and public institutions (e.g. when government or public sector credit insurance agencies participate in the financing), as well as in finance agreements related to government-sponsored foreign investment projects.

VII. ALTERNATIVE DISPUTE RESOLUTION (ADR) AND OTHER RECENT DEVELOPMENTS

Significant and often unacceptable difficulties exist in utilising the court system for the settlement of banking and financial disputes. The financial consequences and costs associated with the loss of a business relationship can be greater than the amount in dispute. The adversarial system in common law countries often acts as a disincentive to settlement (at least, as a disincentive to the lawyers, who are often paid by the hour, rather than according to how quickly and effectively a dispute is resolved). It is also commonly used as a commercial weapon. The topic is now a political issue in many countries.

One consequence has been experimentation with ADR in financial matters, especially in Anglo-US systems. The concept of an “Ombudsman” is now common. This is a public official to whom complaints can be referred for investigation and mediation. Although normally only used for consumer complaints against banks, it is now being expanded, for instance in Australia, for use with commercial clients.

Perhaps the most interesting instance of ADR being applied to large, complex and sensitive situations has been the City Disputes Panel (CDP). Founded in 1994 in London, it seeks to settle disputes in the “Wholesale Financial Services Industry”. The forms of dispute settlement used are conciliation, mediation, evaluation, expert determination and arbitration. Panels are usually composed of one experienced lawyer, and two “financial market practitioners”, in recognition of the need for technical

13 The general conditions, s. 10.01 provides: “the rights of the parties shall be valid and enforceable in accordance with their terms notwithstanding the law of any State or political subdivision thereof to the contrary”. It is interesting to note that up to now, there has not been one single dispute resolved by arbitration (see Aron Broches, Correspondence to the Co-Editor in Chief, American Journal of International Law, Vol. 91, No. 3, 1997, at p. 490).
expertise. Depending on the urgency of the case, there is an "ordinary procedure", a "fast-track procedure" and a "short-notice procedure". The CDP aims at fast and expert dispute resolution.

A recent impressive example of the work of the CDP was summarised in a notice in the Financial Times of 13 March 1998, announcing the implementation of a conciliation plan relating to a dispute between the bondholders in Barings and the administrators of the banking group. Both parties agreed on suggested terms and the settlement was put to the courts for ratification.

VIII. THE OBJECTIONS OF BANKS TO ARBITRATION: A RESPONSE

Arbitration in banking and finance is still the exception, apart from securities arbitration in the United States, the practice of a few major US banks, certain public sector financings, and the increasingly important bank-related work of ADR institutions in the City of London. According to the General Counsel of a major Swiss bank, what is found increasingly in other business segments is a subsequent agreement on conciliation/mediation or arbitration, if disputes arise out of a contractual relationship that provides for court jurisdiction. The author believes that the following arguments may explain the reticence of banks to utilise arbitration clauses:

- the fear of unpredictable arbitral awards\textsuperscript{14} and of inequitable ex aequo et bono decisions;
- a desire for "correct decisions" and maximum legal security for complex transactions, as well as the interest among banks in swiftly achieving consistent court decisions (primarily in the field of capital market activities and derivative transactions); and
- the fear that pre-award attachments and interim judicial injunctive relief will be excluded in arbitration proceedings.

Banks are also critical of arbitration because:
- the arbitration clauses invariably provide for one single forum, whereas standard agreements can provide for non-exclusive legal venues; the choice of an ordinary court selection clause would facilitate the selection of a "friendly jurisdiction";
- the possibilities of appeal in arbitration proceedings are largely restricted;
- in arbitration proceedings only those litigants that have agreed to the arbitration clause may be included; and
- arbitration proceedings can be protracted and sometimes more expensive than court proceedings.

From the author's point of view, these arguments do not withstand a thorough examination as explained below.

The (alleged) unpredictability of arbitral awards may be best countered by the

\textsuperscript{14} In arbitration, the parties assume some risk of a "bad award" when an arbitrator gets the facts or the law wrong. However, normally the parties do not permit the arbitrators to exercise excess authority, to be biased or to depart from fundamental procedural fairness (see note 2, above, at p. 251).
choice of qualified and professional arbitrators, a possibility court proceedings cannot ensure. In addition, it is known that resort to court jurisdiction cannot prevent unpredictable judgments. Both in the Continental and Anglo-US legal system, arbitral tribunals must make their decisions on the basis of the contracts under examination and usually in accordance with the applicable law chosen by the parties, and not according to "equitable considerations". If the parties have not determined the applicable substantive and procedural law, it is the arbitral tribunal’s task under all modern legal systems to determine such law.\textsuperscript{15} If an arbitral tribunal intends to decide exclusively \textit{ex aequo et bono}, or on the basis of general principles of private law, it must be authorised to do so by all participating parties. Contravention of this principle is usually regarded as a violation of the public policy of the forum and may be a grounds for appeal.

In the OTC derivatives business, practically all master agreements provide for ordinary court selection agreements. The primary motive for choosing court jurisdiction seems to be the need for recourse to harmonised case law, and thus the desire for optimal market and legal security. In contrast to court procedures, the arbitration process, by choosing experienced and professional arbitrators, offers the opportunity to introduce experience, impartiality and a maximum of expert knowledge into the decision-making process. The quality of the arbitrators also helps to expedite the proceedings. Moreover, it is an open secret that banks are often inclined to pursue out-of-court settlements arising out of complex market transaction disputes whenever this is feasible, due to their fear of the negative effects of court judgments on their future activities. Thus, trust in the efficiency of State courts does not appear to be unlimited.

Modern Arbitration Acts usually vest arbitral tribunals with the competence to order preaward attachments and interim relief. The Swiss legislature has embodied this competence in Article 183 of the Federal Act on Private International Law. This is also in harmony with the most important international arbitration codes which vest arbitral tribunals with this competence.\textsuperscript{16} Last but not least, the stipulation of an arbitration clause does not exclude the possibility to appeal to State courts for protective measures. Thus, the parties are free to file such a petition in a State court, if this course of action appears to be more favourable.

When they conclude a contract and agree to arbitration, the parties may choose, apart from the substantive law, the law applicable to the arbitration proceedings. In so doing, they will be guided by considerations of expediency. The parties are free to choose an acceptable legal environment that favours arbitration within a balanced \textit{lex arbitri}, guaranteeing transparent and fair proceedings, secrecy and, measured against the requirements of the dispute, a swift conclusion to the procedure. The guarantors for achieving such results are primarily the arbitrators. Arbitration cannot guarantee a

\textsuperscript{15} Recently revised arbitration rules—of the American Arbitration Association (AAA), the London Court of International Arbitration (LCIA), the World Intellectual Property Organisation (WIPO) and ICC 1998 and most statutes authorise the judge, in the absence of a choice of law by the parties, to choose the applicable substantive law directly, i.e. without making a detour via conflict of law rules ("voie directe").

\textsuperscript{16} AAA, LCIA, WIPO, UNCITRAL arbitration, ICC rules and the regulations of the Zurich and Geneva Chamber of Commerce.
"friendly jurisdiction", but it does not necessarily result in an "unfriendly jurisdiction". In addition, even in supposedly bank-friendly court jurisdictions, there is (fortunately) no guarantee for the preferential treatment of banks.

Protracted legal disputes may hamper the litigants' freedom of action. Therefore, a swift clarification of the legal situation is important for them. Flexible procedural rules, and the professional composition of the arbitral tribunal throughout a proceeding, serve this objective. In this context, it is indispensable to restrict the possibilities of appeal, which, as is generally known, may protract court proceedings for years. This restriction is a major concern for many business sectors and is regarded as a significant advantage of arbitration. It is surprising that banks do not seem to share this opinion.

For reasons of liquidity and distribution of risk, banks very often assign commitments (mainly from loans, securities issues and derivative transactions) to third parties. If disputes arising out of these transactions are to be judged by arbitral tribunals, the assignment of commitments may be taken into account by inserting appropriate wording into arbitration clauses. Moreover, it is generally acknowledged that in case of an assignment of legal claims, the assignment also covers the arbitration clause. Court jurisdiction, above all with respect to international transactions, does not provide an advantage in this regard. The inclusion of third parties in a pending court proceeding depends on the rules of civil procedure applicable in the forum. These rules usually exclude the forced consolidation of different proceedings and limit the inclusion of third parties.

International arbitration proceedings are no more protracted than ordinary court proceedings. In most cases the opposite is true. As to their respective costs, while the remuneration of the arbitrators is often higher than the ordinary costs of State court procedures, in arbitration proceedings appeals are restricted so costs are competitive with proceedings before State courts. In addition, it needs to be borne in mind that the major expenditure in all judicial proceedings is for attorneys' fees, and not the fees of the arbitrators.

IX. CONCLUSION

Arbitration has long been employed to settle commercial and insurance disputes. In contrast to the commercial and insurance business communities, bankers have traditionally preferred judges to arbitrators. However, the financial community is increasingly finding benefits to arbitration. In some areas of banking and finance, arbitration already seems to be more common, or can at least be found relatively often, namely:

– in certain contractual relationships between banks and third parties (e.g. in the case of merger, acquisition and outsourcing agreements);
– in fields that are largely governed by self-regulation (e.g. in the case of stock exchange regulations and in the conduct rules of professional associations);
– in securities-related disputes involving broker-dealers in the United States;
– in international public sector financings by multilateral financial institutions; and
– in project and co-financings, as well as agreements concerning government subsidised foreign investment projects.

In addition, arbitration can be thoroughly suitable for international finance, securities underwriting and derivative transactions. The interaction of all elements of a given financial transaction will determine when and how arbitration may be appropriate to the resolution of banking and finance controversies, and depending on the outcome of the analysis, it will often prove that an arbitration clause is more advantageous than a court selection agreement. In this context, it appears that certain major US banks and some “market practitioners” in the City of London reached the same or a similar conclusion some time ago. On the other hand, it would be premature to conclude that there is a general trend in favour of arbitration. As the rules of international arbitration have recently been modernised in numerous countries, it is quite conceivable that arbitration and other forms of ADR will gain increasing recognition and application within the field of international banking and finance. If this is to happen, the major arbitration institutions and arbitration practitioners will need to dedicate more effort to the education of the international banking and finance community.