

A Comparative Legal Analysis of the Application of Alternative Dispute Resolution (ADR) to Banking Disputes

ADEOLA A. OLUWABIYI (Mrs)* Ph.D

* Lecturer, Department of International Law, Faculty of Law, Obafemi Awolowo University, Ile-Ife
E.mail-adeolaayodele2002@yahoo.com

Abstract

As a result of the ever increasing commercial activities, disagreements which sometimes result into full-blown disputes are bound to occur, requiring resolution, one way or the other. There is no doubt that commercial activities in the industrial and financial sectors, has increased tremendously and frequent disagreement and disputes are necessary occurrence requiring resolution. Whenever disputes occur in the commercial arena, two major hurdles face the disputing parties: How to resolve the disputes quickly, at the least cost and in a manner that will not stifle or disturb the continuum of their business activities. The aim of this paper is to examine the application of Alternative Dispute Resolution Techniques to banking disputes using a comparative approach.

Keywords: Alternative Dispute Resolution, Banking Disputes, Nigeria, Select Countries

1. Introduction

Investigation¹ reveals that most new generation banks in Nigeria have nothing to do with union; therefore, they do not belong to any union. While, the old generation banks belong to two different unions. The junior workers belong to the National Union of Banks, Insurance and Financial Institutions Employees (NUBIFIE) and the senior staff belong to Association of Senior staff of Banks, Insurance and Financial Institutions (NEABIA), while the banks, their employers belong to Nigeria Employers' Association of Banks, Insurance and Allied Institutions (NEABIA). The investigation also revealed that most banks managers lack the knowledge of conflict management, the study shows that there are a lot of factors responsible for the causes of conflict in banking industry². Such as disciplinary procedure, retrenchment of staff by banks management, lack of additional qualification, recruitment of new staff, agitation for increase in salaries, wages and allowances. Most importantly, is the breakdown of negotiation, breach of contract of employment and non-implementation of negotiated collective agreement.

However, summarily, disputes in the banking industry can be grouped into 4 categories; disputes between banks and their customers; disputes between banks; disputes between the banks and the CBN; and disputes between bank customers and the CBN. Although the banking and finance sector represents one of the backbones of the world economy,³ arbitration has for a long time played a rather limited role in this sector. Instead, there has been a preference for resolving arbitration and finance disputes in state courts of important financial centers, such as New York or London. Things are, however, changing. Arbitration is increasingly gaining importance in banking and finance. The aim of this paper is to examine the application of Alternative Dispute Resolution⁴ to Banking disputes.

2. What is Alternative Dispute Resolution (ADR)?

ADR typically refers to processes and techniques of solving disputes that fall outside of the judicial process i.e. formal litigation. Courts are increasingly encouraging parties to utilize ADR of some types, most often court assisted mediation or conciliation are attempted before parties' case are heard. The Lagos Multi-court Door House based in the Lagos High Court is an example. Also provisions encouraging the settlement of disputes through the ADR windows are surfacing in various High Court Rules. The key features of an ADR Scheme is that a so-called third party (an ombudsman, a mediator, conciliator or a compliant board assists the consumer of the service provider to resolve their dispute by proposing or imposing a solution or by bring the parties together to convince them to find a solution by common agreement

Some ADR Schemes Commonly In Use for Financial Disputes

(a) Italian Banking ombudsman

¹ Franklin Ohiole Ohiwerei and M.O. Omo-Ojugo (2008), Causes of Conflict in Banking Industry: A Case Study of Banks in Edo State of Nigeria. *International Business Management*, 2: 132-144

² ibid

³ According to statistics of the European Union, the total value of financial transactions in 2007 was equal to 70 times the total worldwide GDP. *Opinion of the European Economic and Social Committee on 'Financial Transaction Tax' (Own-Initiative Opinion)*, 2011 O.J. (C44) 81 (referencing Bank of International Settlement statistics). after referred to as ADR

- (b) German insurance ombudsman
- (c) French Ombudsman of the Authority of Financial Markets
- (d) United Kingdom Financial Ombudsman Service.
- (e) Nigeria's Sub-Committee on Ethics and Professionalism of the Bankers Committee

2. An Overview of the ADR Techniques under Examination in Nigeria

Apart from litigation, the Nigerian legal system recognizes arbitration and other variants of dispute resolution generally described as ADR and these methods have gained considerable ground in recent times. The better known types of ADR in Nigeria are Mediation/Conciliation, negotiation and Arbitration. Rules of procedure encouraging resort to these methods of dispute resolution are incorporated into the rules of practice and procedure of some Nigerian courts. Indeed, under the current High Court of Lagos state (Civil Procedure) Rules of (2012) ('CPR 2012') which took effect on 31st December 2012, recourse to ADR has been made mandatory in appropriate cases. The Principal Legislation regulating the practice of arbitration in Nigeria is the Arbitration and Conciliation Act Cap A18 LFN 2004. ('ACA')¹ which was enacted in 1988 and is modeled on the UNCITRAL Model law on International Commercial Arbitration 1985, with minor modifications and the rules made thereto. However some states of the federation also have their own arbitration laws, notable among which is Lagos state.

Arbitration: Arbitration is a process in which a third party neutral, after listening to parties in a relatively informal hearing makes a binding decision resolving the dispute². Also according to the section 57 of the Act³, which bothers on interpretations, arbitration was defined as commercial arbitration whether or not administered by a permanent arbitral institution. "Commercial" was defined in the same section 57 of the Act⁴ as all relationships of a commercial nature including any trade transaction for the supply of exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreement or concession, joint venture and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea, rail or road. **Arbitration** is one of the oldest forms of ADR. Arbitration involves a formal adversarial hearing before a neutral, called the arbitrator, with a relaxed evidentiary standard. The arbitrator is usually a subject matter expert. An arbitrator or an arbitration panel of two or more arbitrators serves as a "private judge" to render a decision based on the merits of the dispute. Arbitration decisions can be binding or non-binding. The essence of arbitration is the decision-making role of the third party neutral. It is usually a right based dispute resolution technique but could also be interest based or merely advisory⁵

Conciliation is a process in which a third party, called a conciliator, restores damaged relationships between disputing parties by bringing them together, clarifying perceptions, and pointing out misperceptions. The conciliator may or may not be totally neutral to the interests of the parties. Successful conciliation reduces inflammatory rhetoric and tension, opens channels of communication and facilitates continued negotiations. Frequently, conciliation is used to restore the parties to a pre-dispute status quo, after which other ADR techniques may be applied. Conciliation is also used when parties are unwilling, unable, or unprepared to come to the bargaining table. Conciliation, though similar to mediation is fundamentally different in some aspects. It is more commonly practiced in civil law countries like Italy, unlike the United States, which uses mediation more⁶. The conciliator is an impartial person that assists the parties by driving their negotiations and directing them towards a satisfactory agreement. Conciliation seeks to identify a right that has been violated and searches to find optimal solution. In conciliation, the conciliator plays a relatively direct role in the actual resolution of a dispute and even advises the parties on certain solutions by making proposals for settlement. The conciliator figures out the best solution for the parties. The conciliator, not the parties, often develops and proposes the terms of settlement. Conciliation is used almost preventively, as soon as dispute or misunderstanding surfaces, a conciliator pushes to stop a substantial conflict from developing. In conciliation, the conciliator may offer an opinion and alternatives with respect to proposals advanced by one party to the other.

Mediation involves a neutral, called a mediator, who assists the parties in negotiating an agreement. The mediator serves as an "agent of reality" to help the parties frame the issues, structure negotiations, and recognize self interests as well as the interests of the other side. Mediators may be, but are not necessarily, subject matter experts concerning the substantive issues in dispute. The parties may meet with the mediator together or

¹ Cap A18, Laws of Federation of Nigeria, 2004.

² K. Aina (1988), "Alternative Dispute Resolution", Nigerian Law and Practice Journal, Council of Legal Education, Nigerian Law School, vol. 2, No. 1, March, P. 171.

³ *ibid*

⁴ *ibid*

⁵ K. Aina Op.cit. p. 171.

⁶ Alessandra Sgubini, Mara Prieditis & Andrea Marigetto "Arbitration, Mediation & Conciliation – differences and similarities from an International Italian Business Perspective" p. 3

individually as the circumstances dictate. A meeting between one party and the mediator, called a caucus, allows the party to privately express emotions and core interests. These private sessions avoid alienation between the parties that might otherwise inhibit open communications. Mediators are not vested with any decision making authority and cannot impose resolution on the parties; the parties make decisions themselves. However, the mediator, like a facilitator, serves as the proponent of the process to keep discussions moving on track.

Essentially, the Act¹ is divided into four parts. These are:

1. Part I – Arbitration: Sections 1-36
2. Part II – Conciliation: Section 37 – 42
3. Part III - Additional provisions relating to International Commercial arbitration and conciliation: Sections 43-55
4. Part IV – Miscellaneous : Sections 56-58

The Act also has 3 schedules viz:

First Schedule: Arbitration Rules; Second schedule: Convention of the Recognition and Enforcement of foreign Arbitration Awards June 10, 1958; and the third schedule: Conciliation rules.

2.1. Other Available Forms of ADR Techniques apart from those Practiced in Nigeria

Other available Forms of ADR techniques apart from those practiced in Nigeria are discussed below:²

Adjudicatory

Adjudication - the competitive presentation of evidence to a judge that results in an order, judgment or decree (win/lose decision). The decision-maker is selected by the community and rules according to community legal standards. There are formal rules of procedure and evidence. The judge's decision is appealable.

Court Annexed Arbitration - Court-annexed arbitration is not true arbitration as parties have right to trial de novo (a trial as if no arbitration took place). Court-annexed arbitration is really a negotiation process, intended to promote settlement for designated classes of cases, such as property claims under \$25,000. There are often financial sanctions for proceeding to trial, if a party does not improve their position relative to the non-binding arbitration award.

Private Tribunals (Rent a Judge) - By statute in most states, parties can appoint any person as their judge, with full judicial powers. The private tribunal's decision is entitled to entry as a judgment and may be appealed.

Consensual Processes

Ombudsperson - An official appointed by and paid for by an institution, who investigates problems, seeks to prevent conflict and assists to resolve disputes. The ombudsperson is not a true mediator due to the institutional affiliation which, to some extent, compromises his or her impartiality and neutrality.

Fact-finding - An agreed-upon neutral finds facts as an assist to some other processes - negotiation, mediation or adjudication. Fact-finding is often used in the labor management context. The fact-finder may make findings public, with the parties' consent, to increase pressure for settlement. Alternatively, the fact-finders' recommendations may, by the parties' agreement, be confidential and non-admissible in any subsequent contested hearing. .

Mediation - Facilitated communications for agreement, resolving a past dispute and/or creating agreement for the future, with the assistance of an impartial facilitator. Decision-making power always resides with the participants in mediation. The desired result in mediation is agreement, sometimes, but not always, enforceable under law. Distinguish between voluntary mediation, mandatory mediation and muscle mediation (or med-rec). Also distinguish between early neutral evaluation and interest-based mediation.

Mixed Processes

Med-Rec - Mediation-Recommendation begins as mediation, but, if the parties do not come to agreement, the mediator makes a recommendation to the court or other decision maker as to a recommended resolution.

Med-Arb - Mediation-Arbitration begins a mediation. If the parties fail to come to agreement, the process transforms into an arbitration with the former mediator assuming the role of decision-maker. The process may be modified so that parties may elect out of the process at the close of the mediation component, or the parties may select another arbitrator for their dispute.

Mini-Trial - While there are many types of abbreviated mock or mini trials, they usually include the abbreviated presentation of evidence to one or more expert neutral facilitator(s) and the presence of executives or others with

¹ Arbitration and Conciliation Act Cap A18 LFN 2004

² See <http://www.directionservice.org/cadre/pdf/ADR%20Options%20A%20Spectrum%20of%20Processes.pdf>

decision-making authority. Following the summarized presentation of evidence and a questioning period, the decision-makers and facilitator will meet for confidential settlement discussions.

Summary Jury Trial - The Summary Jury Trial is another type of mock trial (really a settlement event) using one or more advisory juries. Summary jury trials usually include the abbreviated presentation of complex litigation to advisory juries who then render one or more advisory verdicts for executives with decision-making authority to consider in their settlement discussions, again typically facilitated by an expert advisor or facilitator

3. Kinds of Disputes Subject to Arbitration in Nigeria

Generally speaking, there is a two-step process to determine if a controversy is arbitrable:

First, parties should specify in an arbitration agreement or in an arbitration clause of a contract whether disputes will be subject to arbitration. Secondly parties should consider that the law of the country in which the arbitration takes place may prohibit arbitration for certain types of disputes. Arbitration for commercial matters, however, is normally encouraged¹. The types of disputes that are considered arbitrable varies among countries, in the united states, courts have strongly favoured arbitration in the resolution of international business disputes. There have held that almost all civil disputes can be arbitrated and have denied arbitration only where congress expressly stated that the provisions of a specific law can be enforced only in the courts.

In Nigeria, it is not all cases that can be referred to arbitration. Those disputes that can be referred to arbitration must be justiceable issue, which can be tried as civil matters². Generally, disputes that can be referred to arbitration must be such that can be compromised by way of accord and satisfaction. Generally however, the disputes or cases that can be referred to arbitration include:-

- (i) All matters in dispute about any real or personal property³
- (ii) Disputes as to whether a contract has been breached by either party thereto, or whether one or both parties have been discharged from further performance thereof⁴
- (iii) Terms of a deed of separation between husband and wife can be settled by arbitration⁵. Since compromise by either spouse of suits for dissolution of marriage and other matrimonial actions are held not to be contrary to public policy or good moral,⁶ such references to arbitration have been held good.
- (iv) Issues in an action by a court can, if the parties agree, and with leave of the court, be referred.
- (v) Specific questions of law, such as the construction of documents⁷ may be referred to arbitration. If the arbitration agreement covers matters incapable of being settled by arbitration under the laws of the place of arbitration the arbitration agreement is ineffective, since it will be unenforceable even when an award is made.

Banking disputes however are arbitrable from the foregoing

4. The Role of Alternative Dispute Resolution in Resolving Disputes in the Financial Services Sector (ADR) in Nigeria: ⁸

4.1. The Role of CBN as Regulators in the Nigerian's Financial Sector

The Central Bank of Nigeria (CBN) has put in place some mechanisms⁹ aimed at achieving speedy and conclusive dispute resolutions within the financial sector. For the CBN to promote sound financial system in Nigeria, it is imperative for it to employ efficient dispute resolution¹⁰ "As one of the regulators in the financial sector, the CBN has oversight functions over deposit money banks and other financial institutions licensed by it. As such, the CBN is familiar with the various types of disputes in the banking sub-sector and is actively involved in their resolution."

¹ Kathryn Helne Nickerson, Senior Attorney, U.S Department of Commerce, occic@doc.gov

² Blacke's Case (1606) 6 co. Rep. 436.

³ *Backer v Townsherd* (1817) 7 Taunt 422

⁴ *Heyman V Darwins* (1942) a.c 356.

⁵ *De Ricci: v De Ricci*; (1891) Q. 378; *Hart v Hart* (1881) 18ch. D. 670.

⁶ *Besent v wood* (1879) 12 Ch. D 605 at pg 62

⁷ *Government of Kelantan v Duff Development co* 1923, Act 395

⁸ Being paper presented by Mr. Gabriel o. kemb, principal partner Richfield chambers at the Lagos Chambers of Commerce and Industry Round Table discussion held on 24th November, 2011 at the Oriental Hotel, Lekki, Lagos, available at resourcedat.com

⁹ Amaka Abayomi, (2011) The Vanguard, December 8, available at www.vanguardnigeria.com.

¹⁰ Mallam Suleimam Barau (Deputy Governor (Corporate Services) CBN, Speaking on 'The Nature of Disputes in the Financial Sector: A Regulator's Perspective', at a seminar organised by the Lagos Chamber of Commerce and Industry, see www.vanguardngr.com/2011/12/financial-sector-disputes-worry-cbn/, Dec. 7, 2011

Barau¹ listed the initiatives to include the establishment of the Ethics and Professionalism Subcommittee of the Bankers' Committee which plays a vital role in the resolution of disputes within the banking sector particularly disputes between banks; the establishment of a public complaints office in the CBN to coordinate all complaints from members of the public on issues arising from their interactions within the banking sector; and the establishment of the Payment Systems Policy and Oversight Office in the CBN to address all issues relating to payment systems in Nigeria e.g. ATM fraud issues

As the Coordinator of Financial System Strategy 2020 (FSS 2020) the CBN is spearheading a wide range of new legislations and the amendment of certain extant laws that impact on the financial services industry. Some of the legislations that are at various stages of legislative consideration include: the Financial Ombudsman Bill which aims to establish an independent body to be charged with the resolution of disputes within the financial sector which parties are unable to resolve themselves; and the National Alternative Dispute Resolution Regulation Commission which would promote dispute resolution mechanisms other than litigation.

5. ADR and the Financial Services Sector

Alternative Dispute Resolution (ADR) has much to contribute to the banking and insurance sectors. Indeed experience in many countries demonstrates that banking and insurance disputes (mostly arising between bankers or insurance companies and customers are often well suited to resolution by ADR. This is because ADR can help maintain key business relationships and prevent long and expensive litigation. As part of its advantages, it is said to be fast as opposed to the Court. They are cheaper and less stressful to business. Usually these ADR schemes are much quicker, cheaper and flexible way to settle disputes than in Courts. ADR Schemes also improve access to justice as they provide an opportunity to resolve disputes that consumers would not normally pursue in courts. Furthermore, they increase consumer confidence in financial services because consumers know they will have access to redress, if something goes wrong. It is now widely accepted that commercial arbitration and ADR thrives well, where courts play a constructive largely hands free and supportive role, rather than an appellate or interventionist role.

6. Challenges Facing ADR in the Nigeria's Financial Sector and Select Countries

One of the biggest challenges inhibiting the growth of arbitration and other ADR processes in Nigeria is the widespread misuse of the courts by desperate counsel. Also some judges see arbitration and ADR generally as an extension of local litigation and are willing without let, to intervene, often by granting injunctions when requested to do so by one party. A similar misuse of the courts occurs when arbitral awards or settlements agreed to under ADR mechanism are sought to be enforced. More often than not, counsel advise their clients to resist enforcement and challenge an award through the Nigeria Courts system. Grounds of challenge are usually more like grounds of appeal in spite of the limited grounds for challenge stipulated under section 30 of the Arbitration and Conciliation Act 1988 of Nigeria.

For a long time, banks have been very reluctant to submit their disputes to arbitration. It was the prevailing opinion among bankers that disputes in the banking and finance sector are most frequently "one-shot money disputes," i.e., disputes arising from simple transactions such as loans involving a mere payment obligation.² According to bankers, such disputes were easy to settle so that there was no need to have recourse to arbitration.³ Some bankers even considered arbitration to bear the risk that arbitrators might decide *ex aequo et bono* without express authorization to do so.⁴ The limited use of arbitration also resulted from international framework agreements referring to the exclusive jurisdiction of state courts.⁵ The 1992 and 2002 versions of the Master Agreement of the International Swaps and Derivatives Association, Inc. (ISDA) are good examples. The vast majority of OTC derivatives—i.e., derivatives which are negotiate "over the counter" outside a regulated exchange—are documented under the ISDA Master Agreement.⁶ The model jurisdiction clause contained therein provided that all disputes concerning OTC derivatives had to be settled before state courts in New York or London.⁷ Similar jurisdiction clauses in favor of the New York or London state courts can be found in the

¹ *ibid*

² Georges Affaki, (2011), *Nouvelles R'eflexions sur la Banque et L'arbitrage*, LIBERAMICORUM SERGE LAZAREFF, at 27 .

³ See William W. Park, (1998) *Arbitration in Banking and Finance*, 17 ANN. REV.BANKING L. 213, 216 ; Stefano Cirelli (2003), *Arbitration, Financial Markets and Banking Disputes*, 14 AM. REV. INT'L ARB. 243, 268 .

⁴ 12. Affaki, *supra* note 23 at 28; Georges Affaki (2003), *A Banker's Approach to Arbitration*, ARB. IN BANKING AND FIN. MATTERS, ASA Special Series No. 20, at63, 68 .

⁵ Park, *supra*, at 215; Mark Kantor (2000), *OTC Derivatives and Arbitration: Should Counterparties Embrace the Alternative?*, 117 BANKING LAW JOURNAL 408, 409 .

⁶ Section 2(a)(iii) of the ISDA Master Agreement and *Emerging Swaps Jurisprudence in the Shadow of Lehman Brothers*, 7 J. INT'L BANKING L. AND REG. 313, 314

⁷ Marcus C. Boeglin (1998), *The Use of Arbitration Clauses in the Field of Banking and Finance: Current Status and*

standard terms of the Loan Market Association.¹ Reluctance towards arbitration was further fostered for a long time by the uncertainty as to whether or not certain financial disputes could be arbitrated.² In Germany, for instance, the arbitrability of securities-related disputes is limited by the German Security Trading Act. This follows from Section 37 of the German Security Trading Act (“*Wertpapierhandelsgesetz*”), which provides that arbitration agreements on future securities-related disputes are only binding if both parties are merchants or corporate bodies organized under public law.³

To the extent that disputes are arbitrable, the arbitration agreement must meet strict form requirements.⁴ While a different approach has succeeded in the United States, the U.S. securities market was originally also one of the few fields where the arbitrability of disputes used to be contested.⁵ The traditional view was expressed by the Supreme Court in *Wilko v. Swan*.⁶ In this 1953 decision, the Supreme court ruled that claims under the Securities Act of 1933 had to be referred to state courts, as arbitral tribunals would not be able to provide customers with the protection intended by the Securities Act. This mistrust towards arbitration was questioned in 1987 in *Shearson/American Express, Inc. v. McMahon*.⁷ Eventually, in 1989 *Wilko v. Swan* was overruled in the decision *Rodriguez de Quijas v. Shearson/American Express, Inc.* Here, the Supreme Court held that “resort to the arbitration process does not inherently undermine any of the substantive rights

7. Reasons behind the shift to Arbitration on Banking Disputes.⁸

The trend towards arbitration in banking and finance has been motivated by several factors including the internationalization of banking and finance transactions,⁹ the increased complexity of disputes, the lack of consistency in court decisions, a demand for more flexibility and party autonomy, and privacy and confidentiality considerations.¹⁰

1. Internationalization of Banking and Finance Transactions¹¹

In today’s globalized world, banking and finance transactions are of greater international dimension than ever before. A large number of financial transactions are made with participants from emerging markets. Here, arbitration can be the only efficient means of dispute settlement. On the one hand, it is often not a viable option for market participants from capital exporting countries to resolve disputes before state courts where the counterparty has its assets. This has to do with the risk of legal uncertainty in these countries. Pursuant to statistics of Transparency International, corruption is still widespread in large parts of the world, thereby undermining the basic tenets of justice.¹² On the other hand, it is rarely productive to settle disputes before state courts in financial centers such as New York or London if judgments are unenforceable against the respective

Preliminary Conclusion, 15 J. INT. ARB. 3,9.

¹ Viviane Gillor (2008), Die Bedeutung der Schiedsgerichtsbarkeit für Großbanken, DIS-MAT XIV (2008); Schiedsgerichtsbarkeit in Finanz- und Kapitalmarkt-Transaktionen, p. 55 (62).

² See B. Hanotiau (2003), *Arbitrability of Financial Disputes*, in ARBITRATION IN BANKING AND FINANCIAL MATTERS, 20 ASA Special Series 33 (Gabrielle Kaufmann-Kohler & Viviane Frossard eds., 2013)

³ § 37 h WpHG. See also D. Quinke (2008), Die Gleichwertigkeit auf dem Prüfstand: Schiedsverfahren mit Privatanlegern, in: DIS-MAT XIV, Schiedsgerichtsbarkeit in Finanz- und Kapitalmarkt-Transaktionen, p. 76 ff.; K.P. Berger, Schiedsgerichtsbarkeit im modernen Finanzmarktgeschäft – ein Überblick, in: DIS-MAT XIV (2008), Schiedsgerichtsbarkeit in Finanz- und Examining the current trend Kapitalmarkt-Transaktionen, p. 29 f. See also T. Niedermaier, Schiedsgerichtsbarkeit und Finanztermingeschäfte – Anlegerschutz durch § 37 h WpHG und andere Instrumente, SchiedsVZ 2012, 177 (177 et seq.).

⁴ BGH NZG 2010, 550 (551); BGH, decision of 25 January 2011, reference no. XI ZR 106/09; BGH NJW-RR 2011, 548 (549); BGH, decision of 22

March 2011, reference no. XI ZR 22/10.

⁵ See William W. Park (2003), *Arbitrability and American Securities Law: A Tale of Two Cases*, in ARBITRATION IN BANKING AND FINANCIAL MATTERS, 20 ASA Special Series 81 (Gabrielle Kaufmann-Kohler and Viviane Frossard eds.; Bradley J. Bondi (2010), *Facilitating Economic Recovery and Sustainable Growth Through Reform of the Securities Class-Action System: Exploring Arbitration as an Alternative to Litigation*, 33 HARV. J. L. & PUB. POL’Y 607, 622 ; Marilyn Blumenberg Cane and Marc J. Greenspon (2002), *Securities Arbitration: Bankrupt, Bothered & Bewildered*, 7 STAN J. L. BUS. & FIN. 131, 134 ; Kenneth R. Davis (1998), *The Arbitration Claws: Unconscionability in the Securities Industry*, 78 B.U. L. REV. 255, 265 .

⁶ 21. 346 U.S. 427, 438 (1953), overruled by *Rodriguez de Quijas v. Shearson*, 490 U.S. 477, 109 (1989).

⁷ 482 U.S. 220 (1987).

⁸ INKA Hanefeld (2012) “Arbitration in Banking and Finance” *NYU Journal of Law & Business* [vol. 9:917, pp. 924-928

⁹ INKA Hanefeld (2012) “Arbitration in Banking and Finance” *NYU Journal of Law & Business* [vol. 9:917

¹⁰ *ibid*

¹¹ *ibid*

¹² *ibid*

counterparty.¹ Within the European Union and Switzerland, this problem is of less acuity due to the Brussels/Lugano regime on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Article 33 of the Brussels Regulation provides that a judgment rendered in a Member State shall generally be recognized in other Member States without any special procedure required. Similarly, if a case is brought before New York courts,² and provided that the underlying party has its accounts in New York banks, the successful party may easily attach these assets and enforce the New York court decision without greater problems.

However, apart from these scenarios, enforcement of foreign judgments is significantly more difficult than the enforcement of foreign arbitral awards. According to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the “New York Convention”), each of the contracting states “shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in [its] articles”.³ The recognition of foreign arbitral awards may only be denied on very limited grounds, such as the violation of the public policy of the country where recognition and enforcement is sought.⁴

2. *Increased Complexity*⁵

Disputes in the banking and finance sector have raised increasingly complex, difficult legal questions. Structured financial products like synthesized collateralized debt obligations, for example, often involve a high number of legal relationships which are governed by different individual contracts and framework agreements. Assessing the interaction of these different contracts can be a challenging task. Things are rendered even more complicated because new financial products are being invented on an almost daily basis. In addition, these disputes often raise difficult factual questions. Project finance serves as a good example. This financing technique involves highly structured loans that are paid out of the cash flows produced by the specific project. The assessment of these cash flows typically requires a thorough knowledge of economic concepts as well as familiarity with market expectations. Arbitration can be a particularly suitable means of resolving such disputes because parties can choose their arbitrators. The principle of party autonomy allows parties to ensure that arbitrators with the necessary expertise will be in charge of their dispute.

3. *Inconsistent Court Decisions*

Inconsistent court decisions are a further reason why banks have become more open to arbitration. For example, in the aftermath of Lehman Brothers’ (hereinafter “Lehman”), bankruptcy, courts in London and in New York reached different conclusions as to whether Section 2(a)(iii) ISDA Master Agreement is enforceable. Section 2(a)(iii) ISDA Master Agreement stipulates that certain obligations under the ISDA Master Agreement are subject to the condition precedent that no event of default or potential event of default with respect to the other party has occurred and is continuing. When Lehman became insolvent, Section 2(a)(iii) of the ISDA Master Agreement was invoked by Lehman’s counter parties in two highly similar situations in order to justify a suspension of payment obligations under interest swap transactions. In both cases, the administrators of Lehman challenged this suspension on the basis that Section 2(a)(iii) of the ISDA Master Agreement is unenforceable. Despite these similarities, the two courts reached opposite conclusions. The UK Court of Appeal confirmed the enforceability of Section 2(a)(iii) of the ISDA Master Agreement in *Lomas v. Firth Rixson*⁶ whereas the New York Bankruptcy Court of the Southern District of New York denied its enforceability in *Metavante*.⁷ These different conclusions were not only caused by differences in the applicable insolvency laws, but also by discrepancies in interpreting Section 2(a)(iii) of the ISDA Master Agreement.

Does arbitration offer a panacea against such inconsistent court decisions? Obviously, one could overstate the advantages of arbitration by arguing this. Yet, arbitration appears to have comparative advantages when it comes to the interpretation of international agreements such as the ISDA Master Agreement. There is notably a lower prospect that the decision of an arbitral tribunal consisting of three qualified experts from

¹ Ibid

² 41. In relation to Iceland, Norway and Switzerland, this protection is extended by the Lugano Conventions.

³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. III, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3. [hereinafter New York Convention]; see also L. Levy, *Arbitration of Asset Management Disputes, in ARBITRATION IN BANKING AND FINANCIAL MATTERS* 89 (G. Kaufmann- Kohler and V. Frossard, eds., 2003); Allan L. Gropper (2012), *The Arbitration of Cross- Border Insolvencies*, 86 AM. BANKR. L.J. 201, 240 .

⁴ New York Convention, *supra* at art. V.

⁵ INKA Hanefeld (2012) , Op.cit at 925

⁶ [2010] EWHC 3372 (Ch), (Eng.). For more on this decision, see Edward Murray, *Lomas v. Firth Rixson: A Curate’s Egg?* 7 CAP. MARKETS L. J. 5 (2011)

⁷ See *In re Lehman Bros. Inc.*, No. 08-13555 (JMP), Transcript [Dkt. No. 5261]; *In re Lehman Bros. Holdings Inc.*, No. 08-133555 (JMP), 2009 WL 6057286 (Bankr. S.D.N.Y. Sept. 17, 2009); *Section 2(a)(iii) of the ISDA Master Agreement and Emerging Swaps Jurisprudence in the Shadow of Lehman Brothers*, 7 J. INT’L BANKING L. & REG. 313, 316 (2011).

different jurisdictions will be affected by national particularities.

4. *Demand for More Flexibility and Party Autonomy*

A further attribute that has fostered the rise of arbitration is that it grants parties more flexibility and autonomy. Arbitration allows the parties to design the proceedings in advance in accordance with their needs for special experience of the arbitrators, speed and efficiency.¹ In certain fields of banking and finance, this aspect has been key in strengthening the role of arbitration. A prominent example is Islamic banking. Here, parties often share an interest in choosing an arbitrator who belongs to a certain religious community.² While the ability to choose such an arbitrator was put into question when the U.K. Court of Appeal held in *Jivraj v. Hashwani*,³ that a requirement for arbitrators to be part of the Ismaili community would violate European Antidiscrimination Regulations, this decision was quashed on appeal by the U.K. Supreme Court.⁵⁵ Reportedly, a complaint was filed to the European Commission pursuant to Article 258 of the Treaty on the Functioning of the European Union.⁴ Accordingly, there is still a possibility that the case will be referred to the Court of Justice of the European Union

5. *Privacy and Confidentiality*

Finally, the possibility to shield information from the public sphere may also have been a driving factor for the increasing use of arbitration in banking and finance. Especially in times of crises, when financial institutions already struggle to maintain their reputation, there is a premium placed on privacy and confidentiality. Shielding information from the public sphere in arbitration

is possible due to two related but distinct concepts: privacy and confidentiality. Privacy means that hearings are not open to the public. Thus persons other than arbitrators, parties, parties' counsel or witnesses can be excluded from the hearing.⁵ Under most institutional rules, the privacy of proceedings is the default rule that applies unless parties have agreed on something else. Confidentiality, on the other hand, concerns the obligation of the participants not to disclose information related to the proceedings to third persons.⁶ Such an obligation is not limited to the hearing but may also exist in the pre- and post-arbitration phase. Even though confidentiality obligations are foreseen in some institutional arbitration rules,⁷ such provisions are less prevalent in institutional rules than the equivalent rules on privacy. If the parties seek confidentiality, they should include individual agreements on confidentiality.

8. **Factors Parties are expected to put into Consideration when choosing ADR for Resolution of banking disputes.**⁸

Parties who wish to resolve disputes in banking and finance by means of arbitration should observe various practical considerations. Two considerations that merit special attention are the choice of an adequate arbitration institution and the drafting of the arbitration agreement.

A. *Choice of an Adequate Arbitral Institution*

International practice shows a strong tendency towards institutional arbitration. Not every institution, however, offers the same advantages and parties should be cautious when making their choice. Some arbitral institutions with a general mandate for dispute resolution have issued special rules for disputes in the banking and finance sector. In addition, there are specialized institutions with an exclusive mandate for dispute resolution in the banking and finance sector.

1. *Arbitral Institutions Which Have Issued Special Rules for Disputes in the Banking and Finance Sector* Some arbitral institutions such as the American Arbitration Association (AAA), and the China International Economic and Trade Arbitration Commission (CIETAC) have issued special rules for arbitration in the banking and finance sector.

a. AAA Arbitration Rules for Commercial Financial Disputes⁹ The AAA Arbitration Rules for

¹ See, for example, the modified version of the UNCITRAL Arbitration Rules (as revised in 2010) in the P.R.I.M.E. Finance Rules discussed *infra* Part III.A.2.

² Jasri Jamal et. Al (2011)., *Alternative Dispute Resolution in Islamic Finance: Recent Developments in Malaysia*, 3 INT'L J. SOC. SCIS. & HUMANITY STUDIES 185

³ Court of Appeal [2010] EWCA Civ 712

⁴ See Craig Tevendale (2012), *Jivraj – It's Back and This Time it's at the European Commission*, KLUWER ARB. BLOG (Sept. 28,), <http://kluwerarbitrationblog.com/blog/2012/09/28/jivraj-%E2%80%93-its-back-and-this-time-its-at-the-european-commission/>.

⁵ . I.M. SMEUREANU (2011), CONFIDENTIALITY IN INTERNATIONAL 3 (Springer Heidelberg Dordrecht).

⁶ London Court of International Arbitration Rules art. 19(4) [hereinafter *LCIA Rules*] (discussing confidentiality requirements); International Chamber of Commerce Statutes, app. II art. 1(3) [hereinafter *ICC Rules*] (same).

⁷ See, e.g., *LCIA Rules*, *supra* note 60 at art. 30.1 (discussing confidentiality requirements); Swiss Rules of Int'l Arb. art. 44 [hereinafter *Swiss Rules*] (same); World Intell. Prop. Org. Rules arts. 52, 73-76 [hereinafter *WIPO Rules*] (same).

⁸ INKA Hanefeld , Op.cit.pp 929-932

⁹ *Commercial Finance Rules*, AM. ARB. ASS'N, available at <http://www.adr.org>.

Commercial Financial Disputes are a set of rules governing disputes “involving any commercial financial arrangement, product or other matter or conduct relating thereto.” Considering the time constraints of many financial disputes, the rules set forth various mechanisms to expedite the proceedings. Thus, Article 1 of the AAA Arbitration Rules for Commercial Financial Disputes stipulates that “parties shall make every effort in good faith to conclude the arbitration within 120 days of its commencement.” In order to facilitate such a smooth arbitration within a short period of time, the AAA Arbitration Rules for Commercial Financial Disputes provide various time limits, e.g., concerning the parties’ submissions, the appointment of arbitrators or the rendering of the award after the hearing. In addition, the AAA Arbitration Rules for Commercial Financial Disputes provide for the possibility of expedited proceedings that are applied in cases where no disclosed claim and counterclaim exceeds US\$75,000 or upon agreement of the parties. CIETAC Arbitration Rules for Commercial Financial Disputes¹ CIETAC is another arbitral institution that has issued special rules for disputes arising from or in connection with financial transactions. Similar to the P.R.I.M.E. Finance Rules, the CIETAC Arbitration Rules for Commercial Financial Disputes also stipulate that arbitrators shall in principle be drawn from a list of arbitrators provided by CIETAC.² Importantly, however, the parties are not bound by this list. The CIETAC Arbitration Rules for Commercial Financial Disputes also contain mechanisms to expedite the proceedings. The rules stipulate strict deadlines for the parties’ submissions and envisage that the award be rendered within 45 days after the constitution of the arbitral tribunal.³

b. CIETAC Arbitration Rules for Commercial Financial Disputes⁴

CIETAC is another arbitral institution that has issued special rules for disputes arising from or in connection with financial transactions. Similar to the P.R.I.M.E. Finance Rules, the CIETAC Arbitration Rules for Commercial Financial Disputes also stipulate that arbitrators shall in principle be drawn from a list of arbitrators provided by CIETAC.⁵ Importantly, however, the parties are not bound by this list. The CIETAC Arbitration Rules for Commercial Financial

Disputes also contain mechanisms to expedite the proceedings. The rules stipulate strict deadlines for the parties’ submissions and envisage that the award be rendered within 45

2. Special Institutions : Examples of special institutions with an exclusive mandate for the settlement of disputes in the financial and banking sector include the London City Dispute Panel, Diriban (for interbank settlement)⁶ or Euro arbitration.⁷ The most recent example of a special institution with an exclusive mandate for the settlement of disputes in the financial

and banking sector is P.R.I.M.E. Finance, whose rules are a modified version of the UNCITRAL Arbitration Rules. In response to the possibility of high complexity of cases, Articles 8 and 9 of the P.R.I.M.E. Finance Rules require that arbitrators be selected from P.R.I.M.E. Finance’s list of approved arbitrators.⁸ This list encompasses a number of highly distinguished dispute resolution experts who have won the confidence of P.R.I.M.E. Finance. Apart from a list of arbitrators, P.R.I.M.E. Finance has also issued a list of approved financial experts. Pursuant to Article 29 of the P.R.I.M.E. Finance Rules, the arbitral tribunal may appoint such experts after consultation with the parties to report on specific issues to be determined by the arbitral tribunal. Unlike the list of arbitrators, the list of financial experts is not binding. P.R.I.M.E. Finance Rules implement several mechanisms to accommodate time constraints. If the parties cannot await the constitution of the arbitral tribunal because they are in need of an urgent measure, they may, for example, file an application for emergency proceedings. The appointment of an Emergency Arbitrator shall be made within 72 hours.⁹ An Emergency Arbitrator then must render an order within 15 days after transmission of the case. As an alternative to emergency

org/aaa/faces/aoe/commercial/financialservices/commercialfinance [hereinafter *AAA Rules*].

¹ CIETAC, Financial Disputes Arbitration Rules, available at: <http://www.cietac.org/index/rules/47607aa1ab746c7f001.cms> (last accessed June 1, 2013)

² Arbitration Rules for Commercial Financial Disputes (promulgated by China Int’l Econ. & Trade Arbitration Comm’n, Feb. 3, 2012, effective May 1, 2012), art. 6, available at <http://www.cietac.org/index.cms>

³ *Id.* at art. 22.

⁴ CIETAC, Financial Disputes Arbitration Rules, available at: <http://www.cietac.org/index/rules/47607aa1ab746c7f001.cms> (last accessed June 1, 2011)

⁵ Arbitration Rules for Commercial Financial Disputes (promulgated by China Int’l Econ. & Trade Arbitration Comm’n, Feb. 3, 2012, effective May 1, 2012), art. 6, available at <http://www.cietac.org/index.cms>.

⁶ S. Cirielli (2003), *Arbitration, Financial Markets and Banking Disputes*, 14 AM. REV. INT’L ARB. , 243 (254); G. Affaki, *A Banker’s Approach to Arbitration*, in G. KAUFMANN-KOHLER & V. FROSSARD (2003), *ARBITRATION IN BANKING AND FINANCIAL MATTERS*, ASA Special Series No. 20 , 63 (67).

⁷ . See A. Hirsch (2003), *Presentation of Euroarbitration*, in EUROPEAN CENTER FOR FINANCIAL DISPUTE RESOLUTION, in 55 ASA Special Series No. 20 .

⁸ P.R.I.M.E. FINANCE ARBITRATION RULES, art. 26a (2012).

⁹ *ibid.* art. 4, Annex C.

proceedings, the parties may file an application for urgent provisional measures in referee arbitral proceedings per the Dutch Code of Civil Procedure.¹ Recourse to these proceedings is, however, only available if the place of arbitration is in the Netherlands and if the parties have agreed on the application of the Referee Arbitration Rules.² Parties under time constraints may also agree on expedited proceedings³ or file an application for interim measures³.

3. Selection Criteria

While the two recurrent aspects—a highly complex subject matter and time constraints—are a challenge for an efficient resolution of disputes in the banking and finance sector, this does not necessarily mean that parties should limit their selection to one of the above-mentioned dedicated arbitral institutions or procedures. Likewise, ordinary arbitration procedures that are administered by arbitral institutions with a broader mandate still offer alternative solutions. An application for an emergency arbitrator is, for example, also possible under the current Rules of Arbitration of the International Chamber of Commerce (ICC) in force as of January 1, 2012.⁴

To the extent that institutional rules do not provide special mechanisms in response to time constraints or the high complexity of proceedings, they typically leave parties enough flexibility to find their own solutions. Even in the absence of a list of arbitrators and experts, parties remain free to select their own well-qualified arbitrators who can then decide to hear experts on complex financial questions. The choice of rules and arbitral institutions therefore ultimately depends on whether the parties prefer an active involvement of the arbitral institution or whether they wish to retain ultimate autonomy for themselves and the arbitrators. Whatever the final decision, the expertise, experience and quality of the arbitrators will be key for the quality of the proceedings.

9. Expectations ADR is Expected to Meet in the Area of Resolution of Banking Disputes.⁵

A. First Challenge: Establishing Legal Certainty Legal certainty has an economic value. If market participants cannot be sure whether a certain financial product will withstand scrutiny by an arbitral tribunal, this will affect the price ex ante. Parties will discount the price they are willing to pay for the financial product in light of the legal uncertainty. Is the quality of justice rendered by the arbitrators sufficient to establish a requisite degree of legal certainty in banking and finance matters? Or is there a need for more transparency and publicity in banking and finance arbitration? The P.R.I.M.E. Finance Rules, for example, support the idea of transparency and publicity in banking and finance arbitration. Art. 34 para. 4 of the P.R.I.M.E. Finance Rules, provides that: An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party or of P.R.I.M.E. Finance by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority. P.R.I.M.E. Finance may include in its publications excerpts of the arbitral award or an order in anonymised form. P.R.I.M.E. Finance may publish an award or an order in its entirety, in-anonymised form, under the condition that no party objects to such publication within one month after receipt of the award. This provision aims to strike a balance between the interest in shielding sensitive information from the public on the one hand and the need to develop an established body of case law on the other.⁶ Furthermore, it reflects the demands of market participants. ISDA, for example, has also suggested publishing arbitral awards where the names of the parties and other confidential information are deleted.⁷ Likewise, in 2010 the American Bar Association recommended publishing awards unless expressly prohibited by the parties.⁸

B. Second Challenge: Dealing with Mandatory Rules A second challenge in banking and finance arbitration will be to anticipate and account for the mandatory rules in the substantive law on banking and finance that are likely to develop. Mandatory rules have been defined as those rules that “arise outside the contract, apply regardless of what the parties agree to, and are typically designed to protect public interests that the state will not allow the parties to waive”.⁹ Such mandatory provisions could, for example, flow from the European Markets in Financial

¹ . *Ibid.* art. 26b

² *Ibid.*

³ *Ibid.* art. 2a.

⁴ See ICC ARB. R., art. 29 (2012); ICC IRB. R., appendix V (2012). 85. ICC Arb. R, art. 25.

⁵ INKA Hanefeld *Op.cit.* pp 935-939

⁶ See also Klaus Peter Berger (2009), *Herausforderungen für die (deutsche) Schiedsgerichtsbarkeit*, SchiedsVZ, at 289 .

⁷ *The Use of Arbitration Under the ISDA Master Agreement: Feedback to Members and Policy Options*, Memorandum for Members of the International Swaps and Derivatives Association, Inc. (Nov. 10, 2011), available at <http://www2.isda.org/functional-areas/public-policy/financial-law-reform> (Apr. 18, 2012).

⁸ Am. Bar Ass’n, Preliminary Report and Exposure Draft of Supplementary Arbitration Rules for Commercial Finance Transactions, (Section of Business Law, Task Force on Alternative Dispute Resolution in Commercial Finance Transactions and Section of Dispute Resolution, Arbitration Committee, Subcommittee on ADR in Commercial Finance Transactions, 1 Apr. 1, 2010) at 18, available at <http://apps.americanbar.org/buslaw/newsletter/0093/materials/pp3a.pdf> (Apr. 17, 2012).

⁹ Donald F. Donovan & Alexander K.A. Greenawalt (2006), *Mitsubishi After Twenty Years: Mandatory Rules before Courts*

Instruments Directive (MIFID),¹ the German Banking Act,² or the U.S. Dodd- Frank Wall Street Reform and Consumer Protection Act of July 21, 2010.³ It is beyond the scope of this paper to analyze these legal regimes in detail with regard to their provisions' mandatory character. At first glance, these laws may contain several provisions designed to protect important public interest which have to be honored in arbitration proceedings regardless of whether the parties plead these provisions or not. There have been calls for even stricter regulation and supervision of the various actors in the banking and finance sector. Accordingly, one can expect that the number of mandatory rules will increase. Does this mean that disputes governed, among others, by mandatory rules should be reserved for resolution before state courts? While this has been suggested by some scholars,⁴ the overall trend points in the opposite direction.⁵ Many energy disputes, for instance, are submitted to arbitration, irrespective of whether they are governed by mandatory EU antitrust law or not. Nevertheless, arbitral tribunals will have to apply mandatory provisions *ex officio*.⁶ In doing so, they will face several problems: First, the question arises as to which mandatory rules should be applied. To date, it is unsettled whether apart from the chosen law, arbitrators may also have to apply a given third country's mandatory provisions.⁷ Second, there is no boilerplate methodology to identify mandatory provisions.⁸ While some rules are mandatory, it is unclear whether other rules are optional. It will be interesting to see how arbitral tribunals will respond to these challenges in banking and finance arbitration.

10. The Way Forward and Conclusion

Disputes arising in the financial services sector could be and should be settled through any of the ADR mechanisms. They are no doubt firmly suited for ADR resolution. Currently, most of these disputes between the providers of financial services and consumers of the services are being resolved in the courts with the attendant delays in both the processes and the practices of counsel to seek frivolous motions and objections. These delays are neither in the business interest of the service providers nor that of the consumers.

Unarguably, too many litigation with customers in the portfolio of a bank or an insurance company is distractive, expensive and time consuming. There is also no statutory inhibition to referring most of the disputes between a bank and its customer to an ADR window. Even though providers of financial services are heavily regulated by enabling enactments, yet, there is nothing in those legislations that prevent them from using any of the ADR windows to resolve disputes with their customers. Legal instruments peculiar to the financial services sector include Loans Agreements, Mortgages, Debentures, Equipment Leasing Agreements, Cheque Purchase Agreement, Insurance Policies, Advance Payment and Performance Bonds. These documents could contain multi-tiered dispute resolution clauses. That is from negotiation, to mediation or conciliation and arbitration. Even where it is not possible to insert a dispute resolution clause in the agreements, the parties can enter to a submission agreement after the dispute had arisen, to refer the dispute to arbitration. Happily under Section 31 of the ACA of Nigeria, awards made by the arbitrator can be recognized and enforced by the Court. Similarly, agreement signed after mediation or conciliation can also be recognized and enforced by our courts under the legal principle of *pacta sunt servanda*.

There is no doubt that there are thousands of unresolved disputes between the providers and consumers of financial services in Nigeria. This is gleaned, for example, from the number of disputes referred to the Sub-committee on Ethics and Professionalism of the Bankers Committee in Nigeria. We learnt that there are over 5,000 cases pending before the sub-committee. At the pace the Sub-committee is working, there is no way they can cope with magnitude of their case load. There is, therefore, the compelling need to urgently popularize adoption of ADR mechanisms in the resolution of these disputes in the interest of the financial system, the life-wire of the Nigerian economy. Whichever mechanism or a combination of mechanism will be favoured will require further studies and deliberations, given the regulatory and supervisory challenges peculiar to specific industries in the sector.

and International Arbitrators, in L.A. MISTELIS & J.D.M. LEW, PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION (ALPHEN AAN DEN RIJN, p.1 at 13.

¹ Directive 2004/39/EC (*OJ 2004 L 145, p. 1*) (amending Council Directive 85/611/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC).

² German Banking Act (*Kreditwesengesetz*, KWG) (amended on June 26, 2012).

³ Dodd-Frank Wall Street Reform and Consumer Protection Act Pub. L. No. 11-203, H.R. 4173.

⁴ Robert H. Smit (2011), *Mandatory Law in Arbitration*, in MANDATORY RULES IN INTERNATIONAL ARBITRATION 207, 226 (Bermann & Mistelis, eds., New York

⁵ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

⁶ Norbert Horn (2008), *Zwingendes Recht in der internationalen Schiedsgerichtsbarkeit*, SchiedsVZ 212 .

⁷ Laurence Shore, *Applying Mandatory Rules of Law in Int'l Commercial Arbitration*, in MANDATORY RULES IN INTERNATIONAL ARBITRATION,

⁸ George A. Bermann, *The Origin and Operation of Mandatory Rules*, in MANDATORY RULES IN INTERNATIONAL ARBITRATION, at 1.

The success of arbitration in banking and finance will depend on whether it will be responsive to the needs of market participants. While it is impossible to predict the future developments with certainty, this success will to some extent depend on the competitiveness and performance of the State courts traditionally called upon in banking and finance matters. In general, there is no reason why arbitration should not have the potential to extend its market share in banking and finance matters in the same way as arbitration has grown in other industries of major economic relevance (e.g., energy and reinsurance)

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. This leads us to the issue of capacity building to increase the number of practitioners of ADR mechanism, particularly who are skilled and experienced in the law and practice of banking and insurance. There is the need to develop a pool of arbitrators and mediators who are experts in the practice of banking and insurance and who can handle these disputes. 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 e.g. New York and London, arbitration is already becoming a preferable method of dispute resolution in the banking and finance industries. It is the hope of the Central Bank of Nigeria that when these Bills for the establishment of the Office of the Financial Ombudsman,¹ and the National Alternative Dispute Resolution Regulation Commission² are eventually passed into law, they would provide more avenues for effectively and efficiently resolving financial sector disputes which would ultimately contribute to the promotion of a sound financial system in Nigeria. This step will make Nigeria to rank among United States and other nations in this aspect of development.

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¹ This Bill seeks to establish the Office of the Nigerian Financial Ombudsman, as an independent body charged with the responsibility for resolving financial and related disputes in the Nigerian financial services sector and for related matters. See <http://www.draftbillmagazine.com/bill/office-of-the-nigerian-financial-ombudsman-bill2011>

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