Use of International Commercial Arbitration for Project Finance Disputes: A new approach for drafting the arbitration clause

A thesis submitted for the degree of Doctor of Philosophy in Law

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Abstract

International arbitration, as an alternative dispute method to traditional litigation, has gradually gained popularity for cross-border commercial disputes. On one hand, international commercial arbitration is one of the fastest growing sectors with an overwhelmingly increasing number of parties of any commercial transaction resorting to the arbitration route to resolve their disputes all around the world. The world has witnessed a considerable number of arbitral institutions being formed and providing guidance, setting out their own rules, putting a significant amount of effort into promoting the fundamentals of arbitration and its advantages. As a result, international commercial arbitration has been widely used by the parties of a transaction mainly due to its speed, neutrality, confidentiality, and the expertise offered by the arbitrators. On the other hand, despite the fact that several surveys and research reflect this rise of interest in using international commercial arbitration for many different sectors including construction and energy, international arbitration has failed to become as popular for financial disputes. The advantages and disadvantages regarding the use of international commercial arbitration have been analysed in a more comprehensive way within the last decade, with the financial arbitration institutions, financial dispute resolution centres and the commercial arbitration institutions have started addressing the main issues and been trying to shape their rules and approaches with the aim of improving the use of arbitration for financial disputes. Although the efforts are undeniably beneficial, this only solves one part of the problem: technicality. Some of the general disadvantages of international commercial arbitration compared with litigation have an elevated impact considering finance transactions and witnessing the institutions taking action is a massive improvement and surely will escalate the number of parties choosing alternative dispute resolution over litigation. However, there are certain problems evaluated in this research in a detailed way, which are mainly due to the nature of a project finance transaction, which cannot be solved just by improving general rules. There is a considerable amount of effort which is definitely in the right direction, just like the introduction of a 'single dispute resolution scheme', but it is time to take it to the next level, in terms of the content and mechanism of the proposed consolidated agreement, in order to make it more attractive to the financial institutions. This thesis proposes a mechanism where the parties can choose the specifics of their

transaction, in terms of the jurisdictions involved, the location where the project is built, the nature and number of parties involved. Subsequently, a system which suggests specific clauses to be inserted in the model clauses and making the parties aware of the 'red flags' that needs to be paid attention to before drafting the clauses may significantly improve the use of arbitration. This thesis comprises two case studies and uses the UK and Turkey as case studies but aims to provide recommendations that can lead to a significant contribution for designing a future model for any jurisdiction. Based on the two jurisdictions, this research aims to demonstrate how the proposed system might work by pointing out the main jurisdictional challenges in the current environment through an analysis of two different countries.

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Table of Abbreviations

AAA	American Arbitration Association
ADGM	Abu Dhabi Global Market
BIT	Bilateral Investment Treaty
BOLT	Build Operate Lease Transfer
BOO	Build Own Operate
BOT	Build Operate Transfer
BOOT	Build Own Operate Transfer
BRT	Build Rent Transfer
CIETAC	The China International Economic and Trade Arbitration Commission
DIFC	Dubai International Financial Centre
EBITDA	Earnings before interest, taxes, depreciation and amortisation
EBRD	European Bank of Reconstruction and Development
ECHR	European Convention on Human Rights
EFTA	European Free Trade Association
EMEA	Europe, Middle East and Africa
EPC	Engineering, Procurement and Construction
EURIBOR	The Euro Interbank Offered Rate
FINRA	Financial Industry Regulatory Authority
GCC	The Gulf Cooperation Council
HKIAC	Hong Kong International Arbitration Centre
ICA	International Commercial Arbitration

ICC	International Chamber of Commerce
IPPL	International Private and Procedural Law of the Republic of Turkey
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
ISDA	International Swaps and Derivatives Association
LCIA	London Court of International Arbitration
LIBOR	The London Interbank Offered Rate
PFI	Project Finance International
PPP	Public Private Partnership
P.R.I.M.E. Finance	Panel of Recognised International Market Experts in Finance
SCC	Stockholm Chamber of Commerce
SPV	Special Purpose Vehicle
STR	Secured Transactions Law Reform Project
The New York Convention	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards
The Receivables Convention	UN Convention on the Assignment of Receivables in International Trade
UN	The United Nations
UNCITRAL	The United Nations Commission on International Trade Law
Uniform Commercial Code	UCC
QFC	Qatar Financial Centre

List of Cases

- *Ali Shipping Corp v. Shipyard Trogir* [1999] 1 W.L.R. 314
- *Anatolie Stati, Gabriel Stati, Ascom Group SA, Terra Raf Trans Trading Co Ltd v The Republic of Kazakhstan* [2017] EWHC 1348 (Comm)
- *Anatolie Stati, Gabriel Stati, Ascom Group SA, Terra Raf Trans Trading Co Lts v The Republic of Kazakhstan* [2019] EWHC 1715 (Comm)
- *Bankers Trust Company and Bankers Trust International v PT Jakarta International Hotels and Development* [1999] 1 Lloyd's Rep 910 (QB Comm Ct)
- *Blue Sky One Limited v Mahan Air* [2010] EWHC (Comm)
- *Dolling-Baker v. Merrett [1990]* 1 W.L.R. 1205 at [1213]
- *International Trading and Indus Inv. Co. v. DynCorp Aerospace Technology*, 763 F. Supp 2d 12 (D.D.C 2011)
- *Law Debenture Trust Corporation Plc v Elektrim SA & Anor* [2010] EWCA Civ 1142 [2010]
- *Madison Pacific Trust v Shakoor Capital* [2020] EWHC 610 (Ch)
- *NB Three Shipping Ltd v Harebell Shipping Ltd* [2005] 1 Lloyds Rep 509
- *Pearl Petroleum Company Limited, Dana Gas PJSC, Crescent Petroleum Company International Limited v The Kurdistan Regional Government of Iraq*, Royal Courts of Justice [2015] WLR (d) 476
- *Pearl Petroleum Company Limited, Dana Gas PJSC, Crescent Petroleum Company International Limited v The Kurdistan Regional Government of Iraq*, LCIA case no: 132527
- *The Federal Republic of Nigeria v Process & Industrial Developments Limited* [2020] EWHC 2379 (Comm)
- *Yukos Capital S.a.r.L v OJSC Rosneft Oil Company* [2011] EXHC 1462 (Comm)
- *Yukos Capital S.a.R.L v OJSC Rosneft Oil Company* [2012] EWCA Civ 85

Table of legislation

- Administration of Justice Act 1920
- Arbitration Act 1996
- Commercial Pledge Law of Saudi Arabia enacted by the Royal Decree M/75 dated 21 November 1424H
- Cross Border Insolvency Regulations 2006
- Foreign Judgment (Reciprocal Enforcement) Act 1933
- Insolvency Act 1986
- Law of Property Act 1978
- Localism Act 2011
- Model Law on Secured Transactions' prepared and published by European Bank of Reconstruction and Development (the "**EBRD Model Law on Secured Transactions**")
- UN Convention on the Assignment of Receivables in International Trade (the "**Receivables Convention**")
- Planning Act 2008
- Recovery of Debts Due to Banks and Financial Institutions Act 1993
- Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (the "**Brussels I Regulation (recast**)")
- The Convention of 30 June 2005 on Choice of Court Agreements (the "**Hague Convention**")
- The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the "**Lugano Convention**")
- The Convention on the Recognition and Enforcement of Foreign Arbitral Awards
- The ICC 2021 Arbitration Rules Article
- The LCIA 2020 Arbitration Rules
- The Republic of Turkey Banking Law No:5411
- The Republic of Turkey Capital Markets Law No:6362
- The Republic of Turkey Execution and Bankruptcy Law of Turkey No: 2004

- UN Legislative Guide on Secured Transactions
- UNCITRAL Model Law on Cross border Insolvency
- UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments
- Uniform Commercial Code 1952
- United Nations Commission on International Trade Law

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1. Chapter One – Introduction

1.1. Background

Arbitration is a private method of dispute settlement where the parties, as an alternative to traditional litigation, agree to bring their dispute before one or more decision makers who are not a part of any judicial system.[1] Both arbitration and litigation, which are substitutional, offer a legally binding dispute resolution mechanism for parties to choose from prior to, or after the existence of a dispute.[2] In an arbitration proceeding, parties also agree that the decision, which is enforceable in a national court, is final and binding.[3] Subject to certain exceptions, parties, in principle, are free to choose many different components and layers of the procedure, including the location of the court, the applicable laws, the language, and whether the dispute will be resolved by an institution or an independent arbitrator.

International arbitration is an alternative dispute resolution mechanism which has gradually grown into a meaningful alternative to litigation for the resolution of commercial and investment disputes, as a result of 'the increased globalisation of world trade and investment'.[4] The continuing development of international markets and trade paved the way for the businesspeople involved to build a 'supra-national jurisdiction', which was the core aim in the creation of the concept of international arbitration.[5]

The latest survey conducted by Queen Mary University of London and law firm White & Case in 2021[6], entitled *Adapting Arbitration to a Changing World*, sets out the growing popularity of cross-border arbitration. The survey was conducted via a questionnaire completed by 1,218 respondents, which consisted of a wide spectrum

[1] Margaret L Moses, *The Principles and Practice of International Commercial Arbitration: Second Edition* (2nd edn, Cambridge University Press Textbooks 2012) 433.
[2] Christopher R Drahozal and Stephen J Ware, 'Why Do Businesses Use (or Not Use) Arbitration Clauses' [2010] Ohio State Journal on Dispute Resolution vol 25 no2.
[3] Moses (n 1).
[4] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (Sixth edn, Oxford University Press 2015).
[5] Alessandra Casella, 'On market integration and the development of institutions: The case of international commercial arbitration' [1996] European Economic Review vol 40 Issue 1, 156.
[6] '2021 International Arbitration Survey: Adapting Arbitration to a Changing World' (Queen Mary Survey) (2021) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf> accessed 22 October 2021.

of market participants including counsels, full-time arbitrators, in-house counsels from private sector and governmental entities. Based on the opinions gathered from a very diverse group of participants, the survey discovered that 90% of participants prefer arbitration[7] as a dispute resolution mechanism, demonstrating the popularity of arbitration all around the world.

Although there has been a rapid increase with respect to choosing international commercial arbitration as an alternative dispute resolution, especially in multinational transactions, it can be clearly observed that the choice of international arbitration for financial transactions[8], particularly for project finance disputes, is not as common as in any other international field such as energy and construction. According to the PwC survey, the use of international commercial arbitration for disputes related to financial services is at the other end of the spectrum; an overwhelming 82% of the participants noted that their most preferred dispute resolution method is court litigation.[9]

As mentioned above, international commercial arbitration is generally used to resolve those disputes which arise between private parties, based on private contracts. According to an earlier survey conducted in 2013 by Queen Mary University with the support of the global financial advisory firm PwC,[10] international commercial arbitration is a more popular choice for disputes related to the energy and construction sectors compared to court litigation, with the majority of the survey participants (56% for the energy sector and 68% for the construction sector) noting arbitration is the most preferred dispute resolution mechanism.

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[7] *Queen Mary Survey* (n 6) (According to the survey results, 31% of the participants stated they would prefer arbitration as a standalone method, and 59% in conjunction with another alternative dispute resolution method).
[8] Drahozal and Ware (n 2) (Drahozal and Ware state that they expect the sophisticated parties would prefer litigation over arbitration regarding a commercial loan agreement since the 'governing law and contract terms are well developed an relatively certain in application') *see also* Walter Mattli, 'Private Justice in a Global Economy; From Litigation to Arbitration' [2001] 55 Int'l Org (Mattli notes that regarding disputes arising from construction, engineering and intellectual property, there is a tendency to choose arbitration, but for financial disputes, if the dispute is in relation to the loan itself, it usually comes down to answering a very simple question, which is whether the amount borrowed has been repaid and how much is the non-repaid portion. These two questions are usually easy to answer, and the possibility for uncertainty and complexity to arise is not very common. In addition, the case law and legislation extensively cover the legal issues under loan agreements. Therefore, usually, the New York and United Kingdom courts have the sufficient resources to cope with disputes arising from loan default issues.).
[9] '*Corporate Choices in International Arbitration: Industry Perspectives'* (n 9).
[10] 'Corporate Choices in International Arbitration: Industry Perspectives' (2013) <https://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf> accessed 10 October 2022.

In terms of the relationship between banking sector and international arbitration, Georges Affaki states that:

> The world of arbitration and the world of banking are apart. Arbitration practitioners consider bankers as being most ungrateful for not showing more gratitude to the many advantages that arbitration offers. […] Conversely, bankers reproach arbitrators for not understanding the basics of a banker's business.[11]

One of the main reasons why international commercial arbitration is more utilised in other sectors, such as construction, but not as much in project finance transactions, is because financial disputes require a distinctive level of expertise.[12] Georges Affaki,[13] a veteran of the financial arbitration market and the Chair of the P.R.I.M.E. Finance Rules Review Drafting Group stated, that when determining breaches of contract, regulatory compliance may become an impactful consideration. In highly regulated financial markets, enforcing claims can run up against banks' minimum capital and asset ring-fencing requirements, while concern about potential losses can spark an exodus of bank clients and investors. The ability to gather information is also hampered by the institutions' statutory duty to safeguard customer information.[14]

Despite the fact that international commercial arbitration has not been as popular choice for financial disputes as for other sectors, there has nonetheless been an increase with respect to the choice of international arbitration over litigation as a result of the global and transnational structure of financial transactions and the implementation of arbitration clauses within the finance documents used by the international institutions and organisations involved in financial markets. For example, both the ISDA Guide 2013 for the implementation of arbitration clauses within the ISDA Master Agreement[15] and P.R.I.M.E. Finance Arbitration Rules[16]

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[11] Georges Affaki, 'A Banker's Approach to Arbitration' [2003] *in* G. Kaufmann-Kohler, Gabrielle/Frossard (eds) *Arbitration in Banking and Financial Matters*, ASA Special Series No. 20, 63.

[12] Georges Affaki, 'Revamping of P.R.I.M.E. Finance Arbitration Rules Underway' (2012) <http://arbitrationblog.kluwerarbitration.com/2021/01/20/revamping-of-p-r-i-m-e-finance-arbitration-rules-underway/> accessed 14 September 2021.

[13] 'Expert resume of Prof. Dr. Georges Affaki, C.Arb, FCIArb' <https://primefinancedisputes.org/expert/prof-dr-georges-affaki-fciarb> accessed 3 February 2023.

[14] Affaki, '*Revamping of P.R.I.M.E. Finance Arbitration Rules Underway'* (n 12).

[15] 'ISDA Master Agreement' <https://www.isda.org/tag/master-agreement/> (accessed 13 September 2021).

introduced an official approach to the involvement of arbitration clauses to financial transactions including for derivatives and swaps.

According to the annual report published by the AAA, there was a 58% growth for the disputes brought before the institution regarding financial services for the year 2019.[17] Moreover, the LCIA reported that 20%[18] of its cases were in relation to banking and finance disputes in 2020.[19] Even though the preference for international arbitration in financial disputes is on the rise, banks and financial institutions still usually prefer litigation to arbitration, especially for the financial transactions that involve the emerging markets.

One of the reasons for this situation would be set out by way of comparing the context and structure of a facility agreement (loan agreement) with other agreements between parties which commonly include arbitration clauses, such as an EPC contract. It can be observed that one of the differences which stands out significantly is the fact that a facility agreement is based on monetary issues and the structure of a facility agreement is mainly purposed for the repayment of the loan granted to the borrower. On the other hand, an EPC contract has more of a technical aspect. Therefore, choosing arbitration as an alternative means of dispute resolution and appointing an arbitrator who has considerable expertise in the related field would be advantageous for EPC contracts in terms of avoiding the loss of time waiting for the case to be brought before an expert by the competent court. Meanwhile, the courts of England and New York have significant expertise and precedent in the field of international finance law, which provides for such disputes to be resolved in a considerably shorter amount of time. In addition, when it comes to choosing a host jurisdiction that has hundreds of years of expertise in a specific area with a global reputation, it might take a very long period of time for the private arbitration practices

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[16] 'P.R.I.M.E. Finance Arbitration Rules' <https://primefinancedisputes.org/page/p-r-i-m-e-finance-arbitration-rules> accessed 14 January 2022.
[17] 'American Arbitration Association 2019 Annual Report: Advancing Future of Alternative Dispute Resolution' (2019) <https://adr.org/sites/default/files/document_repository/AAA_AnnualReport_2019.pdf> accessed 14 January 2022.
[18] LCIA 2020 Annual Casework Report' (2020) <https://www.lcia.org/lcia/reports.aspx> accessed 14 January 2022 (It is important to point out that although the 20% banking and finance caseload is considerably high, there is a 12% year-on-year decline since the LCIA's 2019 casework report showed 32% banking and finance caseload. The 2018 figures are also higher than 2020, with 29% of the caseload being banking and finance disputes.).
[19] ibid.

to build up the same credibility and popularity compared to the local courts of the host state.[20]

However, in the case of project finance transactions, the multijurisdictional and global aspects of these international finance transactions, and the introduction of different financial approaches to the transactions, tend to result in these transactions being structured in a more complex way than usual. At this point, the advantages of international arbitration as an alternative dispute resolution mechanism with respect to transactions based on complex financial structures, such as syndicated loan arrangements or financial transactions involving elements of Islamic finance may also be discussed.

Moreover, the complexity of a project finance transaction and the fact that the repayment of the project finance debt is based on the anticipated cash flow of the project, means that the evaluation of the cash flows in the event of a dispute would usually require a specific set of knowledge in the field regarding the economic concepts involved and also a 'familiarity with market expectations'.[21]

Bearing in mind that one of the biggest concerns of the banks and financial institutions when structuring a financial transaction in an emerging market is the situation where an event of default is triggered and the loan granted becomes due and payable, the law of the emerging market where the borrower is located is of crucial importance. In this respect, the security structure and the enforcement of security in an event of default are highly relevant, all the more so in a project finance transaction where the lenders are mostly relying on the cash flow that will be generated by the project itself for repayment (as opposed to the repayment ability of the project's equity sponsor). The possibility of non-payment, therefore, is a highly considered risk.

Apart from the issues arising from the enforcement of arbitral awards in emerging markets, which is a major concern not only for financial transactions, the status of the

[20] Jens Dammann and Henry Hansmann, 'Globalizing Commercial Litigation' [2008] Cornell Law Review vol 94, no 1 p 1-72, 38.
[21] Inka Hanefeld, 'Arbitration in Banking and Finance' [2013] New York University Journal of Law and Business vol 9 no 3, 925.

governing law with respect to ancillary finance documents including the security documents is also of vital importance. For example, the private international law of Turkey, which is considered to be an emerging market, sets out that the parties to a contract can choose the law which governs the facility agreement. However, the ownership rights and rights in rem granted over the movable and immovable property shall be subject to the law where such movable or immovable property is located at the time of the transaction.

Therefore, the governing law of the security documents including share pledge agreements, commercial enterprise pledge agreements and account pledge agreements shall be Turkish.[22] Another example would be the unenforceability of the choice of hybrid jurisdiction clauses due to Turkish law.[23] Therefore, taking a potential dispute arising from a security document governed by the laws of the relevant emerging market into account, the current situation with respect to emerging markets, and whether it would be more practical to bring the case before a competent court of such emerging market rather than choosing arbitration as an alternative dispute resolution, is an aspect which needs to be analysed.

In addition, another issue to consider is the freedom to choose the applicable laws after arbitration has been chosen by the parties as an alternative dispute resolution and therefore, is the limits of party autonomy while choosing international arbitration for financial disputes involving the emerging markets. Party autonomy, the freedom to choose an applicable law for each layer (being the law applicable to the merits of the dispute, the arbitral proceedings or the arbitration agreement itself), is one of the most advantageous aspects of international arbitration that differs from litigation. However, since there are even limits to the law applicable to some of the finance and security documents, the extent of party autonomy in international arbitration for financial transactions in emerging markets is also crucial to determine whether it is advantageous or disadvantageous to choose international arbitration for financial disputes in emerging markets.

[22] Nazli Dereli Oba and Bengu Coskun, 'Turkey: Project Finance Comparative Guide' (2022) https://www.mondaq.com/turkey/finance-and-banking/1109186/project-finance-comparative-guide accessed 10 October 2022

[23] Efe Kinikoglu and Ugursan Yigit Parmaksiz 'Practial Law Q&A: Governing Law and Jurisdiction Clauses in Turkey' (2020) <www.bcct.org.tr/news/practical-law-qa-governing-law-and-jurisdiction-clauses-in-turkey/68730> t accessed 10 October 2022.

Among the wide spectrum of financial transactions, the problems in the banking and finance sector differ vastly based on the type of the financing transaction. The concept of 'one size fits all' is practically impossible to exercise.[24] It is very important for the parties to take this into consideration and make sure a well-drafted dispute resolution clause is inserted into their contracts in order to avoid any future complications. Moreover, this issue is significantly more important for project finance transactions since the risk undertaken by the lenders to a project is considerably higher than for many other types of financial transaction, something which will be evaluated in detail throughout this thesis.

1.2. Literature Review

As international arbitration is used more widely on a global level, the scholars have started to pay more attention to its use on a more sector-by-sector basis. There have been several very significant research studies about the use of international arbitration (either investment or commercial arbitration) for finance transactions, but rather than providing a solution, the articles are mainly setting forth the main obstacles by way of a comparison of international arbitration and litigation. Some of the articles propose an international financial arbitration centre to be established (which currently already exist), but a specialist arbitral institution, on its own, is not enough to improve the use of international commercial arbitration specifically for project finance disputes.

Moreover, the majority of research analysing the use of international commercial arbitration for financial disputes and the related obstacles are written by practitioners of the field, and there is a lack of scholar research questioning the reasons behind it. Before getting into more detail regarding the use of international commercial arbitration for finance disputes (with a particular focus on project finance

[24] 'ICC ADR Task Force Report' (2016) <https://iccwbo.org/content/uploads/sites/3/2016/11/icc-financial-institutions-and-international-arbitration-icc-arbitration-adr-commission-report.pdf> accessed 3 February 2023 *see also* Georges Affaki, 'Arbitration in Banking and Finance Deconstructed' (2018) <https://www.lexisnexis.co.uk/blog/dispute-resolution/arbitration-in-banking-finance-deconstructed> accessed 14 January 2022 (Affaki, the co-chair of the ICC Task Force on Financial Institutions and International Arbitration noted that one size fits all approach is not possible to follow when it comes to banking).

transactions), there are certain criticisms and observations to be highlighted regarding the use of international commercial arbitration for any commercial dispute and the future of its practice.[25]

Parties to a project finance transaction have the freedom to choose the dispute resolution mechanism that will be applicable to each and every agreement. None of the parties enter into a contract thinking the obligations promised to be undertaken by the other party will not be fulfilled and therefore an issue will arise which can only be resolved by an authority, even in a 'high risk, high return' type scenario such as a project finance transaction. Foreign investments in emerging markets are considered to be a profitable form of investment from the perspective of financial institutions but one which also carries a higher potential for risks. While some of the clauses that govern the dispute resolution issue are fairly standard, some others need to be tailored to the specific situation.[26]

Due to the nature of a project finance transaction, there are many different aspects, jurisdictions, sub-contracts and parties to be taken into consideration before drafting the clauses. But what if there was a mechanism that guides you through the alternative ways of drafting these, based on all the various aspects of your project finance transaction? Another question that subsequently arises: is it worth going through all that, or does litigation provide sufficient flexibility and solution?

The issue of trying to come up with a solution to improve the use of arbitration has been evaluated. For example, Georgios Martsekis[27] suggests that a new international financial court may be the most competent body to resolve this kind of dispute

[25] Julian Nyarko, 'We'll See You in . . . Court! The lack of arbitration clauses in international commercial contracts' [2019] International Review of Law and Economics Vol 58, 6 (Nyarko notes that as it is demonstrated with this study, international arbitration's effect on the commercial environment tends to be overstated. Nyarko states that the statistics show that the percentage of parties adding an arbitration clause to their either international or domestic contracts is not high per se – meaning the hopes that arbitration will take over traditional litigation process in the near future is lessening. The situations where the parties tend to choose arbitration over litigation are when 'their choice is motivated neither by efficiency concerns nor by a general desire to avoid litigating before another's domestic courts'. Moreover, taking the situations where the parties chose arbitration into consideration, the current evidence shows that the choice is merely aimed to avoid the local courts dysfunctionality in terms of enforcement).

[26] Bahar Hatami Alamdari 'The emerging popularity of international arbitration in banking and financial sector – Is this a fashionable trend or a viable replacement?' (2016) Doctoral thesis, University of London.

[27] Georgios Martsekis, 'Arbitration in International Finance Transactions: The Path to Financial Arbitration' [2018] The international Journal of Arbitration, Mediation and Dispute Management, Vol 84 Issue 2 <https://www.ciarb.org/media/1378/april-2018.pdf> accessed 14 January 2022.

effectively.[28] According to Martsekis, an international financial court, with many experienced arbitrators is urgently needed in order to create a 'global mecca for the resolution of financial disputes' and to avoid current problems that the local judges are facing.[29] However, on top of the specialised arbitration institutions, there needs to be a system, which would be used by such financial arbitration institutions, specifically designed for project finance disputes, to make a change in terms of improving the use of such establishments.

Martsekis refers to an article written by Jeffrey Golden[30] from 2009, stating that the world needs a financial court with specialist judges, just like the specialist courts we have for family law, tax law, intellectual property law and bankruptcy law. This article was very relatable a decade ago, but currently, there are already several institutions established just for this purpose, such as P.R.I.M.E. Finance. In fact, Golden is the founder of the P.R.I.M.E. Finance Foundation, which was established in 2012.

This thesis aims to fill the gap in the literature and advance this solution a stage further, suggesting that a system, specifically for project finance transactions, should be introduced with the help of existing financial arbitration institutions.

As mentioned above, there has been research conducted detailing the reasons why arbitration is not used as much as litigation for project finance disputes, but there is not a proposed system about how to tackle this problem. This thesis aims to suggest a 'pooling system' that brings all the jurisdiction-based problems together, for the parties to be aware of the red flags and therefore incorporate those into their arbitration clauses or agreements.

International commercial arbitration provides a layered system when choosing the applicable laws (to the merit, seat, procedure etc.). If used consciously, this can be a

[28] 'ICC ADR Task Force Report' (n 24) (The Task Force notes that 'The banking and finance sector involves transactions that are not amenable to a 'one size fits all' approach. Export finance, for instance, is different from arbitraging securities on the secondary market. The approach to risk-weighting in project finance involving state instrumentalities differs considerably from what is involved in mortgage lending. Besides, a large part of the banking industry does not involve lending at all, as when banks and specialist funds offer advisory services in corporate restructuring, sovereign lending, securities listing and privatisation')

[29] Martsekis (n 25).

[30] Jeffrey Golden, 'World Financial Markets Need a World Financial Court' (2010) <https://www.theguardian.com/law/2010/nov/03/world-financial-markets-court> accessed 14 January 2022.

significant advantage for project finance disputes, since project finance transactions are also considered to be multi-layered and multi-jurisdictional.

Due to the increase of international financial transactions in the emerging markets, especially within the last twenty years, and the fact that international arbitration is a highly resorted to mechanism for resolving disputes, research on this topic, focusing on project finance disputes and offering a potential solution to some of the major hurdles faced, would be a significant contribution to knowledge, since it will try to anticipate the future of international arbitration, and examine the possible obstacles and advantages of choosing international arbitration for project finance disputes in emerging markets. This proposed research would complement the previous work in the area of the use of international arbitration for financial disputes by analysing the limits of party autonomy, and the possible advantages and disadvantages of international arbitration specifically in emerging markets which would set out the current position and the potential future, in a more detailed way.

1.3. Research Questions

The use of international commercial arbitration is gaining popularity in all sectors, however the pace of this trend has proven lower when it comes to project finance disputes. Project finance transactions are so unique that certain characteristics of international commercial arbitration are perceived as disadvantages in terms of choosing arbitration to resolve disputes as an alternative to conventional litigation proceedings.

Therefore, given the legal nature of project finance disputes, this thesis will explore to what extent the use of international commercial arbitration can be improved for project finance disputes by introducing a database system that would help the parties to draft their arbitration clauses or agreements by flagging the potential issues to take into consideration.

The system which will be proposed in this thesis aims to provide a solution on an international level, and in order to provide an answer to the main research question,

there are several additional sub-questions to be asked to explore the ways in which the use of international commercial arbitration for project finance disputes can be improved on an international level. To evaluate the use of international commercial arbitration for project finance disputes, and to demonstrate how the proposed system would work, it is essential to initially analyse which specific characteristics of project finance have led to the slower uptake of international commercial arbitration in the industry, and also which key aspects of a project finance transaction differ from any other financial transaction. These questions also aim to analyse the types of parties involved and the documents used in a project finance transaction.

This thesis will also explore the reasons why litigation is statistically more popular for project finance disputes, by analysing the main advantages and disadvantages of international commercial arbitration compared with traditional litigation procedures within a project finance context.

In order to evaluate whether there is room for improvement by bringing a new approach to the table, it is also essential to explore the global efforts made so far to encourage the use of international commercial arbitration for financial disputes, especially for project finance disputes, and ask whether these are adequate, or if there is anything else that can be done to encourage further improvement.

Based on detailed analysis conducted to answer the main research question and the sub-questions, a case study will be presented based on the Turkish and UK jurisdictions, two prominent countries when it comes to the volume of project finance transactions, as samples to demonstrate the proposed approach.[31] Choosing these two countries as samples (the former a common law jurisdiction which has sophisticated domestic legislation and judicial precedent on arbitration and finance; the latter a civil law jurisdiction that has less matured legislation and precedent, but still has a very high volume of project finance transactions per year) will help in assessing how the proposed approach would work for jurisdictions with very different characteristics. It will also help to answer the research question by understanding the

[31] Please see Section 1.5.2 *Jurisdictions to be used as samples* for the reasoning behind the UK and Turkey being chosen as two sample jurisdictions for this thesis.

bigger picture, as both countries exhibit many aspects that represent a lot of qualities and issues that can be witnessed in other jurisdictions.

The main research question, alongside the sub-questions will be answered based on the analysis that will be carried out throughout this thesis, and a new approach for drafting the arbitration clauses for project finance transactions will be provided based on findings.

1.4. Research Methodology

To answer the research questions, this thesis uses multiple methodologies including doctrinal research and comparative methodology based on the analysis of primary and secondary legal materials, arbitral awards and court decisions. This research is based upon an extensive literature review of primary and secondary sources including published books, journals and papers alongside court cases and arbitral awards on project finance, international commercial arbitration and the use of international commercial arbitration for finance disputes, with a particular focus on disputes emerging from project finance transactions.

This thesis begins with doctrinal research, critically analysing the concepts of project finance and international commercial arbitration. The chapter on the main characteristics of a project finance transaction also refines and evaluates the information on project finance by viewing it through the lens of international commercial arbitration, both in theory based on primary and secondary sources including academic papers, and also in practice, based on practitioners' notes and observations. Analysing the theory and practice enables the researcher to critically explore both project finance transactions and international commercial arbitration, to provide a basis for further analysis and subsequently, answers and recommendations regarding the research questions.

Furthermore, to support the doctrinal research, and in order to answer the main research question this thesis adopts a comparative analysis, by way of examining the advantages and disadvantages of international commercial arbitration as an

alternative dispute mechanism to traditional litigation, alongside a jurisdictional comparison between the UK and Turkey, to demonstrate the proposed pool mechanism in Chapter 5. The aim of using comparative analysis in this thesis is not merely to provide a comparison of the UK and Turkey jurisdictions on a national level per se, but to use the comparison as a tool to analyse the comparative elements that can potentially influence the use of project finance for international commercial arbitration on an international level.[32] Although the UK and Turkey are picked as the sample jurisdictions for the reasons stated below, other countries, their legislations, case law, and issues that arise in practice are also discussed throughout the thesis. Adopting a comparative analysis provides a better understanding of different jurisdictions, and thus gives guidance as to which aspects of either jurisdiction can be adopted to create an applicable international system, and to explore if there is a way of harmonising the legislations. Generally, comparative methodology is used to re-evaluate the national legal systems, to decide if anything can be improved on a national, regional or international level.[33] The aim of using a comparative analysis is to identify good practices, lessons to be learned from different jurisdictions on a national level, advantages and disadvantages of international commercial arbitration with a focus of financial disputes as opposed to litigation, and to explore if a system can be introduced on an international level, which will be elaborated further in Chapter 5.[34] This thesis also uses comparative analysis in terms of the national and international efforts to harmonise the legislation for secured transactions, by exploring the approaches to create a more globalised system for creating, perfecting and enforcing security interests and how these approaches are received based on jurisdictional differences.

Building research in the field allowed the researcher to utilise her own practical experience and network in the banking and finance law sector, having worked as a banking and finance lawyer for a global law firm, observing the use of international

[32] Esin Orucu, 'Comparative Motley: Offerings from a Comparative Lawyer [2021] Critical Analysis of Law Vol 8 No 2 (Orucu notes that 'Comparative law, by drawing from the pool of models to illustrate the general points it is making, can bring additional perspectives to aid our understanding of the world of law and society. Only thus would a continuous desire to look for comparative inspiration to be fostered').

[33] Edward J. Eberle, 'The Methodology of Comparative Law' [2011] 16 Roger Williams U L Rev, 51.

[34] Orucu (n 32) (Orucu also states that there are different methods that can be followed when it comes to comparative law, such as the traditional black-letter-oriented comparative law, which basically focuses merely on the doctrinal resources such as statutes and cases. On the other hand, a more creative approach can also be adopted, which would be more about 'suggesting core concepts and point out the way to ideal systems, or at least to the better law approach').

commercial arbitration for project finance disputes first hand, and drafting and negotiating the terms of project finance documents with a specific focus on loan and security agreements. Previous work experience also allowed the researcher to properly analyse technical reports and surveys used in this thesis to support the critical analysis. Furthermore, the researcher's current role as a financial journalist enabled the researcher to gain extensive insight regarding the recognition and enforcement of arbitral awards and how this particular issue is handled by the English courts. While some of the case law analysed in this thesis to support the hypothesis are prime examples found as a result of extensive doctrinal research, several court cases, including the legal proceedings between the Ukraine-based bank PrivatBank and its bondholders, and the long-running legal battle between the Stati family and the Republic of Kazakhstan, which are evaluated in detail under this thesis, were observed by the researcher by physically attending the hearings in London and following them closely from start to finish. The cases analysed in Chapter 4 of this thesis are chosen from the limited number of cases that are available as examples of international commercial arbitration that are connected to financial disputes, which are all rendered after 2010 up until 2023, reflecting the most recent approaches. As the results of the cases vary, they show different outcomes, including a successful enforcement, annulment of an award by the courts, refusal of efforts to set an arbitral award aside, and refusal of the recognition and enforcement of an award. Therefore, the analysis of these seven cases pave way for a more balanced argument and serve as a crucial step to form the system proposed under Chapter 5.

Furthermore, advanced empirical research to obtain primary information by conducting interviews was considered by the researcher as well, by conducting interviews with experienced practitioners who focus on financial law and international commercial arbitration. However, after careful consideration on the back of informal conversations held with the researcher's existing network, and weighing its advantages and disadvantages the researcher decided not to proceed with conducting formal interviews, given the sufficient information and resources available online provided by the practitioners regarding their own experience. This was mainly because the prospective candidates for a formal interview were reluctant to openly discuss the transactions they were involved in, as both the arbitral awards and the

nature of advisory roles that the market participants would take on for a project finance transaction would usually be subject to confidentiality. However, to test the reliability of this thesis, certain arguments and findings were shared with practitioners, and their opinions were gathered, which provided an opportunity to test the arguments set forth in this thesis and therefore gave an indication as to the validity of the premise.

Instead, the researcher used her network and professional relationships to gather further evidence and information to support the arguments presented under this thesis. She has attended many international conferences, including the P.R.I.M.E. Finance Conference held in the Hague in 2017 and Paris Arbitration Week in 2018, where the researcher had the opportunity to hold discussions with and gain insight from esteemed academicians and practitioners who have expertise in financial arbitration. The researcher also had the opportunity to informally discuss the main subject matter of her thesis with the market veteran, Professor Jeffrey Golden, the co-founder of P.R.I.M.E. Finance and received valuable guidance as to how to progress with her thesis.

The researcher also utilised her expertise in the field to conduct quantitative as well as qualitative research and further empirical research by going through several databases and surveys, including the data provided by PFI, surveys conducted by Queen Mary University and PwC, and used these statistics to support the arguments on the popularity of project finance, both globally and on a jurisdictional basis, alongside the volume of project finance transactions geographically. Such research specifically focused on the project finance transactions that materialised in the last decade, and the research was conducted by using keywords such as ‘project finance in emerging markets’, ‘PPP’, ‘infrastructure’, ‘construction’ and ‘renewable energy’. Moreover, the researcher also used legal databases that she has access to identify and gather legal documents for cases that not usually available in public domain, such as the HM Courts and Tribunals Service, developed by Thomson Reuters Court Management Solutions. As mentioned above, the researcher also benefited from attending come of the court hearings personally.

1.5. Research Scope and its Limitations

1.5.1. International Commercial Arbitration and International Investment Arbitration

There are two main areas of international arbitration: international commercial arbitration and international investment arbitration. The common aspect of both concepts is that the dispute needs to be of a foreign nature. Arbitration has a privileged position for international disputes, as many international treaties, such as the New York Convention, provide for an easier enforcement process.[35] In addition, certain local legislation makes international arbitral awards harder to appeal against compared to national arbitral awards.[36] The essence of international commercial arbitration - that is, the necessity that the dispute at hand has a foreign element - is the same quality that is seen in most project finance transactions, as a project finance transaction consists of multiple contracts entered into between parties from different jurisdictions and countries.[37]

The main difference between international commercial arbitration and international investment arbitration is their applicable substantive law.[38] International commercial arbitration, generally, deals with disputes arising between private parties and based on private contracts. Even if a sovereign entity gets involved in an international commercial arbitration proceeding, it usually acts in its own private capacity.[39] On the other hand, international investment arbitration deals with public international law instead of private law and 'states acting in their capacity as sovereigns (which enter into treaties) and regulators (which govern populations)'.[40]

[35] Casella (n 5).
[36] Ibid.
[37] Christophe Dugue, 'Dispute Resolution in International Project Finance Transactions' [2001] Fordham International Law Journal, vol 24 no 4, 1064.
[38] Anthea Roberts, Divergence Between Investment and Commercial Arbitration' [2012] Proceedings of the Annual Meeting American Society of International *Law* Vol 106, 298.
[39] Ibid.
[40] Ibid.

International investment arbitration started gaining popularity following the conclusion of the first BITs in 1959 and the World Bank's ICSID Convention in 1965.[41] Currently, investment arbitration is the preferred dispute resolution method in thousands of investment treaties and contracts between states and foreign enterprises.[42] In terms of legal framework, the relevant legislation in terms of international investment treaties include the BITs, the ICSID Convention and the Energy Charter Treaty.[43] The application and scope of international commercial arbitration and international investment arbitration are different, and due to its nature and use, international investment arbitration does not fall under the scope of this thesis and therefore the disputes between host states and investors will not be included in this thesis.

1.5.2. Jurisdictions to be used as samples

Although there are two jurisdictions – the United Kingdom and Turkey – that are chosen as samples, the thesis does not aim to find a solution solely for these two jurisdictions, but it aims establish a system on an international level, by using the United Kingdom and Turkey as examples to check to which extent the international commercial arbitration can be utilised for project finance disputes. Although these two countries are selected as case studies, since this thesis is aiming to demonstrate the use of international commercial arbitration on an international basis, legislations and precedents in other jurisdictions, both in developed countries and emerging markets, are also presented throughout this thesis. Therefore, this thesis has a separate section under which the UK and Turkey are used as samples by applying a set of questions to a hypothetical project located in these two jurisdictions, but as it aims to establish an international system, there are certain examples from other jurisdictions given throughout the thesis to showcase the current international environment.

By using the United Kingdom and Turkey as case studies, this thesis aims to provide certain recommendations that can lead to a significant contribution for designing a

[41]Karl Heinz Bockstiegel, 'Commercial and Investment Arbitration: How Different are They Today? The Lalive Lecture 2012' [2012] Arbitration International, The Journal of the London Court of International Arbitration vol 28 no 4, 577 (The survey was conducted in two phases, firstly an online questionnaire was completed by 101 market participants, followed by more than 30 interviews conducted with the respondents).
[42] Ibid.
[43] Ibid.

future model, as an international solution, and mainly to improve the use of international commercial arbitration for project finance disputes. Based on the two jurisdictions, this research aims to demonstrate how the proposed system might work by pointing out the main jurisdictional challenges in the current environment through an analysis of two different countries, which would be applicable to other countries under the proposed system.

There are several reasons why these two jurisdictions were chosen as samples, the most important one being the volume of project finance transactions that are happening on a yearly basis. The more a country is familiar with project finance transactions in their region, the more there is to analyse, in terms of case law, practice and relevant legislation. Another reason behind choosing a country with more volume as a case study is due to the increased visibility of the existing problems.

In addition to the volume of project finance transactions, in order to demonstrate the proposed system and how it would work internationally (and how different every jurisdiction is), it is important to choose two separate countries, ideally one country with a more sophisticated legal system, alongside a more developed economy, whereas the second country to be put forward for the case study is chosen amongst the countries regarded as 'emerging markets'.

Due to the fact that the courts of New York and England are very popular in terms of dealing with complex financial disputes, the first jurisdiction to be analysed in detail and compared with the others should be either the UK or New York, as they are considered to offer solutions supported by the most developed and matured legal systems in the world.

When it comes to choosing between the two – being New York and London – the volume of project finance transactions in the United Kingdom is a significant factor. According to PFI league tables,[44] the UK has been in the top three within the EMEA region regarding the project finance loan volume for the past couple of years. In

[44] 'PFI League Tables 2020' (2020) <https://www.pfie.com/story/2709582/pfi-league-tables-2021-qgsrghbx36> accessed 14 January 2022.

2018, USD 22.4 billion of all the project finance loans within the region, which was USD 110.1 billion in total were invested in the UK, which corresponds to roughly 20% of all project finance deals in EMEA.[45] This trend continued in 2022, as USD 15.67 billion of the total USD 103.5 billion worth of project finance loans in EMEA was granted to the projects based in the UK in the first nine months of 2022.[46]

In the first quarter of 2021, the United Kingdom had a 101% increase year-on-year in terms of the project finance loans granted, ranking the first amongst Europe with a total of approximately USD 4.8 billion.[47] In 2017, the United Kingdom ranked third worldwide with 58 new project finance deals, which corresponds to 9.2% of the whole loan volumes. In 2019, the United Kingdom ranked third as a country with 56 new project finance deals, which is 7.9% of the number of deals globally. Moreover, there is also another crucial factor for choosing the UK as the sample jurisdiction rather than New York, which is London's unquestionable popularity, not just as a litigation hub, but also a centre for international arbitration.[48]

On the other hand, to offer a comprehensive solution to the problem, the second sample jurisdiction needed to be one considered a major emerging market, with less global legal system in terms of regulating project finance transactions, but also with legislation that has significant commonalities (and therefore similar potential problems) with a large number of other emerging markets countries. In addition, the country to be chosen needed to have a great volume of ongoing project finance deals.

[45] 'PFI League Tables 2020' (n 44).
[46] 'Global Project Finance Review First Nine Months 2022' (2022) <https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwj7nbj4gPuDAxUDh_0HHYihClcQFnoECA4QAw&url=https%3A%2F%2Fthesource.lseg.com%2FTheSource%2Fgetfile%2Fdownload%2F869ac0a4-1c43-440e-9f37-e70d36223d04%23%3A~%3Atext%3DGlobal%2520Project%2520Finance%2520Loans%2520during%2Cfirst%2520nine%2520months%2520on%2520record.&usg=AOvVaw3PYmtpiS-V1GHKasB68SeO&opi=89978449> accessed 20 September 2023.
[47] 'Global Project Finance Review' (2021) <https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjxuPTegfuDAxX0QkEAHTRACLcQFnoECBQQAQ&url=https%3A%2F%2Fthesource.lseg.com%2FTheSource%2Fgetfile%2Fdownload%2F82449f4c-7d9d-40d8-bb13-dc8f069b9a4b&usg=AOvVaw3HK2leygqOuu6I0Tgsnpik&opi=89978449> accessed 14 January 2022.
[48] Gary Born, *International Commercial Arbitration* (Kluwer Law Int'l, 2009) page iii, (also see Queen Mary Survey (n 6) LCIA is in the world's top five most preferred arbitral institutions).

Turkey is one of the biggest markets for project finance transactions, where several jumbo-sized project financings are closed a year[49]. In 2016, when major countries such as the United States, Russia and Mexico had cutbacks, several countries such as Turkey and Canada had increased investments.[50] Turkey managed to rank the first in Eastern Europe in the first quarter of 2020 in terms of project finance loans within the region.[51] In the first nine months of 2022, Turkey had the second highest volume of project finance loans within Eastern Europe, with USD 1.73 billion worth of loans, out of the total amount of USD 5.82 billion.[52]

Turkey has been going through a serious currency crisis since the beginning of 2018. Due to the massive plunge in Turkish lira, Turkish corporates have been struggling to service their debt, since the vast majority of the loans were granted in a foreign currency while the companies are making money in Turkish lira. Even under these circumstances, where most of the new project financings are on hold, Turkey was still in the first four countries in terms of project finance loans in the first quarter of 2021.[53]

According to the 'Geographic Distribution of Project Finance and All Syndicated Loans' chart,[54] out of 673 project finance loans all across Western Europe in 2000, 306 of their borrowers were located in the UK[55] with a total value of USD 91.7bn. The same chart shows that Turkey had the biggest number of project finance loans within the entire Middle East region (198 loans and USD 14.4bn), as 198 of the project finance loans out of 501 were granted to borrowers located in Turkey.[56]

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[49] Pelin Alpkokin and Murat Samil Capar, 'Dispute boards in Turkey for infrastructure projects', [2019] Utilities Policy, Volume 60, 2019, 100958, ISSN 0957-1787, ('Turkey has a large and global construction industry which is strongly marked by mega and complex projects, and it has been ranked as the second largest, in a recent Engineering News Record (ENR) listing based in the revenue generated abroad (46 Turkish contractors were contained under this list on 2017)').

[50] 'Bridging Global Infrastructure Gaps' (2016}. <https://www.mckinsey.com/~/media/McKinsey/Industries/Capital%20Projects%20and%20Infrastructure/Our%20Insights/Bridging%20global%20infrastructure%20gaps/Bridging-Global-Infrastructure-Gaps-Full-report-June-2016.ashx> accessed 3 May 2020.

[51] 'Global Project Finance Review' (n 47).

[52] Global Project Finance Review First Nine Months 2022' (n 46).

[53] 'Global Project Finance Review' (n 47).

[54] Stefanie Kleimeier and William L. Megginson, 'Are Project Finance Loans Different from Other Syndicated Credits?' [2000] Journal of Applied Corporate Finance, vol. 13, no. 1, 2000, 75.

[55] ibid (also notes that the proportion of the project finance loans provided to the UK borrowers compared with the corporate loans is way higher than any of the other Western Europe countries. Kleimeier notes that 'this preference of project finance lenders for British borrowers is not merely and artifact of the disproportionately large Eurotunnel loans […] It also reflects the emphasis placed by the Conservative Thatcher and Major governments (and now the Labour government of Tony Blair) on the private rather than public financing of large infrastructure projects – many of which have proven to be remarkably successful, both financially and operationally.').

[56] Ibid.

1.6. Overview of the Research Chapters

This thesis comprises six chapters, including the introduction and conclusion. Chapter 1 sets out the main research question and the thesis plan alongside a literature review stating what the contribution to the previous work in this particular area will be. This chapter also includes the methodology that is used in this research, and the definition of the key concepts used throughout the paper.

Chapter 2 aims to provide information about what project finance is; since it is vital to understand the main characteristics of a project finance transaction to be able to analyse and evaluate the potential obstacles and to be able to come up with a solution to the problems identified in this thesis. The chapter answers the questions of what makes a project finance transaction unique within the concept of finance transactions; the parties involved in a project finance transaction; what the main and ancillary project finance documents are; how the whole mechanism is structured and what a complex project finance transaction is. A very important part of this chapter is with respect to the security documents, as this is one if the biggest challenges in terms of using international commercial arbitration as an alternative dispute resolution mechanism and understanding the main aspects and types of security documents, their role in a project finance transaction and their enforceability will be evaluated in this chapter. This chapter, summarising the legal nature of a project finance transaction, lays the groundwork and is necessary in order to proceed with demonstrating the use of arbitration in project finance disputes.

Chapter 3 aims to provide an overview of what international commercial arbitration is and includes an analysis of the advantages and disadvantages of international commercial arbitration compared with litigation. The parameters of comparison include several generic factors inherent to all commercial arbitration, such as neutrality, cost, time and the extent of the parties' freedom to choose the applicable laws (party autonomy). But the chapter also aims to provide an in-depth analysis of certain advantages and disadvantages that are relatively more applicable to a project finance transaction, such as the possibility to have a joinder (since project finance transactions involve many different parties from different jurisdictions), expertise and enforcement of security.

After evaluating the main characteristics of a project finance transaction and international commercial arbitration, Chapter 4 aims to focus on the main problem, which is the use of international commercial arbitration for project finance disputes. Chapter 4 outlines the main issue underlying the research question by elaborating on the reasons why parties still resort to litigation rather than arbitration and the causes of this situation on a project finance-specific basis. Chapter Four also includes certain concepts such as a unilateral jurisdiction clause and its enforceability, the current efforts to improve the use of litigation for financial disputes, and case law regarding the recognition and enforcement of financial arbitration awards in different jurisdictions.

Chapter 5 sets forth the various global approaches and initiatives intended to improve the use of international commercial arbitration for project finance disputes, focusing on jurisdictional trends and the current situation on an international level – the biggest financial arbitration organisations active in the market and their recent efforts. This chapter also answers the question of whether there is a current mechanism to improve or overcome the obstacles mentioned in the previous chapter, the work undertaken by financial and legal institutions.

Chapter 5 also puts forward the proposed mechanism to improve the use of international commercial arbitration for project finance, and describes how such a mechanism should work – which is mainly accepting of the fact that a general mechanism and drafting applicable to all jurisdictions may not be a practicable solution, and introduces the concept of a ‘pool’ system which will work on a grouping basis (there should be more than one set of arbitration provisions for different groups of jurisdictions to be inserted into their project finance documents, but these provisions should be unified for each group).

Lastly, Chapter 6 provides a conclusion to this thesis and makes recommendations with the main aim of proposing a way to improve the use of international commercial arbitration for project finance disputes. Suggestions of future research and an identification of the key contributions of the thesis will be included in this final chapter.

2. Chapter Two – Project Finance

2.1. Introduction

As mentioned in Chapter 1, in order to analyse the use of international commercial arbitration regarding disputes arising out of project finance transactions, and its popularity in comparison with the traditional litigation route, it is important to understand the legal nature of a project finance transaction.

Also as briefly evaluated in Chapter 1, there is a high volume of project finance transactions executed every year, which includes a considerable number of parties involved and multiple agreements that fall under the scope of a project finance transaction. Therefore, spotting the reasons why arbitration as a dispute resolution mechanism is not preferred over the conventional litigation method and providing solutions to the problem is crucial, as it concerns a significant number of people.

Chapter 2 will provide the definition of a project finance transaction and a brief historical background. Before evaluating recent global developments in, and efforts to promote the use of, international commercial arbitration for project finance disputes, it is important to comprehend the main elements that differentiate a project finance transaction from any other kind of financial transaction, and also to set out the legal nature of a project finance transaction and its components, the agreements under its umbrella and the parties that participate in the deal. This chapter aims to explain these main characteristics of a project finance transaction, its legal nature, its scope, history, participants and the documents used.

This chapter serves as a prelude to Chapter 3, which will analyse the advantages and disadvantages of international commercial arbitration specifically for project finance disputes.

This chapter also identifies what makes a project finance transaction different from any other financial transaction, laying the groundwork for an examination of the

specific challenges to using international commercial arbitration in this context. In turn, this allows an examination of whether these features are permanent obstacles to the use of international commercial arbitration as an alternative dispute resolution mechanism for project finance.

2.2. What is project finance?

Project finance aims to provide the funding necessary for a specific project, where the repayment of project finance lenders is made from the cash flows of the finalised project along with the assets of such project. It is important to note that the loan facility granted to the borrower will not be repaid through the other assets, shares or capital of the owner(s) of the project finance company special purpose vehicle (SPV), but directly from the project assets themselves. Financing is provided for the construction of a specific asset, such as a power plant, motorway or skyscraper, within a specific timeframe and budget.[57]

The main types of projects can be classified as (a) process plants, (b) infrastructure such as motorways and airports and (c) private public partnerships.[58]

Take the example of a company which applies to its potential lenders to construct a power plant. This company would be asking for a loan to be made to the project SPV from one bank, or a syndicate of lenders, in order to construct the power plant and carry out all the necessary works until it starts to operate. In such a structure, the borrower would undertake to repay the loan with the cash that will be generated when the power plant starts operating. Another example would be for the building and operation phases for a hospital, where the borrower agrees to repay the loan with the cash that will be generated when the hospital is up and running, and therefore generating cash.

[57] Dirk Kayser, 'Recent Research in Project Finance – A Commented Bibliography' Procedia Computer Science, [2013] Vol 17, 729.

[58] John E Triantis, *Project Finance for Business Development* (1st edn, Wiley and SAS Business Series 2018) Chapter 1.

This can be contrasted against a more straightforward corporate loan, which would generally sit directly on the company's balance sheet, and might be used to finance capital expenditure or general corporate purposes including maintaining existing operations or providing a certain level of working capital. In other words, unlike a straightforward loan syndication (corporate finance) where a borrowers' balance sheet assets are crucial to raising the loan, a project financing is structured around the cash to be generated from the completed project. The potential risks that this aspect brings, and how it is implemented in the agreements will be discussed in greater detail further below.

There are two main elements as to why project financing has grown to be the type of financing it is today. Firstly, it gives borrowers the possibility to raise an extensive amount of financing which is completely entwined with the specific characteristics of the project itself.[59] Unlike the sums of cash needed to sustain the daily operations of a company, the amount of money needed for a project, based on its type and extent, is usually much higher.

Moreover, since the debt is assumed by the project company, but not the project sponsors themselves, it is usually completely separate from the sponsors' own cash flows and allows for a higher level of leverage.[60] It also diminishes lenders' risk by splitting the loan backing a potentially massive project into smaller segments, which can be provided by many different lenders under a syndication process, and can even include a government's participation under a public private partnership.[61] Project finance is regarded as technique which rests on a detailed risk assessment regarding the construction, operation and revenue along with the allocation of such risks between investors, lenders and third parties via contractual or other arrangements.[62]

Money for a project comes from two main sources: the loan provided by the lenders and the equity provided by the sponsors. However, the contribution from the equity providers is generally relatively small as a portion of the overall project cost, with the

[59] Stuart Greenbaum and others, *Contemporary Financial Intermediation* (Elsevier Science & Technology, 2015) 212.
[60] Ibid.
[61] Ibid.
[62] E. R. Yescombe, *Principles of Project Finance* (Academic Press, Business & Economics 2013) 1.

greater portion of financing granted as a loan facility, usually by a syndicate of creditors. When a project financing is in place, the sponsors (i.e., the equity participants who are undertaking the project itself) form an SPV. The debt financing is structured through the SPV, not the project sponsors themselves. The funds provided to the SPV would be kept on the SPV's separate balance sheet[63], and is also easily separable from the remaining cash flows of a sponsor.[64] This brings another aspect of a project financing into the picture, which is full recourse to the SPV, but limited recourse, or no recourse at all, to the sponsors or governments, unlike an ordinary corporate finance transaction.[65]

Lastly, unlike a corporate loan[66], the project assets, including the accounts to be used for the project, the shares of the SPV and the commercial enterprise itself, would be pledged as collateral in order to preserve the creditors' rights.[67] Since the recourse is limited, it is normal practice for the creditors of a project financing to request a stronger security structure over the assets of a project, to diminish the underlying risk in the event of non-payment. The importance of security documents in a project finance transaction, its types and its enforceability will be discussed in detail in this chapter.

2.2.1. History of Project Finance

'Throughout history, mankind has strived to create monumental landmarks in infrastructure and engineering, consistently exceeding the frontiers of what has been technically, organisationally and financially possible'.[68]

[63] Kayser (n 57) 730.
[64] Krishnamurthy V. Subramanian and Frederick Tung, 'Law and Project Finance' [2016] Journal of Financial Intermediation, Vol 25, 155.
[65] Stefanie Kleimeier and Roald Versteeg, 'Project finance as a driver of economic growth in low-income countries' [2010] Review of Financial Economics, 19, 50.
[66] Corporate loans might be secured or unsecured; sometimes the borrower provides a certain level of collateral over its assets, shares, accounts etc. as security for the borrowed amount which is considered as a secured loan; sometimes the loan can be guaranteed by the parent company or a shareholder, which is considered as an unsecured loan.
[67] Valerio Buscaino and others, 'Project Finance Collateralised Debt Obligations: an Empirical Analysis of Spread Determinants' [2012] European Financial Management, 18, 951.
[68] Jakob Müllner, 'International project finance: review and implications for international finance and international business' [2017] Manag Rev Q 67, 97.

Although the concept of repayment through the cash generated from the sale of a product has its roots from centuries ago, the modern concept of project finance grew in popularity in Europe and the United States in 1970s.[69] In that decade, project finance transactions became popular especially in the petroleum sector as a tool to extract crude in England while in the United States, renewable energy production from alternative sources were promoted and supported with regulations.[70]

Before the 1970s, a vast amount of infrastructure projects were owned by the government of a state, and more importantly, were funded by the government through its local reserves and savings, taxes, international borrowings or in some cases, through foreign aid. [71] Such burden on the governments caused stress over their budgets, thus paving the way for partnering up with the private sector, under public-private partnership (PPP) [72] projects. PPP projects were regarded as a solution to such budgetary concerns, as an alternative method that combined the efforts of the public and private sector to develop projects together.[73] The expertise and funding needed by the governments were therefore provided by the public sector.[74]

Starting from the 1980s, governments' participation in developing such projects faded away even further, when governments increasingly took the approach of opening up the space to the private sector in order to stimulate their economic growth and leave the construction of big-scale infrastructure projects to be built and operated by non-government-owned enterprises.[75]

Private sector domination meant competition. In this global competitive environment, in order to win tenders, a 'competitive advantage' had started to become more and more necessary for sponsors of a project, which meant a new technique to achieve a new business approach.[76] Up until the 1990s, the main aim of project finance was to

[69] Stefano Gatti, *Project Finance in Theory and Practice: Designing, Structuring, and Financing Private and Public Projects*, (Academic Press, 2012, Business & Economics) 27.
[70] Ibid.
[71] Willie Tan, *Principles of Project and Infrastructure Finance (1st edn, Taylor & Francis, 2007) 5.*
[72] See below: Chapter 2.3.5. *Private and Public Sector Participation* for more details on PPP projects.
[73] Tan (n 71) *5.*
[74] Ibid.
[75] Douglas Sarro, 'Do Lenders Make Effective Regulators? An Assessment of the Equator Principles on Project Finance' [2012] German Law Journal, *13*(12), 1525-1558.
[76] Triantis (n 58) Ch 2.

attract foreign currency lending, mainly for oil and gas projects. However, in the last decade of the 20th century, this idea started evolving and different sectors such as telecommunications, infrastructure and electric utility saw a huge interest in the use of project financing.[77]

The more project finance grew as a sector, it opened doors to contingent issues, such as the need to regulate the market on a legal level. When it came to adoption of a legal framework for project finance transactions, different countries have taken a variety of approaches to legislation. For example, Turkey's project finance laws have been on a more general level, whereas some other countries such as Russia have enacted laws that are more sector-specific, taking into account the requirements and expectations of private investors.[78] Meanwhile, in other countries, such as the UK, there has been a move to standardise the forms of contracts used in project finance transactions.[79]

2.2.2. Importance of Project Finance

The importance of project finance can be demonstrated with its growing popularity across the world. According to a 2016 report prepared by McKinsey, one of the leading consultancy firms globally, roughly 3.8% of the world's gross domestic product (GDP), or USD 3.3 trillion a year is needed to be invested in just infrastructure projects to maintain the expected growth rates.[80] In addition to providing an opportunity for a sponsor to undertake a high-calibre project, project finance also has advantages on a sovereign level. The specific characteristics of a project finance structure pave the way for underdeveloped economies to be able to replicate the privileged features of a fully developed market.[81]

In 2018, the total volume of project finance deals globally amounted to USD 368.5 billion, across 1035 deals. Of this, some USD 114.1 billion were in the Americas,

[77] 'Project Finance In Developing Countries' [1999] International Finance Corporation <https://library.pppknowledgelab.org/d/4394/download> accessed 14 January 2022.
[78] Catherine Pedamon, 'How is Convergence Best Achieved in International Project Finance' [2001] *Fordham International Law Journal,* vol. 24, no. 4, 1277.
[79] Ibid.
[80] 'Bridging Global Infrastructure Gaps' (n 50).
[81] Kleimeier and Versteeg (n 65).

followed by USD 128.6 billion in Europe, the Middle East and Africa and a further USD 125.8 billion in Asia Pacific.[82] These figures indicate both global scale of project finance and its undeniable popularity. It has become the go-to model for financing high-scale and high-cost projects and has gained popularity each and every year. The years 2020 and 2021 can be considered as an exception in terms of gathering data, due to the global COVID-19 pandemic and its contingent effects on both companies and governments and their ability to prioritise the projects in their pipelines. Even with the global COVID-19 pandemic showing its adverse effects in 2021, the global project finance grew by 38.4% compared to 2019 before the pandemic, with a total amount of USD 529.8 billion.[83]

On the other hand, the use of international commercial arbitration for specific sectors remains comparatively unpopular. A 2021 survey conducted by Queen Mary University of London and law firm White & Case[84] highlighted that the four main sectors where the use of international commercial arbitration as a dispute resolution method is lagging are energy, infrastructure, technology and banking and finance. The participants to the survey were asked specifically about the future of these four sectors, and while their prediction for the likelihood of an increase in international arbitration's use in energy, infrastructure and technology is between 80-85%, the banking and finance sector stood at 56%. As much as this result is seen as an improvement compared with the tendency from previous years, half of the participants still thought it unlikely that international commercial arbitration will be used more widely for disputes arising from banking and finance transactions.[85]

This data is highly important when it comes to considering the use of international commercial arbitration for project finance disputes, since it creates a double effect. Project finance transactions are usually a combination of a banking and finance

[82] 'Project Finance Rankings Full Year 2018' http://pages.dealogic.com/rs/793-VBG-848/images/Dealogic%20Project%20Finance%20Rankings%20FY%202018.pdf?mkt_tok=eyJpIjoiTnpBME5UTTBZV1JrTVdZdyIsInQiOiJhemc4ZHVaUWRUOGw3d1BVdkdcL0dOVTJMd2VONXpUVjRVQzRYaklWQUYweTBBM0ZEbmhmOGFMUENQSmhlMHFHM01qaThITXRzUHJRNmt0aUJRUmJwSUNZZDN0ZWdJbFBaWDJKZUo3bXA4NUh1aVwvN2s1WkFiUTFNYzdDTGJuOVwvcCJ9 (accessed on 23 April 2020).
[83] IJ Global, 'Infrastructure and Project Finance League Table Report, Full Year 2021'. <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiN7eiQvvX9AhWRT8AKHQVJBIEQFnoECBMQAQ&url=https%3A%2F%2Fwww.ijglobal.com%2Fuploads%2FIJGlobal%2520League%2520Tables%2520Full%2520Year%25202021.pdf&usg=AOvVaw0ZIcAkPTBWz0MAC2tOJaY2> accessed 24 March 2023.
[84] Queen Mary Survey (n 6).
[85] Ibid.

transaction, together with the construction of an energy or infrastructure project, therefore it contains both financing arrangements, but also agreements that fall under the scope of these two sectors. Therefore, from a project finance point of view, two of these sectors – energy and infrastructure – are quite closely connected. Hence, not only is there a preference for traditional litigation for banking and finance transactions, but considering that the vast majority of project finance deals include the building and operation of power plants or infrastructure such as bridges and motorways, the combination of these factors further promotes traditional litigation. In other words, taking into any standard project finance transaction into consideration, there is a considerable number of projects that are in the fields of either energy or infrastructure[86], such as the construction of bridges, motorways and power plants.

In light of the above-mentioned data, it is important to analyse if the comparative unpopularity of international commercial arbitration for project finance disputes is something that is strictly caused by the nature of the transactions and therefore something that cannot be improved or resolved, or if there is room for improvement. As mentioned before in this chapter, in order to evaluate this aspect, a detailed analysis on the basic components of a project finance transaction needs to be undertaken. Following such analysis, the use of international commercial arbitration for finance disputes, with a particular focus on project finance transactions will be analysed further in Chapter 4 of this research paper.

2.2.3. Risk factors of a project finance transaction

One of the most important issues when it comes to evaluating the risk factors of a project financing is the location where the project is based. The legislative and regulatory systems of a 'weak host-country' and the difficulty enforcing the project agreements are regarded as one of the initial reasons for the failure of a project.[87] Moreover, the different native languages spoken in the country where the sponsors are located along with the country where the project is located complicates the

[86] Triantis (n 58) (Triantis refers to the Annual Project Finance Default and Recovery Study 1980-2014 by S&P Global Market Intelligence published in June 2016. The data shows that 3,022 projects out of the 7,959 between the years 1980 and 2014 are power projects, while 2298 of them are infrastructure, followed by 1108 projects in the field of oil and gas) (The same study also shows that 41.1% of the power projects have defaulted, while 22.1% of the infrastructure projects have witnessed a default.*).*

[87] ibid 3.2.10. Contracts and Agreements.

efficient ‘negotiation, implementation, and arbitration of contractual agreements due to misinterpretations or inability to grasp the impact of differences in legal intervention for conflict resolution’.[88]

From the lenders point of view, the main priority when deciding whether to grant financing to a project is not primarily based on how reliable or creditworthy the sponsors are, or even the strength of assets that the sponsors are willing to provide as security.[89] The most important aspect that the creditors will focus on would be the project’s capability to repay the granted loan and the capital investment in the project at a reasonable rate, consistent with the overall project risk.[90]

Moreover, due to the fact that the repayment depends on a future cash flow, but not any existing assets that the company has, the borrower would be required to provide a stronger and bigger security package to compensate for the risk of the lenders.

On the other hand, as with any other transaction in the finance world, the considerable security package on offer means lenders can grant larger loans for a project that has not been realised yet, which means companies can undertake jumbo-sized projects, power plants, bridges, hospitals and so on with the support of such project financings and without having to spare a huge chunk of financing from their own pockets.

Project financings are custom-made transactions for a specific project. Since it is a high-risk investment, lenders need to be assured that the project itself will be able generate cash for repayment. The most frequent situations where risk has been insufficiently mitigated are the result of the security package, the insurance arrangements or the hedging agreements not being strong enough.[91] Mainly infrastructure developments, such as transmission lines, motorways, railways and bridges, use project financing as a funding technique. Apart from these, power plants, telecommunication projects, refineries, mass construction projects such as

[88] Triantis (n 58)
[89] Gatti (n 69) 1.
[90] Ibid.
[91] Triantis (n 58) Ch 3 3.2.8. Risk Management.

hotels and hospitals, oil and gas exploration sites fall under the scope of project financings.[92][93]

As the magnitude of risk is relatively higher compared to a straightforward loan transaction, this increases the importance of choosing the most suitable dispute resolution mechanism – since the risks are bigger, the assurances required by project lenders for an effective and fast enforcement mechanism, or repayment, is very high.

2.2.3.1. Types of Risks

There are two main categories of risk in an international project finance transaction which are transnational and commercial[94] along with the classification of risks based on the parties involved and their level of exposures.[95] Such exposures would be 'risk weighted[96] at 130% before the project reaches its operational phase, 100% during the operation phase and 80% after it becomes operational'.[97]

The project risks include, but are not limited to, completion risk, permitting risk, price risk, resource risk, operating risk, political risk or insolvency risk[98]. A project financing can be structured with the aim of mitigating every one of these risks, with different guarantees, representations and undertakings, along with allocating such risks to different project participants.

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[92] 'Basel III: Finalising post-crisis reforms' <https://www.bis.org/bcbs/publ/d424.pdf> accessed 24 May 2020. (In its report, the Basel Committee on Banking Supervision defines project finance and its scope as a type that allows lenders to derive returns from a single project, whose revenues also provide security for the loan. As such the risk is specific to the economics and viability of that project rather than, say, the overall creditworthiness of a corporate entity. Typically, these investments support big ventures in chemical or power plants, transport infrastructure and the media and telecoms sectors. This can address the needs of various stages of new developments or refinance an existing installation).

[93] Müllner (n 68) (According to Müllner, the largest sector for PF is power generation (38%), followed by transportation (22%) and oil and gas (20%)).

[94] Scott L Hoffman, *The Law and Business of International Project Finance (*3rd edn, Cambridge University Press 2007) 2.

[95] Ibid.

[96] The risk weighting assigned to various different asset types by lenders are used to determine the minimum regulatory capital that the lender must maintain.

[97] 'Basel III: Finalising post-crisis reforms' (n 92) accessed 24 May 2020.

[98] Philip R Wood, *Project Finance, Securitisations, Subordinated Debt,* (The Law and Practice of International Finance Series Vol 5, second edn, Thomson Sweet & Maxwell 2007).

For example, the loan agreement would usually foresee 'conditions precedent', certain conditions to be met before the loan facility can be drawn, such as obtaining specific permits. Failing to obtain these permits in a specified amount of time may give the lenders the right not to finalise the financing arrangements and strike down the deal in its entirety. The loan agreements would also include certain undertakings to be fulfilled after the execution of the documents, which are called 'conditions subsequent', which comprise various conditions including the establishment and perfection of security over the project company's assets, and failure to comply with these conditions may result in the lenders accelerating the loan and demanding the entire outstanding amount from the borrower before its repayment date.

Another way of transferring the burden to the borrower in a high-risk project would be to negotiate strict covenants under the loan agreement and put such clauses in the project documentation in order to avoid bigger risks for the lenders. These covenants would include the project company adhering to certain pre-agreed financial ratios, for example, maintaining a certain EBITDA margin or keeping its net debt-to-EBITDA level below a given threshold. Failure to comply with the covenants might also give lenders the ability to take action.

Due to the fact that a project finance transaction is riskier compared with other forms of financings, the risks can be distributed to all project participants, including the creditors.[99] The allocation of risk is determined on a case-by-case basis, based on the 'bargaining position of the participants and the ability of the project to cover risk contingencies with the underlying cash flow and reserve accounts'.[100]

However, allocating risk is accompanied by certain challenges, such as the intricacy of the risk allocation process itself, and elevated risk for lenders and costly due diligence procedures undertaken by lawyers, auditors and experts.[101] Due diligence reports prepared by advisors have very wide scope, encompassing many risk factors that can have an adverse effect on the project. Apart from a comprehensive financial analysis, several different aspects including project permits, licences, host countries'

[99] Andrew Fight *Introduction to Project Finance (1st edn, Butterworth-Heinemann 2006)* 45.
[100] Scott L Hoffmann (n 94).
[101] Fight (n 99) 6.

relevant legislation, concessions, and companies' existing legal arrangements with third parties are thoroughly investigated in order to mitigate the risk.

In order to mitigate the risk exposure, there are certain steps taken before granting the company the funding necessary to develop the project such as conducting a 'project screening, a feasibility study, project development, financial model development and economic evaluation' would be beneficial to identify and address the risks. [102] 'It also requires project risk management, due diligence, a financing plan, financial structuring, creation of a project company business plan and project implementation.' [103]

Meanwhile, another risk factor that plays an important role in project financings is potential political risk. Political risk becomes highly relevant if the project is located in a developing country, which generally raises additional concerns among lenders and project companies.[104] The main political risks, particularly in emerging markets, include the possibility of a government terminating a contract, the risk of expropriation and/or nationalisation of the project assets, or the risk that one of the shareholders of a project company may unduly influence the process.[105] A way of mitigating the political risk is to have an insurance agreement covering for 'revocation of permits and licences, adverse regulatory changes, changes in tax and business laws, expropriation, currency inconvertibility, political violence and war, breach of contract, disruption of access to project company facilities, and asset transfer risks'.[106]

Due to the size of project finance transactions, the total amount of funding to be provided to the project company is syndicated among multiple financial institutions, often from several different jurisdictions. One of the main reasons to involve different creditors from multiple countries is to dishearten the government where the project is undertaken from expropriating or even interfering with the process, and thereby

[102] Triantis (n 58) Ch 2.
[103] ibid
[104] Anita Spaic, *Legal Aspects of Mitigating Risks in Project Finance*; *Mitigating Commercial and Political Risks in Project Finance* (Second edn, Podgorica).
[105] 'The World Bank's Risk Allocation Bankability and Mitigation in Project Financed Transactions' <https://ppp.worldbank.org/public-private-partnership/financing/risk-allocation-mitigation> accessed 1 February 2023.
[106] Triantis (n 58) Ch 9.

risking its economic affairs with such countries.[107] Other ways creditors can seek to mitigate political risk is for creditors to ensure the presence of a 'strong local sponsor' among the SPV shareholders, and also by involving a multilateral development bank or other official agency in the financing.[108]

2.3. Parties to a project finance transaction

A project finance transaction involves numerous separate legal agreements and parties. As explained above, since the funding of a project finance transaction is usually very large, and the project itself has many different components including its construction, its operation, outsourcing certain elements of the project and therefore subcontracting certain services to different service providers and its overall maintenance. Starting from the input supplier to output buyer, more than 15 parties engaging in 40 or more contracts might be involved in a standard project, which is the reason why some people call project finance as 'contract finance'.[109]

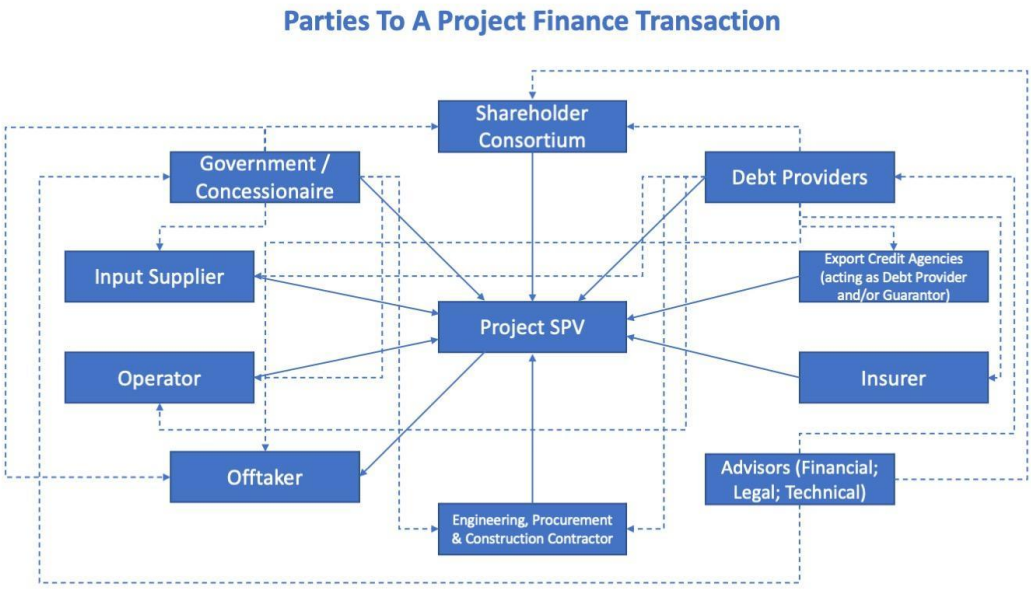
There are, of course, many different parties involved in different types of project finance transactions based on the particular field in which the project will be engaged in, but the main parties involved in any mainstream project financing are the project company borrower(s), the equity investors who provide a certain level of investment into the project company, the financers of the debt such as banks and other financial institutions, the EPC contractor who undertakes the construction of the project, the offtake purchaser, the insurers, the operator, the grantors and the input supplier. It is important to highlight that this list of parties is not exhaustive, and every project has its own characteristics in terms of the number and type of parties involved. There are also certain situations where the government is also included in the transaction, which will be explained in detail below.

The project company is in a direct relationship with all the main parties, whereas the other parties also have a certain degree of interaction between themselves.

[107] Fight (n 99) 13.
[108] 'Project Finance In Developing Countries' (n 77).
[109] Benjamin C Esty, 'Why Study Large Projects? An Introduction to Research on Project Finance' [2004] European Financial Management, 10, 216.

Considering the most basic form of a project finance transaction, first of all, the shareholders come together and sign a shareholders' agreement to form the project company, also known as a special purpose vehicle. Then, in order to build the project, the company signs an agreement with a contractor, and an offtaker for future purchase of the product aimed to be generated by the project company. Then the SPV initiates talks with the lenders, and a security trustee to arrange the necessary funding for the project.

The structure of a project finance transaction is usually very intricate and complex, which can be demonstrated as follows.



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2.3.1. Special Purpose Vehicle (Project Company) and the Equity Investors

The special purpose vehicle is the main entity formed to undertake the project and participate in the tender process, if necessary. It is commonly a company established in the country where the project is located and hence, subject to the laws of the host country and managed by its equity holders.[111] An SPV usually takes the form of a

[110] Adapted from 'Key Issues in Developing Project Financed Transactions' < https://ppp.worldbank.org/public-private-partnership/financing/issues-in-project-financed-transactions> accessed 25 October 2021.
[111] Fight (n 99) 11.

consortium, or a joint venture owned by the sponsors. A sponsor can be one corporate entity or a group of entities aiming to generate profit off of a project.[112] The sponsors are usually the equity owners of the project company, that collects any profit made either through receiving dividends, or under a management contract, therefore a fee.[113] Such project sponsors do not only provide equity, but they play an important role in the project, as usually they also provide managerial, operational and technical experience for the project to take place.[114]

Equity investors undertake the biggest risk in project finance, since they are under the obligation to accept that the lenders will be receiving all of the repayments of the loan provided from the borrower before taking out their equity return.[115] The SPV is also the main borrower in a project financing.

2.3.2. Lenders (debt financing institutions)

The second main party to a project financing is the lender side. Since a project finance transaction means higher amounts to be borrowed, in comparison with a basic corporate loan, it is usually not one bank or financial institution that provides the financing, but a syndicate of lenders come together and participate in a bigger scale financing. Within the syndicate of banks, different lenders undertake different responsibilities based on their level of involvement and exposure. These roles include a facility agent, a mandated lead arranger, manager, account bank, security agent and insurance bank. Although the lenders do not receive any additional profit from the project based on its success, lenders enjoy the high risk-high return aspect of project financings, since the margin of the loan is higher.[116]

Depending on the size of the project, the project company may also issue local or international bonds, especially when the project it close to being completed, in order to diversify sources of financing from other investors.[117] For the last decade, there has also been a noteworthy increase in an alternative way of funding a project, called

[112] Spaic (n 104) 20.
[113] Fight (n 99) 12.
[114] Ibid.
[115] Yescombe (n 62) 30.
[116] Fight (n 99).
[117] Tan (n 71) *2.*

shadow financing, which is provided by non-bank institutions such as hedge funds and institutional investors.[118] This increase is reflected to the project funding primarily as a participation with project bonds.[119] Project bonds are used to fund the entirety or some part for a project financing, and are issued just like a conventional bond.[120] However, on top of a regular bond issuance, the bondholders of a project bond would enjoy the benefits provided to a project finance lender, such as a broad covenant package alongside security established over the project company's assets.[121] Another advantage of a project bond, compared to conventional loan financing is that instead of the project company receiving portions of the funding before each phase of the project, certain institutional investors offer a concept called phased drawdowns, where such investor buys the project bonds throughout the construction phase of the project and the issuer would be able to receive the funding entirely beforehand.[122]

Unlike the commercial banks that provide funding, export credit agencies may have an additional motive to participate in a project financing, which is to promote the host country's industry.[123] Alongside the local commercial banks, international financial institutions (IFIs), bilateral development finance institutions (DFIs) and export credit agencies (ECAs) are considered to be the major players in the world of project finance, working together with the private sector funders.[124] Therefore, these institutions also have a major effect over the transaction documents and subsequently the choice of dispute resolution mechanism.[125]

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[118]Tianze Ma, 'Basel III and the Future of Project Finance Funding' [2016] Michigan Business & Entrepreneurial Law Review 110 <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1056&context=mbelr> accessed 24 October 2021 123 (Ma states that 'The significant increase in the role of institutional investors is partly as a result of the sharp contraction in project finance after the Financial Crisis, and partly due to non-bank lenders' search for low-risk, high-yield assets').

[119] David J. Park, 'Remembering Financial Crises: The Risk Implications of the Rise of Institutional Investors in Project Finance' [2018] 117 Mich. L. Rev. 383, 392.

[120] Sait Eryilmaz S and Ali Can Altiparmak, 'Draft Law to Diversity Funding Options for Turkish Projects' (2020) Yegin Ciftci Attorney Partnership <https://www.ciftcilaw.com.tr/content/site-ycap/en/publications/recent-publications/draft-law-to-diversify-funding-options-for-turkish-projects/_jcr_content/parsys_article/download/file.res/client-briefing-draftlawtodiversifyfundingoptionsforturkeyprojects-feb2020.pdf> accessed 1 April 2023.

[121] Ibid Accessed 1 April 2023.

[122] Ibid Accessed 1 April 2023.

[123] Graham Vinter and Gareth Price, *Project Finance A Legal Guide (3rd edn, Sweet & Maxwell 2006) 7*.

[124] 'The ICC Commission Report on Financial Institutions and International Arbitration' <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2016/Financial-Institutions-and-International-Arbitration-ICC-Arbitration-ADR-Commission-Report/> accessed 14 January 2022.

[125] Ibid. ('The interviews with IFIs, DFIs and ECAs support the original working hypothesis that these bodies often show a very strong interest in using international arbitration as a means of dispute resolution within their business. However, international arbitration is by no means the only remedy used. Their choice may also depend on legal advice received regarding a specific project or even a specific contract.').

Lenders to a project finance transaction usually provide around 80% of the capital and therefore expect a 'high level of control over project management'.[126]

2.3.3. Construction Contractor (EPC)

Apart from many key responsibilities that an EPC contractor undertakes, one it its main duties is to design and build the project 'on a turnkey, fixed price contract on time and on budget, and assume liability for delay damages and for project performance that does not pass tests'.[127] More detailed information regarding the nature of an EPC contract is evaluated under *Section 2.6.1 Main and Ancillary Project Finance Documents/2.6.1.2 EPC Contracts*.

2.3.4. Operator/Offtaker

An offtake purchaser is a third party that undertakes to purchase an agreed amount of a product generated by the project company under a specific project.[128] As mentioned above, since a project financing carries considerably more risk compared to a corporate financing, with no or limited recourse to the SPV shareholders, finalising an agreement with an offtaker prior to the project being in full operation would be a tool to mitigate the risk, or to provide a certain level of clarity in terms of the company's future potential sales levels.

While there is a certain level of predictability and stability expected from a project company, in terms of the 'cash flow of its output revenue', off-takers 'insist on a balance of their obligations with requirements of the project company'. [129] Therefore, the offtake agreement itself constitutes a highly significant component of a project

[126] Müllner (n 68) 100. (Mullner also notes that the lenders have a different motivation than the equity contributors which arethe sponsors to the project company. Unlike the equity contributors who are highly motivated by other advantages that a project finance transaction brings, the lenders, who are usually 'commercial banks, institutional investors, export credit agencies and multilateral development banks', benefit from substantial fees and somewhat fixed interest rates.).

[127] Triantis (n 58) Ch 7.

[128] 'Offtake contracts – key issuers for project finance lenders' <https://www.lexisnexis.co.uk/legal/guidance/offtake-contracts-key-issues-for-project-finance-lenders> accessed 3 March 2023.

[129] Triantis (n 58) Ch 7.

finance transaction, as it 'ensures predictability of the revenue stream on an ongoing basis for the duration of the project life cycle or concession'.[130]

A more detailed analysis regarding an offtake agreement can be found under Section 2.6.1.1.1 *Purchase Agreements*.

2.3.5. Private and Public Sector Participation

Project finance transactions are very large-scale and costly constructions that, as explained above, provide governments an alternative way of directing a private company to undertake a project and operate it for a certain period of time. Project finance transactions can be in many different forms, including, but not limited to. Build-Operate-Transfer, (BOT), Build-Own-Operate-Transfer (BOOT), Build-Own-Operate (BOO), Build-Own-Lease-Transfer (BOLT) and Build-Rent-Transfer (BRT).[131]

Instead of transferring the entirety of the project's construction and initial operation to the private company, governments can also take an active part in the project itself. Project financing is an integral tool in public private partnerships for governments seeking to undertake infrastructure projects. For this method, a government usually collaborates with a private company where the host government grants a concession to the third party to build and construct the project, own and operate it for an agreed period of time, then transfer it to the government at the end of the concession period. This gives the governments the option to develop large infrastructure project without taking on the financial burden through direct government borrowing. On the other hand, private companies would benefit from the situation by developing the project and generating cash from a huge investment for a certain period of time before transferring it to the government.

2.3.5.1. Government and Public Investors

[130] Triantis (n 58) Ch 7.
[131] Nagla Nassar, 'Project Finance, Public Utilities, and Public Concerns: A Practitioner's Perspective' [2000] *Fordham International Law Journal,* vol. 23, no. Symposium Issue, s61.

It is highly important to evaluate the additional risks that must be undertaken by the lenders when it comes to the project financings that include a public-private partnership (PPP). A public private partnership is defined by the World Bank as;

'A long-term contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility, and remuneration is linked to performance.'[132]

A PPP contract might be in relation with the construction of a school, a hospital, a water utility, or an airport. Taking ordinary project financing into consideration, lenders would be deemed as the stronger party of the contract compared to the project company aiming to raise a loan for its project, where in practice the lenders' special requirements and conditions are mostly reflected in the contracts. However, in a PPP, due to the fact that the public authorities are involved in the process, the main concern of the lenders would be mostly related to the possibility of an early termination: firstly the assets which the related security interests are created upon are either owned by public authorities or have to be returned to the public authorities in the event of an early termination; secondly, the remaining assets in relation to the projects would only provide inadequate resources to provide a complete repayment.[133] Consequently, it Is important for the lenders to be assured that they will be repaid fully and have an additional indemnity in the event of an early termination.

It is highly important to evaluate the additional risks that must be undertaken by the lenders when it comes to the project financings that include a PPP. In 2019, the Global Infrastructure Hub and global law firm Allen & Overy expanded the PPP Risk Allocation Tool launched in 2016, stating that the core foundation for drafting any PPP contract is the PPP-specific risk allocation principles to be included in the agreement.[134] The tool comprises of four separate volumes, covering 18 different types of projects including transport, energy, school or hospital projects. The website

[132] 'World Bank Group Public Private Partnerships Reference Guide' (2014) Ver 2.0, <https://documents1.worldbank.org/curated/en/600511468336720455/pdf/903840PPP0Refe0Box385311B000PUBLIC0.pdf> accessed 14 January 2022.
[133] Antoine Maffei and Jean-Renaud Cazali, *Project Finance in Civil Law Jurisdictions* International Project Finance: law and practice edited by John Dewar (1st edn Oxford Press, 2011) 523.
[134] 'Global Infrastructure Hub PPP Risk Allocation Tool 2019 Edition' (2019) <https://www.gihub.org/resources/publications/ppp-risk-allocation-tool-2019-edition/> accessed 14 January 2022.

provides risk allocation matrices for each project type. For example, if an energy project is undertaken by a PPP, the website provides three options: Solar Power Plant, Hydro Power and Power Transmission – and for instance, under the hydro power tab, how certain risks are allocated between the public partner and the private partner is shown. The access and site risk is shown as a public risk, whereas the operation risk is considered to be a private risk, and financial markets risk is classified as a shared risk. These tools aim to provide a certain level or understanding for all the parties of a PPP, in terms of the common risk allocation problems and therefore 'developing an individual risk matrix for the project in question'.[135]

2.4. Multiple parties and documents and their effect on the choice of dispute resolution method

There are various legal implications of project financings compared with a straightforward corporate finance transaction. First of all, project financing means a variety of documentation, which means the involvement of multiple parties. When it comes to resolving an international dispute rather than a domestic one, there are many factors that need to be taken into consideration. Hence, the first obstacle would arise from the fact that none of the countries are the same as the other, considering their historic legacies, their economic position, political dynamics, how their governments are structured, and their own national interests will all play a significant role on how such disputes on an international level would be resolved.[136]

Moreover, there are many sub-contractors involved in the process which undertake certain parts of the project such as constructor, off taker and operator. The biggest disadvantage as to choosing international arbitration as a dispute resolution mechanism rather than litigation is the aspect of joinder. As Irene Han points out:

> Another argument for preferring litigation is the relative ease of joining third parties in the context of multi-party disputes, which may arise in the context of

[135] '*Global Infrastructure Hub PPP Risk Allocation Tool 2019 Edition'* (n 134).
[136] Natalie Klein '*Litigating international law disputes, Weighing the Balance*' (Cambridge Uni Press, 2014) 1.

transactions that involve a number of different parties, such as syndicated loans and project finance.[137]

This is closely related to any financial dispute, specifically for project finance disputes since the nature of a project finance transaction, as discussed in detail in Chapter 3, has a multi-party structure. Project finance also means many different jurisdictions are involved in the transactions, including but not limited to the laws where the project is located, governing law of the project documents, finance documents and the security documents.

A wide range of different legal disciplines come into play, which include 'civil procedure, contracts, property, trusts, torts, equity, and conflicts of laws'. [138] Similarly, familiarity with the full spectrum of financial instruments is required, such as loans (including from commercial banks, development finance institutions, and domestic state entities), bond instruments, export credit agency guarantees, as well Islamic finance debt instruments.[139]

As much as international arbitration is preferred by the some of the lenders and investors for a project finance transaction, some host countries (where the project is located), claim that such provisions and awards rendered by an arbitral tribunal run counter to their local legislation and local courts' jurisdiction, although such disputes take place in the host country's territory.[140]

2.5. Main and Ancillary Project Finance Documents

It is very important to know the specific types of documents that are usually involved in a project finance transaction, since it is considered to be a complex type of transaction with a considerable variety of documents with different structures and requirements. Hence, this causes a problem in practice when a potential dispute between parties is elevated to courts or arbitral tribunals.

[137] Irene Han, 'Rethinking the Use of Arbitration Clauses by Financial Institutions' [2017] 34 Journal of International Arbitration, Issue 2, 213
[138] Wood (n 98)
[139] Wood (n 98)
[140] Spaic (n 104) 11

Due to the concept of transactional unity regarding project financings[141], it is highly important that the parties to such multiple documents should interact with each other and evaluate the implications 'in terms of implementation and dispute resolution, of the difference between, on the one hand, a set of disparate contracts and, on the other hand, a hierarchical contractual structure between a framework or master agreement and subsidiary agreements'.[142] Therefore, it is very instrumental, from the dispute resolution choice perspective, that the parties have a wider understanding of the whole project financing in terms of drafting the most effective clause.[143]

Project financing transactions are very delicate and a potential disagreement over one agreement might end up affecting the entirety of the project.[144] In order to maintain the unity amongst the project finance documents, a 'common denominator' is necessary, and international arbitration can undertake this role and be the unifying element.[145] On the other hand, the complexity of a project finance transaction also means the risk of parallel proceedings, which is a common source of concern for the banks and financial institutions when funding a project. Adding the international aspect of a project finance transaction into the mix, the risk of parallel legal proceedings in different jurisdictions increases, since there are many different agreements executed between different parties, which are, directly or indirectly, connected to each other under the same transaction or chain of transactions.[146]

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[141] Dugue (n 37) 1069 (Dugue explains the unity of transactional documents for project financings, which is in relation with multiple documents entered into between many different parties, all having a different purpose and philosophy. 'At a more global level, that of the project financing structure as a whole, however, each transaction contributes to the general purpose of the project: the economic viability of the project company and its capacity to make profits and to repay its loans.').
[142] Dugue (n 37) 1071.
[143] Ibid.
[144] ibid 1064.
[145] Maria Davies, 'The Use of Arbitration in Loan Agreements in International Project Finance: Opening Pandora's Box or an Unexpected Panacea?' [2015] 32 Journal of International Arbitration, Issue 2 160 (Davies also notes that 'Unity of contracts and agreements is based on the premise that, within a specific transaction, the various documents are related and work in tandem with one another to promote the success of the project (and, as such, its ability to service its debt). Under this concept, the central planks to a project financing transaction, the loan agreement and the off-take agreement, ought to be aligned in terms of the dispute resolution mechanism utilised.').
[146] Jane Parsons and Samantha Paul, 'Time to reconsider? Post-Brexit, now is a good opportunity for the finance sector to take a second look at the key benefits arbitration offers to resolve disputes' (2021) <https://www.bclplaw.com/en-GB/insights/time-to-reconsider-post-brexit-now-is-a-good-opportunity-for-the-finance-sector-to-take-a-second-look-at-the-key-benefits-arbitration-offers-to-resolve-disputes.html> accessed 14 January 2022.

2.5.1. Project Documents

It is important to be familiar with the types of documents that fall under the scope of a project finance transaction, since the number of agreements involved goes hand-in-hand with the quantity of parties involved in a transaction, hence the variety of applicable law, whether mandatory law or laws chosen by the parties.

There are two main types of project finance documents, which are project documents and finance documents, including derivatives, loan agreements and the security documents. While the parties involved under the project documents play an important role in the choice of dispute resolution method, setting forth the legal nature of the finance transactions, especially the security documents, is vital to understanding why the more popular choice, by far, has been litigation, rather than arbitration. Therefore, the finance documents will be discussed in separate chapters in a more detailed way.

2.5.1.1. Purchase and Sale Contracts

2.5.1.1.1. Purchase Agreements

At the core of the project documentation is the project agreement which the entire financing is structured around.[147] A project agreement may either be in the form of an offtake agreement or an agreement to be executed with the governmental authorities such as a municipality.[148] The offtake agreement or the supply contract is the 'glue that holds together infrastructure project financing'.[149]

The difference between an offtake agreement and an arrangement with the governmental authorities does not necessarily mean that one is an exclusive private-sector agreement whereas the latter is purely governmental. The government may well be involved in a private project indirectly, by being a party to the offtake agreement.[150] The offtake agreement is signed between the project company and a

[147] Yescombe (n 62) 13.
[148] Ibid.
[149] Triantis (n 58) Ch 7.
[150] Soku Byoun and Zhaoxia Xu, 'Contracts, governance, and country risk in project finance: Theory and evidence' [2014] Journal of Corporate Finance 125.

supplier on a ‘supply-or-pay’ basis, where the supplier guarantees to supply a minimum amount of products such as raw materials and if the supplier fails to provide such products, he would be under the obligation to pay for the procurement of the ‘minimum quantity agreed from other suppliers in the market’.[151]

The offtake agreement can be defined as the contract in which the offtaker agrees to purchase a significant ‘portion of the output from the facility and provides the revenue stream supporting a project financing’.[152]

An offtake agreement gives the offtaker the opportunity to purchase a product, for example the electricity that will be generated from a power plant project, and also gives the project company the opportunity to sell its product ‘on a pre-agreed basis’.[153] Majority of the issues attached to the offtake agreements and failure of a project derive from the ‘terms and the enforceability’ of the offtake agreements.[154]

2.5.1.1.2. Supply Agreements

Supply agreements are the arrangements made with the equipment suppliers where they undertake to provide the necessary materials and equipment for the project.[155] Unlike a purchase arrangement, which is in regard to the sale of the product by the project itself, a supply agreement is used to provide the essential equipment to kick start the project. Therefore, a supply agreement can be considered as a relatively more straightforward commercial agreement where one of the parties agree to supply certain equipment in return of remuneration.

2.5.1.2. EPC Contracts

[151] E Ballestero, ‘Project Finance: A Multi-Criteria Approach to Arbitration’ [2000] The Journal of the Operational Research Society, vol. 51, no. 2, Palgrave Macmillan Journals, 184.
[152] ‘Key Issues in an Offtake Agreement’ <http://ehoganlovells.com/cv/8649a2271251051e39f49b81bd0f5640e6bbc71d/p=4273094> accessed 2 May 2020.
[153] Yescombe (n 62) 106
[154] Triantis (n 58) Ch 9.
[155] Wood (n 98).

An EPC agreement is signed between the project company and the contractor who undertakes the design and construction of the project.[156] How that contractor of the project manages to comply with its obligations in the given period of time is crucial for the project to be completed in time, and hence, failing to fulfil its duties in time may give rise to disputes and subsequent legal proceedings between the project company and the contractor. The contractor of a project is often the company, or one of the companies in a partnership of multiple companies, which form the special purpose vehicle. The commitments and obligations to be undertaken by the EPC contractor may be bonded by surety companies or banks. [157] The sponsors of the project might provide a completion guarantee to the project company, as a commitment to complete the project by the long-stop date.[158]

2.5.1.3. Concession Agreement

The concession agreement comes into the picture when a BOT[159] project is in place, when the project company agrees to build and operate a project, i.e., a motorway or a power plant, and transfers the project to the government after a designated amount of time, which is usually more than 25 years. The project company would build the project, operate it for a certain amount of time, the duration of which is determined between the government and the project company, and transfers it to the government when the concession period is over. This way, the government owns a fully operational cash generating asset after a certain amount of time has passed, and the project company benefits from a good profit margin after the loan has repaid, before transferring the project to the government.[160]

2.5.1.4. Operations and Maintenance Agreement

When the construction of the project is completed, the operator steps in and agrees to operate the project for a fee in return.[161] It is an agreement to be entered between the project company and a sub-contractor, as it is usually the case that the project

[156] Gatti (n 69) 12.
[157] Wood (n 98).
[158] Ibid.
[159] Please see Chapter 2.3.5. *Private and Public Sector Participation* for more information on BOT projects.
[160] Wood (n 98).
[161] Ibid.

company itself does not have adequate experience or expertise to operate or maintain the project on its own.[162] There are certain cases where the shareholders would provide the operation and maintenance services themselves. The services to be provided would include the day-to-day operation and maintenance of the project. The creditors to the project would be highly interested in the selection process of the operator of the project, just as they would be regarding the EPC contractor, as they would need reassurance that the chosen operator would have a solid balance sheet and relevant experience of operating and maintaining similar projects effectively in the past.[163]

2.5.1.5. Insurance Contracts

As explained above, project finance transactions are very high-risk financings and therefore the insurance contracts play a vital role in order to mitigate the risk. The insurance contracts, including but not limited to, would cover any project assets before, during or after the construction phase, third party liability insurance or any damages occur due to delay.[164] As the security agreements would provide the lenders the opportunity to enforce the security arrangements they have, both parties would bear the loss if the assets are not covered by insurance, as the security is established over such assets.

2.5.1.6. Shareholder Agreement

As mentioned above in this chapter, the first agreement to be executed for a project finance transaction is the shareholder agreement, as this would form the foundation of the project company. This agreement would be signed between the project sponsors and the project company, which would comprise the main terms of

[162] 'Operation and maintenance contracts – key issues for project lenders' <https://www.lexisnexis.co.uk/legal/guidance/operation-maintenance-contracts-key-issues-for-project-finance-lenders> accessed 5 March 2023.
[163] Dentons LLP, 'A guide to Project Finance' (2013) <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjasPTEk8X9AhUKh1wKHaeBChM4ChAWegQICBAB&url=https%3A%2F%2Fwww.dentons.com%2F~%2Fmedia%2F6a199894417f4877adea73a76caac1a5.ashx&usg=AOvVaw1NFF-Sz1vsOLHYA1CWk7wh> accessed 5 March 2023.
[164] Triantis (n 58) Ch 9.

participation, and the structure of ownership alongside the shareholders' rights and obligations.[165]

2.5.2. Financing Documents

2.5.2.1. Loan Agreement

A loan agreement, in its simplest form, is a legal arrangement between a borrower and a creditor where the creditors would grant money to a borrower, whereas the borrower would be under the obligation to pay the loan amount back, usually with a certain rate of interest. A loan might be provided by a bank, or a financial institution, or it can be granted from both.[166] It can be a bilateral agreement executed between one lender and one borrower as a general credit agreement or it can take the shape of a syndicated loan agreement where the borrowed amount is provided by multiple banks.

As to the nature of a project finance transaction, the project companies, also known as the special purpose vehicles, are structured differently than an ordinary borrower. The project companies tend to be set up in a denser way in terms of their debt and equity structures.[167] Hence, the biggest chunk of the debt loan is provided as a syndicated bank loan rather than a bond, and most of the time, recourse to the project sponsors is not possible.[168]

Loan agreements and their relationship with international commercial arbitration needs to be evaluated from a transactional unity point of view. International commercial arbitration might be considered as more beneficial compared with litigation when borrowers' inability to pay derives directly from the actions of parties to a project finance transaction who are not the borrower, such as an EPC contractor or

[165] Ibid.
[166] Alamdari (n 26) 123
[167] Benjamin C Esty, 'The Economic Motivations for Using Project Finance' Harvard Business School page 8 in reference to Esty (2001b)
[168] Ibid.

an offtaker.[169] As per the concept of project unity, if the parties agree on implementing an arbitration clause that permits multi-party proceedings, or if all the key parties to a project finance transaction decides to execute an 'umbrella agreement' and agree on an alternative dispute resolution mechanism, the borrower then would have the option to include the third-party project participant to the arbitration proceedings brought before the arbitration authority by the lender against the borrower as a joinder.[170]

For lenders in arbitration with borrowers it is worth considering whether to involve the third-party project participant, as this is often an option. 'Although the loan agreements and the contracts with the third-party project participant(s) are distinct from the original agreement', doing so allows for one combined dispute resolution scheme, which may be better for lenders and project unity than the more fragmented approach of resolving the various loan agreements through separate courts.[171]

There are several different types of loan agreements, defined by their repayment mechanism or their maturity dates, but this thesis will not go into much detail as it is beyond the scope of this research.

2.5.3. Security Documents

2.5.3.1. Legal Nature of Secured Transactions and its Importance in International Commercial Arbitration

Security created and perfected pursuant to a financial transaction may be considered as the biggest assurance that the lenders can get from the borrower or the project company, since the enforcement of the security gives the lenders the right to take control of the main asset or interest that the security was established upon. A secured transaction serves for the purpose of reducing the lenders' credit risk by providing them an alternative for recovery in the event of non-payment of the

[169] 'Supplementary Materials to the ICC Commission: Financial Institutions and International Arbitration' <https://iccwbo.org/content/uploads/sites/3/2018/11/icc-arbitration-adr-commission-supplementary-materials-to-report-financial-institutions-and-international-arbitration-english-version.pdf> (accessed on 8 January 2022)
[170] Ibid
[171] Ibid.

obligation secured under the loan agreement.[172] Taking a precaution against any credit risk is mandatory for the banks and financial institutions in order to survive and maintain a business life. In an event of a possible non-payment or bankruptcy of the borrower, the proprietary rights of the lenders remain effective whereas the personal rights may be impeded or invalid. In a borrower's point of view, by granting security to the lenders, the borrower would be given the opportunity to endure higher amounts of credit, which would provide the lender to make bigger investments and therefore grow its financial standing in a more rapid sense. For this reason, it is essential to have a security package in exchange for the loan provided to the borrower in each and every large-scale project finance transaction.

Given the importance of security in project finance transactions, it is critically important to evaluate every aspect of whether international arbitration is more effective and beneficial for the parties to choose as an alternative dispute resolution compared to litigation. In order to make such an evaluation, many issues including but not limited to the eases and difficulties in the time of creation and perfection of a security, its enforcement, the situation in an event of insolvency or bankruptcy and the effects of such issues from a dispute resolution perspective should be thoroughly demonstrated.

This chapter is aiming to answer the questions of whether international arbitration should be chosen over litigation in secured transactions and the advantages and disadvantages of international arbitration for secured transactions. At this point, it is important to establish the domestic nature of secured transactions and the extent of the involvement of the local courts and institutions regarding the creation, perfection and enforcement of security and whether it would be efficient to choose arbitration in this manner.[173] Another aspect which is closely related to the questions raised hereby is the current situation with respect to the globalisation of secured transactions and its effectiveness, since having an international platform and

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[172] 'UNCITRAL Legislative Guide on Secured Transactions' (2010) < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/09-82670_ebook-guide_09-04-10english.pdf> accessed 15 March 2017.

[173] Triantis (n 58) Ch 9 (Triantis states that one of the factors that cause a project to fail is the 'security agreements involving parties in different legal jurisdictions and disagreements among project stakeholders as to which country's courts should have jurisdiction and which country's laws should apply')

legislation has a crucial impact on the improvement of international arbitration for financial disputes.

2.5.3.2. Types of Security

Every jurisdiction has a different approach and legislation considering the types of security, how it can be created and perfected and the kind of assets that a security can be created upon. For example, the United States of America gives lenders the right to establish a 'blanket' security over the current and the future assets whereas in many other countries, a security can only be established upon the existing assets and interests which are expressly specified under the relevant security document.[174] Therefore, it is essential for the lenders to be provided with the necessary information regarding the security structure and the procedures to follow in the relevant jurisdiction.

Although there are many different security types and structures around the world based on different jurisdictions, with respect to syndicated finance transactions which involves multiple lenders internationally, it may be possible to state that there are two common major securities in a project finance transaction which are mainly the security which is created over the assets of the borrower and the security created over the interests of the sponsors in the project company. For this reason, generally the definition of security interests that are mostly used in a project finance transaction include mortgage, charge, pledge, lien or other security interest securing any obligation of any person or any other agreement or arrangement having a similar effect. Apart from the fact that there are many kinds of security agreements used in project financings based on different jurisdictions and the projects; there are certain security documents that are mostly used in the vast majority of international project financings which may be classified as the securities which trail the secured assets or interests including share pledge, assignment of receivables, account pledge and mortgage and personal security such as the guarantees.

[174] Paul R Hoffman, 'Cross-Border Lending' [2009] 126(4) Banking Law Journal. 367, 371

This section aims to provide a framework with respect to the most common types of security included in a project financing. The issues with respect to their enforcement, the legislative arrangements for their global practice and arbitrability and the comparison of litigation over arbitration for the security documents will be covered in further sections of this chapter, alongside Chapter 3 *International Commercial Arbitration*.

2.5.3.2.1. Share Pledge

Due to the different legislative approaches in terms of what falls under the scope of secured interests and the restrictions on establishing pledges over certain lands, assets or rights, pledge of shares is frequently included in the security package besides the traditional asset backed security.[175] Share pledge is one of the most commonly used methods of creating security interest for the benefit of lenders over the shares of the project company's shares. In addition to the shares of the project company itself, a share pledge agreement can be executed between the parties in order to create security over the shares of the companies which are the main shareholders of the project company. As identified by Richard Tinsley, if the borrower is not able to provide security as 'charge, mortgage or hypothecation', then the security mechanism might be structured more via a pledge to be established over the project company's equity, or such equity might be held as security. This way of security might sometimes be tricky, since the jurisdiction where the land is located might not allow foreigners to own a property or hold a security. The security itself might also 'contravene local equity rules'.[176]

There are multiple reasons why share pledge is a highly resorted and preferred way of security by the lenders, since firstly in an event of non-payment or any other reason that would trigger the enforcement of a share pledge, it is in practice, one of the most convenient ways to recover the secured obligations that the borrower failed to fulfil. When it comes to the point where the lenders have to enforce the security created, firstly taking control of the shares of the company would be highly beneficial as the management rights would also be transferred to the lenders and secondly, the

[175] Richard Tinsley, *Advanced Project Financing, Structuring Risk* (1st edn, Euromoney Books, 2000) 250
[176] ibid 236

sale of the borrowers' shares is the best possible option to make sure that the purchaser has an indirect right over all of the rights and interests of the project company while it is also faster, simpler and less expensive than the sale of the assets of the project company.[177]

It is the general wording used in share pledge agreements that the lenders have an unconditional and irrevocable power to enforce the pledge granted over the shares of a company in an event of default until the secured obligations undertaken by the borrower have been completely satisfied and therefore the pledge is released. Another reason for the share pledge to have this amount of importance is the fact that the lenders would be entitled to have a control over the sales of the shares, and therefore any possibility regarding a change of control would be subject to the prior consent of the lenders.

2.5.3.2.2. Account Pledge

Another broadly used way of securing the debt is to create a pledge over the bank accounts of the borrower. As it was set forth above, since it is customary for a company to have international bank accounts as well as domestic ones, it is vitally important to take the multi-jurisdictional aspect of an account pledge agreement into consideration and draft the agreement accordingly to avoid any future complications. The non-possessory nature of an account pledge agreement, which does not give the opportunity to acquire the physical possession of the pledged asset to the lenders, is a motive to establish a well-built pledge especially regarding the ease of enforcement.[178]

In practice, enforcement of the pledge created over the bank accounts can face certain obstacles which require the involvement of the local courts and sometimes it may not be certain whether the creditors would have a priority over the governmental institutions in the event of enforcing the pledge. For example, due to the relevant

[177] Philip Berger and Patrick Holmes, *Ancillary Finance Documentation* International Project Finance: law and practice edited by John Dewar (1st edn Oxford Press, 2011) 324

[178] This section gives jurisdictional examples, such as Saudi Arabia, which might be considered as a wider approach to this thesis, but due to the nature of an account pledge arrangement, it is important to think this type of security on a wider scope, as the location of the accounts can be way more independent than the other types of security, such as the commercial enterprise, mortgage or share pledge.

regulation in Estonia, since the pledge created over the bank account located in Estonia are not registered with an official institution and therefore such information is not publicly available, if the borrower fails to fulfil its obligation to pay taxes, the Estonian tax authority has the authority to seize the account or instruct the bank to transfer the designated amount and any claim of the creditors regarding the pledge and their priority should be brought before domestic courts.[179]

As per the Commercial Pledge Law of Saudi Arabia[180], since the pledge can only be created over the amount credited to the bank account on the day of the agreement being executed, in order to secure the additional amounts credited in the accounts, the creditor would be under the obligation to provide pledge supplements when the amounts reach an agreed threshold.[181] Another issue that has to be considered due to Saudi Arabian legislation, as explained by Henry Cort and Rachel Rayfield is:

> In addition, because currency is a fungible asset, there is a risk that the constant fluctuations in the secured asset (the account balance) may result in the pledge being held to have been released. Although lenders continue to take pledges over bank accounts as part of a security package, on enforcement lenders will more often seek to rely on their right of set-off as a remedy (although note that the right of set-off may not be effective where the borrower is declared insolvent).[182]

In order to provide a safety net regarding the pledges created over an account in a country where the legislation has certain barriers and restrictions, the lenders usually resort to the option to create an account pledge over the offshore accounts of the borrower and create a security interest over an account opened in a bank located in a more familiar country, therefore governed by a familiar law.

2.5.3.2.3. Commercial Enterprise Pledge

[179] Annemari Ounpuu 'The Shortcomings of Commercial-Pledge Regulation and Need for Reform' [2015] 23 Juridica Int'l. 57
[180] Enacted by the Royal Decree M/75 dated 21 November 1424H
[181] Henry Cort and Rachel Rayfield 'The Road to Structured Security' [2008] 27.9 Int'l Financial Law Review. 74.
[182] ibid.

Commercial enterprise pledge is simply the security interest created over the tangible and intangible assets of the project company, which mainly consists of the main assets of the project company itself, project company's inventory, its trade name and intellectual property rights. At this point the applicable law with respect to the pledge created over the moveable assets of the project company (the vessels including the trucks and aircraft) plays an important role. The High Court in *Blue Sky One Limited v Mahan Air*[183] held that although the aircraft owned by Blue Sky One Limited was registered with the local authorities of England, due to the fact that the one of the aircrafts was located in Netherlands at the time when the pledge was created and perfected, Dutch law should be applicable in order to decide upon the effectiveness and validity of the pledge.[184]

Another question which would be for an issue just like the situation explained under the assignment is whether the future assets of the project company would be included in the pledge and the answer is again uncertain and depends on the domestic legislation of the country where the pledge had been created.

Pursuant to the EBRD Regional Secured Transactions Assessment[185], a set of questions were asked to the EBRD countries[186] with respect to non-possessory pledge granted over moveable property, its registration and enforcement.[187] For the questions of whether anyone can grant and take such pledge, eight of the countries including Estonia being a developed country, and Turkey and Egypt which are considered to be developing countries responded that it is mostly not possible for anyone to grant this kind of pledge. This shows that amongst the EBRD countries (which include many developing countries as well as underdeveloped and developed

[183] [2010] EWHC (Comm).
[184] Ibid.
[185] The EBRD Regional Secured Transactions Assessment data was collected from three surveys (with respect to mortgage, pledge and other forms of security) conducted for each EBRD country in 2014. <http://www.ebrd.com/cs/Satellite?c=Content&cid=1395242701340&pagename=EBRD%2FContent%2FContentLayout> accessed 20 April 2017.
[186] EBRD Countries are; Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Egypt, Estonia, FYR Macedonia, Georgia, Hungary, Jordan, Kazakhstan, Kyrgyz Republic, Latvia, Lithuania, Moldova, Mongolia, Montenegro, Morocco, Poland, Romania, Russian Federation, Serbia, Slovak Republic, Slovenia, Tajikistan, Tunisia, Turkey, Turkmenistan, Ukraine and Uzbekistan.
[187] This assessment can be considered as a solid guidance in order to comprehend the current situations in several countries that are EU members as well as certain emerging markets and developed countries. Since this research is intended to evaluate and compare the situations in developed, developing and underdeveloped countries, examples are chosen to reflect the variety of circumstances regarding countries with different statutes amongst the EBRD countries.

countries), some countries including several developed states which are also members of the EU are not able to grant such pledges.

Another very important question addressed to the countries is whether such a pledge can be established over future property and eight countries stated that it is not possible. In the same manner, the questions of whether the security can be established over a changing pool of assets and if it is possible to grant the security over all present and future assets of the pledgor, there are many countries which did not provide an affirmative answer.

With respect to the enforcement issues, the answers given provide a sign of how there are potential issues, which are also closely connected to enforcement of arbitral awards, since seven countries stated that the out of court realisation is not permitted and more than ten countries set forth that creditors cannot decide the way that the realisation will be done and do not have the authority to exercise control over the realisation process. With respect to the rapidity of the enforcement process, all twenty-four countries believe that the process is either slow or uncertain and taking possession of the pledged asset is not quick and simple.

2.5.3.2.4. Assignment of Receivables

Assignment as a general term both includes the assignment of receivables of a borrower to the lenders by way of a security or by the sale of the receivables to the lenders by the borrower (which includes factoring and securitisation).[188] This section is in relation to the assignment of receivables by way of security. One of the most controversial types of security due to difference in legislation and implementation across the world and most often included in a security package is the assignment of receivables agreements.

The main concern with respect to the assignment is the prospect of assigning the receivables ‘in bulk’ and the possibility of including the future claims, ‘more in particular in floating charges when inventory under the charge may subsequently be

[188] N Orkun Akseli *International Secured Transactions Law, Facilitation of Credit and International Conventions and Instruments* (1st edn, Routlegde 2011) 28.

converted into receivables and thereafter in cash payments (or bank balances)'. [189] As Jan Dalhuisen asks: 'Are they all included in the assignment and, more in particular in the case of security assignment, do they all retain the original rank upon transformation of the asset, e.g. into a bank balance upon payment?' [190]

The different approaches to these questions asked by Jan Dalhuisen are mainly caused by the various legislations of each jurisdiction and their related provisions regarding the assignment. In other words, in some of the countries it is possible to assign the claims of the creditor in bulk and future claims may be included in the assignment whereas in certain jurisdictions, these may not be possible.

For the sake of creating a global understanding and implementation of the assignment of receivables, a Convention was adopted under the aegis of the Receivables Convention, and the main purpose behind it was to create a system that can overcome the potential obstacles for cross-border lending with respect to assignment of receivables (by consisting of many provisions on international level including the ones that endorse bulk assignments and assignment of future receivables), however, when it comes to the implementation in developing countries, there are still many issues that restrict its practice.191 Currently, the Receivables Convention has been signed by Luxembourg, Madagascar and the United States of America, and ratified by Liberia only, but it has been stated that the core principles of the Receivables Convention were implemented in the UNCITRAL Legislative Guide on Secured Transactions192 which is evaluated in a detailed way below. Therefore, it has been set forth that the countries which adjust their own domestic laws by taking recommendations of the UNCITRAL Legislative Guide on Secured Transactions into consideration would have also adopted these principles with respect to their domestic law.*[193]*

[189] Jan Dalhuisen, 'The Applicable Law in International Financial Disputes' in Jeffrey Golden and Carolyn Lamm (eds), *International Financial Disputes* (1st edn, Oxford Press 2015) 192.
[190] Ibid.
[191] Akseli (n 188*)* 28.
[192] UNCITRAL Legislative Guide on Secured Transactions (n 172).
[193] 'United Nations Convention on the Assignment of Receivables in International Trade' <http://www.uncitral.org/uncitral/en/uncitral_texts/security/2001Convention_receivables_status.html> accessed 27 April 2017.

As a common legislative approach in many civil law jurisdictions and emerging markets including the Gulf Cooperation Countries jurisdictions and Turkey, regarding the creation and perfection of the assignment, the assignment needs to be acknowledged by the counterparty of the assigned agreement upon the notification of the assignment. However, even after the assignment is created and perfected by the notification and acknowledgment, for example, there is not a certainty if, in the event of the insolvency of the assignor, the courts of Saudi Arabia would prioritise the rights and claims of the assignee over the other creditors.[194]

As it was briefly explained above, since the scope of a security established and the coverage of security interest (whether it covers the future interests and floating charges) differs from each and every jurisdiction to another, it is not surprising to have the assignability of secured interest as an issue. The EBRD Regional Secured Transactions Assessment puts out the main different approaches embraced by each jurisdiction, since amongst the EBRD countries, five of the countries do not even permit a pledge to be created over a future and/or a fluctuating account receivable. Additionally, the data obtained from the assessments show that eleven of such countries states that the security cannot be granted without the notification of the borrower.

2.5.3.2.5. Guarantees

Guarantees are a very commonly used type of security for project finance transactions. A guarantee can be defined as a type of security, in the form of either a personal, corporate or bank guarantee, provided by a third party regarding a specific performance to be undertaken by a borrower, guaranteeing to step in and fulfil such obligation if the borrower 'fails to perform'. [195]

Guarantees serve the purpose of diminishing the risk taken by granting a security for the lenders, since the entity providing the guarantee would be responsible to the limit agreed to be provided to the lenders in the event of default.[196] In other words, for

[194] Cort and Rayfield (n 181) 74.
[195] S Suharnoko, 'Legal Issues on Pledge Share Agreement' [2011] 1.1 Indonesia Law Review 53,70,
[196] Paul R Hoffmann (n 174) 249.

instance in comparison to the pledge created over the shares of the project company shareholder, the burden of risk undertaken by the sponsor is less when it comes to providing a certain amount of guarantee.

Although a project finance transaction does not have any recourse to the sponsors and therefore normally is not structured to request a guarantee, on certain occasions, it might be necessary, especially when the project risk cannot be easily mitigated and therefore would put an extra burden on the creditors and the most common type of guarantee regarding a situation like that would be a pre-completion guarantee.[197]

Based on the extent of the project risk, the guarantee may also be extended until the physical or financial completion of the project, and in certain events. The sponsor might be required to provide a partial loan guarantee as an additional stimulus for the creditors to provide funding to the project.[198] Partial loan guarantee means that the guarantor would just guarantee a portion of the principal and interest payment of the loan.[199] In terms of dispute resolution, guarantors usually are bound by the choice regulated under the principal agreement that the guarantee is provided for.[200]

2.5.3.2.6. Mortgage

Mortgage can be defined as a security interest created over the real property of the borrower that is non-possessory but can be liquidated immediately after an event of default is triggered. Mortgage is not as variable as the other forms of security mentioned above, since the argument with respect to the transfer of the asset is not applicable to the immoveable and therefore *lex situs* is the main approach with respect to mortgage agreements. Apart from these points, a mortgage is generally perfected by registration to the public authorities of a country and can be released as soon as the loan is paid to the lenders in full.

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[197] 'Project Finance In Developing Countries' (n 77) 66.
[198] ibid 67.
[199] ibid.
[200] William W Park, 'Arbitration in Banking and Finance' [1997] Yearbook of International Financial and Economic Law, 2, 161 (citing Bernard Hanotiau 'LA PRATIQUE DE L'ARBITRAGE INTERNATIONAL EN MATIÈRE BANCAIRE' in Bruxelles, Les Modes Nonjudiciaries de Reglement des conflits (1995) 67 and Bertrand Chambreuil, 'Arbitrage International et garanties bancaires in (1991) Revue de'l Arbitrage 33).

Per the EBRD Regional Secured Transactions Assessment, the first survey made in this respect is in relation to mortgages. In this assessment, the first set of questions include general queries including whether a mortgage can be granted over any type of immovable property, or if the debts of any type can be secured by mortgage. It can be observed from the data obtained from each assessment that the majority of the EBRD countries stated that the questions asked under this chapter are mostly answered affirmatively; however, the most negative answers were given to the question of whether the mortgage creditor is protected from subsequent claims which may adversely affect the mortgagor's title to the property, which is the situation in ten countries, whereas three of the countries said it is uncertain. On the other hand, Serbian law allows such protection but in practice, there are many restrictions imposed by the courts and therefore there is a considerable amount of risk.

As to the specific answers given under this section, relevant legislation of Azerbaijan does not allow foreigners to acquire a land plot within Azerbaijan and if they do so, they are required to sell the property within one year after the acquisition. Pursuant to the same assessment, in countries including Latvia and Belarus, it is not allowed to establish any mortgage other than enterprise mortgage whereas pursuant to Armenian law, the legal persons and people who are not Armenian citizens cannot establish a mortgage over the real property located in Armenia. It is also set forth that Russian law does not allow lands under a certain threshold of size to be mortgaged. Another jurisdiction which has specific provisions in relation to general mortgage arrangements is Tunisia, where the lands attributed to agriculture do not fall under the scope of mortgage and more importantly, the prior approval of the governor is required for the mortgage to be established in the favour of a foreign entity or individual.[201]

Secondly, the issues of registration and creation of a mortgage are covered. As to the question of whether the mortgage is registered or not and accordingly if a third person can determine whether a pledge has been granted over a real estate is mostly affirmative, however, approximately one-third of the EBRD countries stated that such data is not available online.

[201] EBRD Regional Secured Transactions Assessment (n 185)

Under the third section, enforcement of mortgage is evaluated in a detailed way, and the answers given to these questions are the most negative ones, especially when it comes to whether the enforcement must be publicised, permission with respect to out of court realisation, the creditors authority to decide the way of realisation to take place or the control of the creditor over the realisation process, the rapidity of enforcement, or whether the right of the creditor is protected in the event of a third party initiating enforcement against the mortgaged property. This shows that there are many issues with respect to enforcement of mortgages in many countries.

The last two sections cover the corporate finance specifics, and the land development projects specifics including the questions of whether subsequent mortgages are permitted over the same property, if the creditor can dispose of its priority position, if the mortgage is following automatically (which majority of the EBRD countries answered affirmatively) when the secured claim is transferred and if the mortgaged property includes subsequent constructions and additions.

2.5.3.3. Globalisation and uniformity of security transactions and documents

For the past decade, there have been several legislative actions taken in order to unify the legislation regarding secured transactions, such as the EBRD Model Law on Secured Transactions, the United Nations Convention on the Assignment of Receivables in International Trade, the UNCITRAL Legislative Guide on Secured Transactions and the UNIDROIT Convention on International Interests in Mobile Equipment. These provisions prepared by some of the world's most respected institutions have a crucial impact on the development of arbitration of international financial disputes, since the domestic laws adjusted in order to meet these standards and accordingly, any new legislation implemented domestically by taking these into consideration would create the laws to be more harmonised on an international level and would provide a more suitable environment for arbitration proceedings.

This section will briefly set forth the EBRD Model Law on Secured Transactions, and the UNCITRAL Legislative Guide on Secured Transactions since these two are considered to be highly effective and reputable for the possible uniformity of security

transactions and documents. However, in order to set forth the above mentioned EBRD Model Law on Secured Transactions and UNCITRAL Legislative Guide on Secured Transactions, it is vitally important to mention Article 9 of the UCC which has a considerable amount of impact and influence on the formation of any global arrangements in this respect.

2.5.3.3.1. General Framework of the Current Situation of Secured Transactions in EBRD Countries

In 2005, 2006 and again in 2014, EBRD conducted research in EBRD countries and published a regional secured transactions assessment for every jurisdiction in order to demonstrate the current standings regarding the implementation of the model law and therefore an international approach to secured transactions. These assessments are crucially important as to observe the current situation of how the countries adapted their legislation to the international understanding of secured transactions. Upon the careful analysis of every report published for each jurisdiction, the detailed analysis with respect to the current situation of legislation and practice of mortgage, pledge and other securities in EBRD countries can be found in this chapter.

2.5.3.3.2. Article 9 of the UCC

Article 9 of the UCC, revised in 1998 and lastly in 2010, has a significant influence on the understanding of international secured transactions and formation of the legislative guides, model laws and conventions in this respect. Article 9 is one of the 11 articles of the Uniform Commercial Code, which has been ratified by all 50 States and territories in the United States. Although the EBRD Model Law and UNCITRAL Legislative Guide on Secured Transactions (followed by the UNCITRAL Model Law on Secured Transactions) have their own differences, it is accepted that they have the characteristic and main features of Article 9 were adopted whilst preparing the harmonised secured transactions arrangements and Article 9 of the UCC has been the skeleton of the law reform in this area within Europe.[202]

[202] Frederique Dahan and Gerard McCormack 'International Influences and the Polish Law on Secured Transactions : Harmonisation, Unification or What ?' [2002] 7(3) Unif. L. Rev. 713

Pursuant to the provisions of Article 9 of the UCC, a security interest can be created over any kind of asset or contract.[203] The essence of Article 9 and why it is considered as a reform in the light of the globalisation of secured transactions is set forth as follows;

> […] namely the concept of a single security interest that applies to all secured transactions, whatever their name and modalities, independent from any specific reference to it by the parties. Article 9 created a new terminology completely eliminating the distinctions that were seen to plague this area of the law.[204]

Implementing a UCC Article 9 type of system[205] on a more international level that simplifies the secured transaction mechanism would be beneficial to project finance transactions, due to the current variety of security creation, perfection and most importantly, enforcement issues on a multi-jurisdictional level. This approach, backed partially by the model laws and legislative guides mentioned in this section, might be considered as the backbone of a future harmonised system. However, as demonstrated within this chapter by relevant examples of legislation and cases, many countries are still reluctant to adopt such a wide understanding of security interest, as the conventional opinion was that adopting a common law-based uniform secured transaction approach was 'incompatible with civil legal tradition'.[206] More recently, on the other hand, international efforts such as model laws to harmonise the common law and civil law practices started emerging.[207]

One of the jurisdictions that was 'inspired' by Article 9 of the UCC is the UK. The Secured Transactions Law Reform Project's (STR)[208] policy paper published in April

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[203] Akseli (n 188*)* 65
[204] Dahan and McCormack (n 202)
[205] The UCC is only applicable in the United States.
[206] Asress Adimi Gikay and Catalin Gabriel Stanescu, 'The Reluctance of Civil Law Systems in Adopting the UCC Article 9 without Breach of Peace Standard - Evidence from National and International Legal Instruments Governing Secured Transactions' [2017] 10 J Civ L Stud 99.
[207] Ibid.
[208] STR was established by Sir Roy Goode as an effort to improve the UK's existing secured transactions law. Professor Goode is retired as executive director and has been succeeded by Professor Louise Gullifer. STR's steering committee is chaired by Lord Saville of Newdigate. 'STR About Us' <https://securedtransactionslawreformproject.org/about-secured-transactions-reform/> accessed 23 January 2024.

2016[209] states that the English secured transactions regime should be the 'best in class' and the law should be 'clear, certain and easily accessible', and a radical reform does not have to be established from scratch, as there are other common law examples, such as Article 9 of the UCC, and the Canadian adoption of the US approach, the Personal Property Security Act[210], to build upon. The policy paper also mentions that the enforcement of security should ideally be effective regardless of whether the borrower is insolvent or not. Therefore, the paper lists the core aspects of how a modern secured transaction law should be structured, based on the common characteristics of secured transactions regimes from different jurisdictions. These aspects include a simplified and codified law of secured transactions, to make it more understandable and accessible; and a wholly electronic registration system[211] for transparency. The paper also argues that instead of having multiple consensual security transaction types, such as mortgage, pledge and lien, there should be a single concept that is subject to a common set of rules.[212]

The STR also notes that if the UK could reform its secured transactions law and 'provide a fully worked-up model, it can also be adopted as the European model as part of the harmonisation efforts.[213]

2.5.3.3.3. EBRD Model Law on Secured Transactions

EBRD Model Law on Secured Transactions was initially prepared and published in 1994. The main purpose of the model law is to combine the beneficial features of the legal framework of secured transactions laws adopted by common law and civil law jurisdictions. One of the most important characteristics of this model law is the fact

[209] 'STR April 2016 Draft Policy Paper' (2016) <https://securedtransactionslawreformproject.org/draft-policy-paper/> accessed 3 January 2024.
[210] 'The Case for Reform – Secured Transactions Law Reform Project' <https://securedtransactionslawreformproject.org/the-case-for-reform/> accessed 3 January 2024.
[211] The policy paper stated that the STR was working on an analysis of both the system introduced under Article 9 of the UCC and a priority notice system for an advanced registration system. (*Also see* Professor Louise Gullifer, 'Secured Transactions Law Reform Project Discussion Paper Series: Registration' < gullifer-registration.pdf (wordpress.com)> accessed 23 January 2024, on a more comprehensive analysis of the two systems and rationale for registration).
[212] The policy paper also made recommendations as to how a security can be created and perfected, by registration of security and if the security is financial collateral, then the paper proposes the creditor to take control of the security, and the creditor to take possession of the asset if the secured assets are tangible.
[213] 'The Case for Reform – Secured Transactions Law Reform Project' (n 213)

that EBRD has conducted very wide research with respect to the current legislation and procedural situation of many countries all around the world in order to demonstrate the most up-to-date framework of secured transactions, their creation and enforcement. This is a crucially significant exploration undertaken by EBRD to create a model law which is not just a theoretical step towards a global set of rules but also may be efficient in practice. As it is stated in the introductory section, EBRD Model law on Secured Transactions is intended to have the following features[214]: (a) all types of security are merged into a single security right; (b) the security granted to the lender is a property right; (c) only the business credits fall under the scope of security provided to the lender; (d) the restrictions and mandatory provisions are kept at the minimum level; (e) a great flexibility is also provided with respect to the definition of secured debt and the secured assets; (f) all of the security created should be publicly registered; (g) ease of enforcement and sale of the secured property and lastly; (h) the ease of practical application. EBRD Model Law on Secured Transactions also provides a more uniform approach to the creation and enforcement of the secured interests and the situation of third parties involved.

2.5.3.3.4. UNCITRAL Legislative Guide and Model Law on Secured Transactions

One of the most outstanding guides prepared for this purpose is the Legislative Guide on Secured Transactions[215] by UNICITRAL[216] which was completed and adopted in 2010. The purpose and scope of the guide is set forth in a detailed way within the guide itself which is firstly to promote the availability of secured credit and be beneficial for the member states which do not have effective secured transactions laws, and the member states which have adopted a secured transactions legislation, however, would like to modernise and harmonise their laws with the other states. It is also stating that the insolvency laws of the member states should also be modernised and be in-line with the secured transactions laws. Accordingly, the UNICITRAL Legislative Guide on Secured Transactions sets forth the best possible solutions in order to overcome the differences of legislation throughout the world.

[214]'EBRD Model Law on Secured Transactions' < https://www.ebrd.com/news/publications/guides/model-law-on-secured-transactions.html > accessed 20 February 2017
[215] UNCITRAL Legislative Guide on Secured Transactions (n 172)
[216] 'United Nations Commission on International Trade Law' < https://uncitral.un.org/> accessed 2 February 2023

Within this context adopting a simple mechanism to accomplish a *third-party effectiveness* by establishing a system of registration in a rapid and inexpensive way and the *priority mechanism* which allows more than one security to be created over the same asset. It is possible to say that these two concepts have already been adopted by a considerable number of states, however, as it was stated above, the states which have not established a secured transaction law structure by taking these into consideration would cause the lenders not to get involved in a financing of a project taking place in such states.

Although the UNCITRAL Legislative Guide on Secured Transactions is considered to be one of the most effective guides covering a wide spectrum on this particular issue, the attempt to harmonise the secured transactions law amongst the member states and to develop a unified legal structure is still under debate and it is believed that until the function of the unitary security device (since the security law structure adopted by common and civil law jurisdictions are considerably different from each other) and conflict of law issues with respect to the third party effects of the security agreement is fully resolved, it is hardly possible to achieve the level of harmonisation as the Guide foresees.[217]

UNCITRAL has also published a model law in October 2016, based on the UN Convention on the Assignment of Receivables, the UNCITRAL Legislative Guide on Secured Transactions, the Supplement on Security Interests in Intellectual Property, the UNCITRAL Guide on the Implementation of a Security Rights Registry and the UNCITRAL Legislative Guide on Insolvency Law. This model law also serves for the same purpose, which is to create a harmonised legislative system throughout the world and prevent inconsistency and unpredictability.[218] Before its publication, its necessity and feasibility were criticised by several doctrines, stating that putting effort in creating a model law for secured transactions where a legislative guide already exists in this respect with the same vision and mission would not be ideal, because regarding the structure of secured transactions and how it differs in every jurisdiction, guiding the countries and maybe providing a regional model law system would be

[217] Anjanette H Raymond 'Cross-Border Secured Transactions: Ongoing Issues and Possible Solutions' [2011] 2.1 Elon Law Review, 95
[218] UNCITRAL Legislative Guide on Secured Transactions (n 172)

more efficient rather than putting time and effort to a universal model law which does not seem to be optimal in the near future.[219]

2.5.3.4. Possibility of a harmonised system for secured transactions

As mentioned above, there are certain legislations, such as Article 9 of the UCC, which are considered the benchmarks for establishing a simple and effective system for creating, perfecting and enforcing security interests. There are also international efforts, such as the EBRD Model Law on Secured Transactions and UNCITRAL Legislative Guide on Secured Transactions that aim to improve the secured credit arrangements in different jurisdictions. The main purpose of such reformative legal efforts is to provide both the creditors and the borrowers with the necessary tools to 'reduce credit risk by placing secured creditors in a priority position vis-à-vis unsecured creditors and competing claimants'.[220]

Article 9 of the UCC, adopted by all the US states, is an example of a successful intra-jurisdictional legal reform, but the situation in the EU is not the same, as these efforts are not widely incorporated into the countries' domestic legal systems. Apart from some issues in relation with financial collateral, the EU member states have their own national laws to govern secured transactions, and 'different legal categories and security instruments often coexist at the national level'.[221]

These differences, unlike a system proposed under Article 9 of the UCC, create additional transaction costs or even further, an additional burden what might result in restructuring the entire transaction, or its abandonment, based on jurisdictional differences.[222] As mentioned previously in this thesis, secured transactions and how to structure them plays a quite important role in project finance deals, as the security is a vital element for the creditors, and certain security needs to be created, perfected and enforced in different jurisdictions under separate legislations.

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[219] Roderick A. McDonald 'A Model Law on Secured Transactions. A Representation of Structure? An Object of Idealized Imitation? A Type, Template or Design?' [2010] 15 (2) Unif. L. Rev. 419.
[220] Giuliano G. Castellano and Marek Dubovec, 'Global Regulatory Standards and Secured Transactions Law Reforms: At the Crossroad between Access to Credit and Financial Stability' [2018] 41 Fordham Int'l LJ.
[221] Ibid ('To North American lawyers, who are acquainted with the uniformity brought by Article 9 of the Uniform Commercial Code and by the Canadian Personal Property Security Acts – the lack of a harmonized, EU-wide legal framework for secured transactions might appear peculiar').
[222] Neil B. Cohen, 'Harmonizing the Law Governing Secured Credit: the Next Frontier (1998) Brooklyn Law School.

Although there are efforts to create a harmonised secured transactions legislation outside the United States, due to the reasons set out above, these are at different stages in different jurisdictions. Therefore, for the time being, it might be useful to extend the proposed pooling system, explained under Chapter 5 of this thesis, to be applicable to secured transactions. In other words, creating a database with the domestic legislative information on secured transactions and flagging the legal and practical issues that revolves around creating, perfecting and enforcing a secured interest in a specific jurisdiction would provide further visibility, and improve the use of international commercial arbitration for project finance disputes.

2.6. Conclusion

To understand the legal nature of a project finance transaction, this chapter analysed the concept of a project finance transaction, which is aimed to provide the necessary funding for a specific project, while the repayment to the lenders is generated form the cash flows and the assets of the project with limited or no recourse to the shareholders of the project company.

This chapter identified the relationship between international commercial arbitration and several sectors including energy, infrastructure, banking and finance, which are closely related to a project finance transaction. The information contained in this chapter is highly instrumental to understand the relationship between international commercial arbitration and project finance transactions and will be integral to present the proposed pooling system in Chapter 5 of this thesis.

This chapter also provided information on the main risk factors of a project finance transaction, such as political, resource, completion and insolvency risk and briefly analysed the types of risks involved in a project finance transaction. Moreover, the parties involved in the process of funding a project was explained in this chapter, which is very important since the multi-party aspect of a project finance transaction is one of the main obstacles of choosing international commercial arbitration rather than litigation, which will be investigated in a detailed way in the following chapters. In

addition to the multi-party nature, a project finance transaction also involves multiple documents and contracts, which creates another challenge and a disadvantage, especially in terms of choice of law, mandatory involvement of the local courts and authorities, and enforceability, which will be discussed in the next chapter.

The type of documents that was evaluated in detail in this chapter is the security documents, because the issues surrounding each and every security document, the difference between local practices in terms of creating security or enforcing it are very vital and in a sense, holds a light as to the unpopularity of international commercial arbitration for security documents, which is one of the core set of agreements for a project finance dispute. In order to tackle the current problems introduced by different security documents, this chapter also identified the globalisation efforts to unify the transactions and documents; such as the EBRD model Law on Secured Transactions, the UNCITRAL Legislative Guide on Secured Transactions, the United Nations Convention on the Assignment of Receivables and most importantly, Article 9 of the UCC, which is considered as a pioneer in its efforts to create a harmonised base for international secured transactions. This chapter also analysed the reasons why many countries are still reluctant to adopt a more harmonised and global legislation for security documents, and the possibility of a harmonised system for secured transactions. These efforts are very noteworthy and provide a vital contribution to the proposed approach which is evaluated in detail in Chapter 5 of this thesis.

3. Chapter Three – International Commercial Arbitration

3.1. Introduction

Following the analysis of the key elements of project finance in Chapter 2, this chapter focuses on international commercial arbitration and its advantages and disadvantages, which is the second step for understanding the core reasons of its unpopularity as a choice of dispute resolution for project finance disputes and is very important for finding the answer to whether there is any room for improvement. Coming up with a solution or a proposal to increase uptake largely derives from identifying the reasons why market participants think one dispute resolution mechanism is better than the other for every aspect of a project.

Before describing the main advantages and disadvantages, it is important to provide a brief history of international commercial arbitration. As this chapter aims to provide a comprehensive analysis and comparison between international commercial arbitration and traditional litigation proceedings, and more importantly, their comparative popularity against each other, it is crucial to provide a background detailing how we have arrived at the current situation over time. The history of arbitration can be traced back several centuries, gaining more and more popularity over the years. The ancient understanding of an arbitration proceeding was that it was a tool to resolve disputes between parties who reside together in small communities, it was not about separate jurisdictions.[223] This way of arbitration, in which the parties choose an arbitrator that had a connection with both of the parties, and the award rendered not being enforced by courts, was used in Roman law and British law until the end of the 17th century.[224] The personal and individual characteristics of arbitration were very appealing to people, and bringing a dispute before arbitrators rather than a court, was considered as the ideal method to resolve disputes by merchants, alongside the fact that it provided a peaceful atmosphere in

[223] Casella (n 5) 159.
[224] Ibid.

the commercial community in England.[225] Following a decline in the use of arbitration during late Roman practice, the concept started being used more frequently once again during the middle ages, especially between 'state-like entities in Europe'.[226]

Although the history of international commercial arbitration has roots stemming back centuries, it was not until the 20th century that its first official introduction was made, by UNCITRAL established in 1966,[227] with the launch of the model law on international commercial arbitration in 1985, which was amended in 2006.[228] The model law was adopted by the United Nations General Assembly in 1985, with the aim of promoting it as an alternative to litigation for cross-border commercial disputes.[229] In 1980s, many developed countries including the UK, Spain, France, Italy, Portugal and the Netherlands introduced arbitration laws to their own legal system.[230]

Ever since international commercial arbitration emerged as an alternative dispute resolution mechanism to traditional litigation proceedings, the advantages and disadvantages have been discussed. The concept of arbitration is considered to be highly flexible, with reasons including, but not limited to, being able to choose many layers of applicable law, freedom to choose the seat of arbitration or even the arbitrators themselves on a more neutral platform, and the possibility of securing a decision far quicker. International arbitration is not bound by any specific judicial system and gives parties the opportunity to build their own dispute resolution mechanism.

According to the Queen Mary survey, the most appealing characteristics of international arbitration according to the participants are firstly the enforceability of

[225] Kateryna Honcharenko, [2019] 'Roebuck Lecture 2019: Has Arbitration Always Been Favoured in England?' Chartered Institute of Arbitrators < https://arbitrationblog.kluwerarbitration.com/2019/07/11/roebuck-lecture-2019-has-arbitration-always-been-favoured-in-england/> accessed 6 March 2023.
[226] Born (n 48).
[227] Vijay K. Bhatia and others, 'Contested Identities in International Arbitration Practice', *Discourse and Practice in International Commercial Arbitration : Issues, Challenges and Prospects* (Taylor & Francis Group 2013) 4 (although the UNCITRAL Model Law is accepted by many different countries and had a massive impact on the globalisation of international commercial arbitration, Bhatia et al mention a research conducted with data and analysis from 12 different countries state that despite the fact that the majority of the domestic arbitration legislations reflect the soul of the UNCITRAL Model Law, the formulation and application of it varied in different countries 'and were often constrained by variations in the languages used, the specific legal systems they were grounded in, and, in addition, the socio-political factors that operated in specific contexts').
[228] ibid 3.
[229] Ibid.
[230] Casella (n 5) 159.

the arbitral awards followed by the option to avoid specific legal systems/national courts.[231] The third factor set forth by the participants is the flexibility, while the fourth characteristic is the ability of the parties to select arbitrators. Lastly, the participants chose confidentiality and privacy as the fifth most valuable characteristic of international arbitration.[232] While arbitration for cross-border disputes has many advantages, the same participants were also asked to list the least attractive aspects of arbitration, which led with cost, followed by the lack of effective sanctions during the arbitral proceedings.[233] The third most concerning characteristic was chosen to be the lack of power in relation to third parties, with worries over third parties significantly increasing compared to the survey conducted in 2015. Lack of speed and lack of insight into arbitrator's efficiency were listed as the fourth and fifth worst aspects.[234]

In their paper regarding the judicialisation of international commercial arbitration, Leon Trakman and Hugh Montgomery mention that there are general concerns about international commercial arbitration which suggests that international commercial arbitration laws and procedures are replicating the national laws and litigation procedures more and more; and also highlight what the biggest concerns are after the evolution of arbitration[235];

Instead of being seen as a cheaper and available dispute resolution system on an international level, international commercial arbitration is considered to become more formalistic and costly, and an additional phase that the parties would need to go through prior to a litigation proceeding.[236]

This chapter will evaluate the advantages and disadvantages of international arbitration compared with litigation based on their general characteristics and the specific aspects of both with regards to financial disputes. Although there is a steady growth in terms of the use of international commercial arbitration in the finance

[231] Queen Mary Survey (n 6).
[232] Ibid.
[233] Ibid.
[234] Ibid.
[235] Leon Trakman and Hugh Montgomery, ''Judicialization' of International Commercial Arbitration: Pitfall or Virtue?' [2017] Leiden Journal of Int'l Law 408.
[236] Also see Dammann and Hansmann (n 20) 1 (Damman and Hansmann state that the courts, which are public, have significant advantages compared to international commercial arbitration, which is private. Therefore, the courts that have international access and which are considered to be 'well-functioning' have a unique advantage).

sector, there are certain aspects of the nature of international commercial arbitration that are seen as non-beneficial, including the arbitrability of the dispute, the closely tied relation of financial transactions with bankruptcy proceedings and the multiparty nature of a finance transaction.[237] On the other hand, the traditional litigation route offers summary judgments and there are certain instances where the involvement of a local court is either mandatory or inevitable. All of these concepts with a particular focus on their baring on project finance transactions will be discussed in greater detail in this chapter.

Based on the general aspects, a more specific analysis regarding the advantages and disadvantages of international arbitration for project finance disputes based on the type of transaction (i.e. security documents, offtake agreements, loan agreement) are discussed in each chapter separately.

3.2. Party Autonomy (Applicable law)

It is a well-established fact that party autonomy is one of the most beneficial characteristics of international arbitration, where the parties are free to choose the applicable law to every layer of an arbitration proceeding. The layers of applicable law include the law applicable to the merits of the dispute, the law applicable to the arbitration agreement (or clause), the law applicable to arbitral proceedings (*lex arbitri*) and conflict of law rules applicable to all other layers.

If the parties fail to choose a governing law for each and every layer, courts step in and make the decision. It might take several months for the courts to hand down a judgment regarding what the proper governing law is.[238]

As much as this autonomy grants the involved parties' freedom to tailor the entire arbitration proceeding, in practice, the freedom has its own limits.[239] For example, the

[237] Matteo Zambelli, 'LIDW 2019: The Rise of Arbitration in Financial Services Disputes' [2019] <http://arbitrationblog.kluwerarbitration.com/2019/05/08/lidw-2019-the-rise-of-arbitration-in-financial-services-disputes-7-may-2019/> accessed 13 January 2022.
[238] Alamdari (n 26) 60.
[239] Christian Bühring-Uhle and Lars Kirchhoff, 'Arbitration and Mediation in International Business [2006] Kluwer Law International B.V., 43 (Bühring-Uhle and Kirchhoff state that 'in a more limited sense of the word, the parties

law chosen to govern the merits of the dispute can be tricky when the mandatory provisions with respect to the applicable law interfere and limit the autonomy given to the parties. In other words, it is important to evaluate whether the advantage of party autonomy regarding the applicable law would be restricted by the private international laws of the countries and therefore the involvement of many legislations and courts is inevitable. The applicable law is fairly limited considering the security documents, which will be evaluated in a detailed way in Section 2.6.3 *Security Documents*.

For example, under Turkish law, a PPP's main project agreement must be governed by domestic law, and also that any security arrangements pertaining to Turkey-located security must similarly be governed by domestic law.[240]

Party autonomy cannot itself be judged to be either an advantage or a disadvantage of international commercial arbitration simply based on the freedom gives to the parties, but instead this aspect would be understood in a better sense with arbitrability, enforceability and bankruptcy which will be set forth below.

3.3. Neutrality

Neutrality of international arbitration has several aspects to it, first being able to choose a neutral platform[241] rather than the courts of a specific country. Subsequently, this aspect also provides the opportunity to choose neutral 'decision-makers'; arbitrators who are not the judges of a country, but independent experts. An arbitrator would most probably take the public policy or public interest issues less into

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can to a certain extent "delocalise" the arbitration through the selection of the law applicable to the procedure. Generally, the law applicable to the procedure will be the local law of the place where the arbitration is conducted and, to the extent permissible under that law, the procedural rules agreed upon the parties and, failing such agreement, the rules determined by the arbitral tribunal.').

[240] 'Key legal issues for project finance transactions in Turkey' (2019) <https://www.lexology.com/library/detail.aspx?g=9a888acf-f1a8-4521-a12b-8ad3b7de7d23> accessed 15 November 2020

[241] Bhatia and others (n 227) 302 (Bhaita et al say that the litigation procedure is also regarded as a neutral platform, but 'unlike litigation, it is claimed to be informal, expedient, economical, private and confidential in nature, and the same time, gives sufficient voice and freedom to disputing parties in the way it is actually conducted').

consideration compared with a judge.[242] Margaret L. Moses points out one of the reasons why arbitrators are neutral;

> Arbitrators are chosen by the parties, and of course, they would like to be chosen again. It is in their interest to be perceived as even-tempered, thoughtful, fair-minded, and reasonable.'[243]

Neutrality as an advantage is closely connected to the party autonomy aspect, giving the parties the freedom to choose the seat of arbitration. When choosing the place where the arbitration will take place, the parties ideally would like to opt out of the seat where the other party is located, to create a more neutral forum without giving the other party the 'home court advantage'.[244]

When considering the tendencies that parties generally display when choosing a seat of arbitration, the most preferred seats of arbitration to date are London, Paris, Singapore, Hong Kong and Geneva; with the most cited reason for choosing London as the seat is shown to be neutrality and impartiality.[245] Although arbitration is a highly preferred method for dispute resolution, the Queen Mary survey also points out that most of the participants stated that more support from the local courts and judiciary is needed to make arbitral seats other than the already-popular choices such as London, Singapore, and Hong Kong more attractive.[246]

On the other hand, it is important to take the nature of a project finance transaction into consideration. It is a well-established fact that banks have the upper hand when it comes to negotiating the terms of the transaction, including the various types of documents used for project financings. In this sense, banks' preferences are highly important and there is still a tendency to opt for courts of England and New York rather than arbitration for finance disputes.[247] One of the reasons for this choice is disclosed by James Freeman as follows;

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[242] Moses (n 2) 2.
[243] Ibid.
[244] Ibid 1.
[245] Queen Mary Survey (n 6).
[246] Ibid.
[247] See also William W Park (n 200) 142 (Park notes the three main reasons why bankers have chosen litigation over arbitration for their financial disputes, which are; (a) the borrower usually defaults due to a 'simple inability or unwillingness to pay', instead of a genuine divergence while interpreting the agreement terms and therefore

> Banks suspect that the constitution of the tribunal can result decisions that (in the unpleasant phrase) "split the baby"[248], when an English or New York court might in the same case have found more decisively in favour of the bank.[249]

The term 'splitting the baby' comes from the criticism pointed at the arbitrators or the arbitral tribunals, usually by the financial lender side of a deal, stating that arbitrators tend to split the arbitral award between the claimants and the defendant, rather than settling a dispute based on the 'proven facts and applicable law'.*[250]*

3.4. Finality of Arbitral awards

When it comes to the finality of arbitral awards, there are two sets of questions to take into consideration. Firstly, is not being able to appeal an award a gift or a curse? An appeal mechanism can be considered a safety net, giving parties the opportunity to challenge the decision before a higher authority. But we have seen many times that this process is abused by parties to a dispute and their lawyers to stretch out the process for years. Secondly, what are the exceptions to the rule? In other words, does the award being final and binding have any exceptions in different jurisdictions?

As a principle, the party which is not pleased with the outcome of an arbitral award has one option – to bring the award before a national court for the purpose of setting it aside or resisting its enforcement, but the grounds for such a legal action are fairly narrow.[251] The main rule for taking an award to litigation – apart from its enforcement – is based on procedural errors, but not over the merits of the dispute. [252]

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arbitration might end up being unnecessary result in a 'split the difference award', (b) it is easier for the lenders with security interest to initiate court actions where the pledged interest or asset is located and lastly (c) due to the lack of summary procedures in international commercial arbitration).

[248] For the meaning of 'splitting the baby' see Ricardo Dalmaso Marques and others, Ana Carolina Weber 'Challenging the "Splitting the Baby" Myth in International Arbitration' *Journal of International Arbitration* Volume 31, Issue 6 (2014), 720-721.

[249] James Freeman 'The Use of Arbitration in the Financial Services Industry' [2015] 16 Bus. L. Int'l. 77.

[250] ibid.

[251] Noam Zamir and Peretz Segal, 'Appeal in International Arbitration—an efficient and affordable arbitral appeal mechanism' [2019] 35 Arbitration Int'l, 79-93.

[252] Article V of the New York Convention set out the limited grounds against the enforcement of an arbitral award: Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:(a) The subject matter of the difference is not capable of

International arbitration institutions include the finality of the award principle in their rules. Some just call their awards 'binding', as they take interim awards into consideration, such as the ICC; whereas some others, such as the LCIA, state the arbitral awards should both be 'final and binding' (although both rules include an automatic waiver of right to appeal to the courts).[253] The New York Convention also states that each contracting state should recognise arbitral awards are binding.[254] However, in practice, the effectiveness of these rules depend highly on the applicable law of the jurisdiction where the arbitral award is sought to be enforced.[255]

For example, the UK's 1996 Arbitration Act Section 69 states that one of the parties can appeal to the court 'on a question of law arising out of an award made in the proceedings'[256], unless the parties explicitly agreed otherwise. Subsequently, the court can decide to allow the appeal application if the decision of the arbitral tribunal is obviously wrong or there is a question of general public importance, and if the decision is at least open to serious doubt.[257] If the parties choose their governing law for their arbitration agreement as one of the institutional rules such as LCIA or ICC, then the right of appeal would be waived automatically. There are also several institutions, both domestic and international, that allow an internal appeal mechanism that would allow the award to be reviewed by a second tribunal upon request.[258]

The finality of an arbitral award is considered to be both an advantage and a disadvantage; on the one hand it is cheaper and faster since the dispute itself cannot be brought before a higher court once the award is rendered.[259] On the other hand, if an award is basically incorrect or contains a significant error (apart from any issue listed in the New York Convention as a ground for appeal), it ceases the possibility to be corrected.[260]

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settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

[253] Jennifer Kirby, 'Finality and Arbitral Rules: Saying and Award is Final Does not Necessarily Make It So' [2012] Journal, Vol 29, Issue 1.

[254] New York Convention Article III

[255] Kirby (n 253)

[256] 1996 Arbitration Act Section 69 (1)

[257] 1996 Arbitration Act Section 69 (3)

[258] Rowan Platt, The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?' Journal of International Arbitration, [2013] Volume 30, Issue 5 p 531-560

[259] Born (n 48).

[260] Ibid.

Moreover, in practice, despite the fact that an arbitral award is considered as final, binding and enforceable in many different jurisdictions, parties to the arbitration usually look out for a plan B if the final award is not in their favour and in practice, circumvent the situation by choosing 'legal experts as arbitrators, rather specialists in the area of dispute, […] as they are believed to be likely to be more accomplished in exploiting opportunities to challenge an award'.[261] This situation also results in a potential 'judicialisation' of the arbitral proceeding, which means the arbitral proceedings tend to be much more similar to a traditional litigation proceeding and therefore lose its characteristic.[262] A more detailed analysis on expertise of the arbitrators as an advantage, and how it works in practice will be discussed under Section 3.9 *Expertise*.

3.5. Bankruptcy

As a general fact, an international bankruptcy law or legislation does not exist. Accordingly, any arrangements made within the context of a financial transaction must be made by taking into consideration the bankruptcy regime where the borrower is located and the authority and competency of the local courts. It is not possible for an arbitral tribunal to initiate an insolvency procedure or ignore a court's decision to initiate such proceeding which also includes the appointment of the insolvency administrator. More importantly, a tribunal is not competent to impose any penalty regarding non-payment of an amount decided as the outcome of an arbitral award on the insolvent borrower which has been sheltered by the insolvency procedures at the time of insolvency.[263] With that being said, the only matters that would fall under the scope of an arbitral award with respect to insolvency would be the ones that are not within the exclusive jurisdiction of a court.[264] As it was stated by Jan Dalhuisen, the possible consequences with respect to the arbitrability of bankruptcy claims may be as follows:

[261] Bhatia and others (n 227) 303.
[262] Ibid.
[263] 'The ICC Commission Report on Financial Institutions and International Arbitration' (n 124).
[264] Ibid.

> Other courts in the country of bankruptcy will submit and defer to their bankruptcy courts, but courts elsewhere and especially international arbitrators may not, although they can often not ignore the existence of such a bankruptcy either and they might have to consider or even define their (anticipated) impact when this becomes an issue in dispute resolution. This may affect the first and foremost any proof of claim which there is usually a summary procedure in the bankruptcy court even in respect of foreign claims against the bankrupt.[265]

In the light of the potential scenarios evaluated above, in relation to insolvency and bankruptcy procedures, the involvement of courts can sometimes be inevitable, and this is not just with respect to the recognition or enforcement of a decision or an award by a local court but also to initiate any kind of proceeding against the borrower in order to secure a full repayment. In other words, a different aspect of insolvency and bankruptcy procedures is the fact that a court proceeding is usually mandatory in addition to the enforcement of an arbitral award, and therefore, since the courts have exclusive authorities in order to initiate the proceedings, bringing a case in this respect before an arbitral tribunal where the panel would not have any competence would be time consuming.

3.6. Enforcement of Arbitral Awards

The New York Convention is the most important tool in terms of enforcement, giving the parties an opportunity to take their dispute before an arbitral tribunal and to seek recognition and enforcement of the award by the local authorities easily as a court judgment. The convention, signed in 1958, currently has 165 contracting states. The New York Convention is considered to be one of the biggest advantages of international commercial arbitration[266], since it gives the parties to a dispute the ability to get their awards recognised and enforced in many jurisdictions.[267]

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[265] Jan Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law Volume I: The Transnationalisation of Commercial and Financial Law and of Commercial, Financial and Investment Dispute Resolution* (Sixth edn, Hart Publishing 2016) 492.

[266] Born (n 48) p. xcix (explaining that the 'significance of [the New York Convention's] terms can scarcely be exaggerated', as it consolidated the Geneva Protocol and the Geneva Convention into one legal instrument and

The New York Convention's main aim is to provide a uniform set of rules on an international level, for the recognition and enforcement of arbitral awards. The New York Convention firstly establishes the fact that the international arbitration agreement between the parties is presumptively valid and enforceable, unless the agreement is found to be 'null and void, inoperative or incapable of being performed'.[268]

The convention also sets out the grounds that would give the contracting state (and a local court) the right to refuse the recognition and enforcement of an arbitral award, which are either that the subject matter of the dispute cannot be resolved by arbitration under the law of such country or that the recognition or enforcement of the award is against the public policy of the country.[269]

Although the New York Convention, in theory, limits the parties' ability to take the arbitral award before a court with the aim of getting the award annulled, in practice, the party who is not happy with the outcome usually tend to disrupt the procedure by launching a post- arbitration litigation procedure, looking to avoid the recognition and enforcement of the award.[270] However, there are several court decisions which have shown that courts' approaches to these efforts are becoming more dismissive.[271] There have also been certain examples where a state that has already ratified the New York Convention did not amend their local arbitration legislation accordingly, or

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therefore offered the first legal framework for the arbitral awards, arbitral proceedings and arbitral agreements from the drafting of the arbitral agreement until the enforcement and recognition of the award).

[267] P.R.I.M.E. Finance Website explains the advantages of obtaining an arbitral award from either P.R.I.M.E. Finance or any other arbitral institution, due to the advantages of the New York Convention compared to a judgment rendered by a court. This is due to the enforcement of a foreign arbitral award being less 'complex and caveated' than the enforcement of a court judgment. In addition, if the parties choose to obtain a court judgment 'in major financial centres can seek to attach funds and assets flowing through those centres, attaching transitory funds and assets can pose practical and legal challenges, making enforcement under the New York Convention potentially valuable in cases involving counterparties with assets in jurisdictions that do not easily recognize the judgments of foreign courts'.

[268] Born (n 48) p. c, *also see* Article II (1) and Article II (3) of the New York Convention. (Article II(1) states that Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration).

[269] See Article V (2)(a) and (b) of the New York Convention.

[270] James E Berger and Victoria Ashworth 'Federal Courts Strengthen Protection of International Arbitration Awards' (2008) https://webstorage.paulhastings.com/Documents/PDFs/864.pdf> accessed 4 February 2023.

[271] Several examples of the recognition and enforcement of the arbitral awards, their annulment, problems that have occurred when the parties sought to enforce the arbitral awards in different jurisdictions are shown with previous case studies under Chapter 4.6 of this thesis, *Recognition and Enforcement of Financial Arbitration Awards in Different Jurisdictions: Case Studies.*

had certain inconsistencies between the two, such as Qatar, Saudi Arabia and the UAE.[272]

As to the enforcement of arbitration awards related to financial disputes, the enforcement procedure can be easier than the recognition and enforcement of a court order. For example, if the dispute arises out of a loan arrangement between a London-based lender and a counterparty based in China or Brazil, enforcement of an English judgment anywhere outside the European Union is likely to be more challenging than enforcing an arbitral award granted by a tribunal seated in London.[273]

3.6.1. Effects of Brexit on the enforcement of court judgments

As a recent development, it is also important to take into consideration the aftereffects of Brexit[274] on the enforcement of judgments and arbitral awards into consideration, as this thesis closely relates to the UK and to the enforcement actions to date within the UK and in any other jurisdiction. Brexit resulted in several major changes in the UK's internal and external affairs, and hence, considerable changes as to the applicable laws, conventions and regulations, alongside the authority of certain regulatory and jurisdictional bodies. In relation to the recognition and enforcement of international commercial arbitration awards, the UK is still a party to the New York Convention, and therefore, is still bound by the convention. However, there is a big change regarding the enforcement of judgments granted by the courts of the 27 EU member states.

The European Union has its own legal framework to facilitate a system for the recognition and enforcement of court judgments between its member states, aiming to ease the process and bypass the complexity of the member states' different

[272] Reza Mohtashami and Merryl Lawry-White [2012] 'The (Non)-Application of the New York Convention by the Qatari Courts: ITIIC v. Dyncorp' Journal of International Arbitration Vol 29 Issue 4, 429 Reza Mohtashami is a Partner and Merryl Lawry-White is an Associate based in the Dubai office of Freshfields Bruckhaus Deringer LLP.
[273] Duncan Speller and Francis Hornyold-Strickland, 'International Arbitration in the finance sector: Room to grow?' (2017) <https://iclg.com/cdr/arbitration-and-adr/7122-international-arbitration-in-the-finance-sector-room-to-grow> accessed 2 February 2023.
[274] The term 'Brexit' refers to the United Kingdom's withdrawal from the European Union on 31 January 2020.

legislations for cross-border disputes.[275] As the UK left the EU at the beginning of 2020 without a deal on civil justice[276], the EU-related legislations and regulations on jurisdiction and the recognition and enforcement of foreign court judgments are no longer applicable.[277] Therefore, the recognition and enforcement of foreign judgments are now subject to the UK's own legislations, namely the common law and CPR 74 where there is a bilateral agreement between the country where the judgment is rendered and the UK.[278]

Although it has been more than two years since the UK left the EU, there are certain issues that will still require further clarification and arrangements, including the uncertainty around the recognition and enforcement of foreign judgments and the UK's status as to being a contracting party to several international conventions that regulate the issue. There is one thing that is certain, Brexit made the recognition and enforcement of foreign judgments in the UK more difficult.[279] A regulation for the enforcement of EU judgments which do not fall under the scope of the Hague Convention needs to be implemented to maintain the pre-Brexit arrangements under the EU legal framework.[280]

3.6.2. Enforcement and arbitrability

Arbitrability in general is the concept related to whether a dispute can be subject to arbitration or not on a national level and closely connected to the public policy and mandatory rules of each country. One of the most outstanding advantages of

[275] Martyna Kulińska 'Cross-Border Commercial Disputes: Jurisdiction, Recognition and Enforcement of Judgments After Brexit' , [2020] 16 CYELP 279.
[276] The UK was a contracting party of the Hague Convention as an EU member, but since 29 September 2020, the UK is an independent party to the Hague Convention. Hague Convention and its advantages and disadvantages are explained in detail under Section 4.5.3 *Hague Convention on Choice of Court Agreements*. On the other hand, as the UK was a contracting party to the Lugano Convention as a Member State of the EU, but not on its own as a country, the UK is no longer a contracting party to the Lugano Convention, following Brexit. More details on both Brussels I and the Lugano Convention can be found under Section 4.5.4 *Brussels I and Lugano Convention* of this thesis.
[277] Alexander Layton QC Andrew Dinsmore, 'Cross-border civil litigation: the new normal.' (2021) *New Law Journal,* 26 February 2021. <advance-lexis-com.ezproxy.brunel.ac.uk/api/document?collection=analytical-materials&id=urn:contentItem:6232-FSX1-FFFC-B1BJ-00000-00&context=1519360> accessed 25 March 2023. Alexander Layton QC Andrew Dinsmore, are both barristers specialising in complex international litigation, arbitration & private international law at Twenty Essex Chambers in London.
[278] Ibid.
[279] Nicholas Philips, 'The Enforcement of EU Judgments in England and Wales' (2022) <https://www.birketts.co.uk/legal-update/the-enforcement-of-eu-judgments-in-england-and-wales/> Accessed 25 March 2023.
[280] Ibid.

arbitration is generally considered to be the ease of enforcement, however, it is important to take the legal nature of the documents into consideration when determining whether arbitration truly does hold more benefits when it comes to enforcement. As stated above, as much as the New York Convention on the Recognition and Enforcement of Arbitral Awards, also known as the New York Convention (having 156 member States all around the world as of February 2017) is widely accepted, the biggest obstacle when it comes to the enforcement of a foreign arbitral award is when the dispute itself is contrary to the public policy of the state where the award is requested to be enforced. Arbitrability is disputed firstly because the regulation of securities markets globally has a solid public interest within it, which is believed to be bargained if such disputes arising from securities were agreed to be resolved in private arbitration. [281]

On a case-by-case basis, the court decisions and the private international law of different countries result in divertive outcomes which have a crucial impact on the arbitrability of a dispute. Secured creditors located in those countries with a more modern approach would face penalties and restrictions if their collateral rights are created in a more conservative country in terms of nonpossessory security.[282] It is a widely accepted fact that one of the most important benefits of arbitration is the freedom of the parties to be able to choose the applicable law to every layer of an arbitration proceeding.

3.6.2.1. Enforcement of Security

Taking the multi-national aspect of secured transactions into consideration, it is vital for lenders to evaluate the ease of enforcement and the possible obstacles that would occur in the event of enforcement because of the following reasons according to Hoffmann:

> Each foreign jurisdiction will have its particular enforcement risks that the secured lender will need to understand and address in its loan documentation

[281] Judith Gill and James Freeman, '*Practical Issues Specific to Arbitrations Containing Financial Products* in Jeffrey Golden and Carolyn Lamm (eds), *International Financial Disputes* (1st edn, Oxford Press 2015) 327.
[282] Ulrich Drobnig 'Secured Credit in International Insolvency Proceedings' [1998] 33.1 Texas International Law Journal 64.

and structuring including, without limitation, priming claims, title retention clauses (e.g., a conditional sale agreement or financing lease) and anti-assignment provisions.[283]

The enforcement procedures and outcomes between a country with a developed and efficient legal system and a country or jurisdiction with a developing or underdeveloped legal system for a secured transaction structure are different. It is very common for the parties of a project finance transaction that provide the funding to be persistent about making sure that the security package provided to them is very extensive, although it is on very rare occasions that they would need to enforce them. *284*

In jurisdictions with well-established legal frameworks and those who have 'experience of catering for complex and innovative financial and commercial transactions', it is neither complicated nor costly to create and perfect security over just about any type of asset, including 'tangible or intangible, moveable or immovable, current or fixed, real or personal, present or future, or of some other type'. [285]However, this may not be the case in countries with less well-established legal frameworks, and it so happens that these are often the same countries in which the project being developed under the project finance agreement are located. [286]

The issues in relation to the enforcement of a security mostly arise when the procedural steps for the creation and perfection of security in a country is vague or absent, and secondly when the step-in rights of the lenders themselves granted by the agreements, and their limits, are unclear.[287] For instance, the creation, perfection and enforcement of security may be impeded by the laws of a country or even the practice of perfection and enforcement may differ in the same country when the laws and instructions are not as clear and predictable as they should be.[288]

[283] Paul R Hoffmann (n 174).
[284] Berger and Holmes (n 177) 324.
[285] Ibid.
[286] Ibid.
[287] Cathy Marsh and Andrew Pendelton, '*Project Participants and Structures'* in John Dewar (ed) *International Project Finance: law and* (1st edn Oxford Press, 2011) 20.
[288] ibid.

There are many examples that can be given regarding the various legal requirements for the enforcement of security in different countries and the reference hereunder will be made to three emerging markets: India, Russia, and China. Due to the relevant Indian legislation[289] recovery and enforcement proceedings in India can only be initiated by Indian banks and/or a branch of a foreign bank located in India before special courts established under the name of Debt Recovery Tribunals. Therefore, it is not possible for a foreign bank which does not have a branch in India to initiate the enforcement procedures. Moreover, the legislation and practice of security enforcement under Russian law also impedes the practical and easy realisation of secured assets because of the limitations regarding the creation and perfection of security over certain assets and the possibility of the Russian courts not recognising the security agent concept.[290]

3.7. Confidentiality

Just like most aspects of international commercial arbitration, confidentiality of an arbitral proceedings has its perks as well as its disadvantages. The main advantage when it comes to the proceedings or the awards not being public is for the parties, having the reassurance that any document submitted to the tribunal or any information given throughout the proceedings, including the company financials or sensitive information will be dealt and shared behind closed doors.

Unlike litigation, the extent of confidentiality for an international arbitration proceeding is decided by the parties in principle, and how they put it in their arbitration clause or agreement. However, when it comes to its practice, this freedom given to parties may not work effectively in certain cases such as the scope of confidentiality being unclear or the lack of an authority or mechanism to enforce such confidentiality clauses.[291]

[289] Recovery of Debts Due to Banks and Financial Institutions Act 1993
[290] Jeffrey Delmon & Others. *International Project Finance and PPPs: A Legal Guide to Key Growth Markets* (1st edn, Kluwer Law International 2010) 89
[291] Filip De Ly, Mark Friedman and Luca Radicati Di Brozolo, 'International Law Association International Commercial Arbitration Committee's Report and Recommendations on 'Confidentiality in International Commercial Arbitration' [2017] *Arbitration International*, Volume 28, Issue 3, 357.

There are two important aspects as to how the confidentiality principle for international commercial arbitration proceedings works in practice; first is the approach of different international arbitration institutions, and second is how the concept of confidentiality is treated under the legislations of various countries.

Under the ICC's 2021 Arbitration Rules, confidentiality is not provided automatically. The arbitral tribunal might decide to make the proceedings confidential, or take necessary measures to protect trade secrets and confidential information, upon the request of one of the parties.[292]

The important issue to be reminded of is that although an arbitration proceeding is private, it is not necessarily confidential, unless parties explicitly agree upon it in their arbitration agreement.[293] Therefore, it is crucial to insert a clause under the arbitration agreement to keep the proceedings confidential. On the other hand, the LCIA 2020 Arbitration Rules adopts a strict approach on confidentiality, and states that the parties are under the obligation to keep all the awards, materials and documents created for the purpose of arbitration, including the documents produced by third parties, confidential, unless they have to be disclosed as a legal duty, a legal right, or for enforcing the award before the courts.[294] The UNCITRAL Model Law, on the other hand, does not have any provisions regarding confidentiality, and the UNCITRAL Notes for Organising Arbitral Proceedings state that the national laws do not provide a unified approach to the duty of confidentiality, and the parties who wish to prioritise confidentiality should agree on 'the desired confidentiality regime to the extent not precluded by the applicable arbitration law'.[295]

The LCIA's approach to the duty of confidentiality, which is automatically imposed on parties, is very similar to the English law approach. Although the Arbitration Act 1996 does not have an explicit article regulating confidentiality, the implied duty of confidentially has been referred to in multiple relevant case law. In *Dolling Baker v.*

[292] ICC 2021 Arbitration Rules Article 22 (3).
[293] Walter H. Boone and Mandie B. Robinson, 'Whole Lotta Shakin' Going on: Recent Studies Link Fracking and Earthquakes' [2015] 82 Def Counsel J 68
[294] LCIA 2020 Arbitration Rules Article 30.1
[295] 'UNCITRAL Notes on Organizing Arbitral Proceedings 2016' <https://uncitral.un.org/en/texts/arbitration/explanatorytexts/organizing_arbitral_proceedings> accessed 4 February 2024.

Merrett and Another[296], the UK Court of Appeal decided that there is an 'implied obligation arising out of the nature of arbitration itself'. However, there are exceptions to the rule, as the Court of Appeal decided in *Ali Shipping Corporation v Shipyard Trogir*[297] that there may be situations where the interests of justice require disclosure.

Unlike the UK case law that sides with the duty of confidentiality for arbitration proceedings, some countries, such as Sweden (where one of the most preferred international arbitration institutions – the SCC – is located, the case law suggests that private arbitration proceedings do not carry an implied duty of confidentiality. Therefore, the parties either need to expressly insert a clause accordingly or choose certain arbitration rules that automatically impose the duty of confidentiality on the parties.[298]

Moreover, a more transparent approach also opens the door of arbitral proceedings conducted behind closed doors, making it more familiar and therefore it might promote the use of international commercial arbitration for any type of commercial disputes.[299] On the other hand, from a financial transaction perspective, a bank would usually prefer to keep a dispute with a borrower regarding a loan agreement confidential, as a bank's reputation is considered to be very important in the banking sector.[300] Therefore, on a sector specific basis, it might be preferable for a financial institution to keep the procedures as private as possible.

3.8. Not being bound by 'precedent'

Another factor to take into consideration is that traditional litigation procedures benefit from the availability of judicial precedent. While the confidentiality of arbitration proceedings may, in certain circumstances, be considered beneficial - allowing disputes to be resolved away from the glare of the public eye - it also poses significant challenges in terms of predictability. Public court judgments can be scrutinised, meaning that the parties to a dispute can look to precedent in similar

[296] [1990] 1 W.L.R. 1205 at [1213]
[297] [1999] 1 W.L.R. 314
[298] Katie Chung and Michael Hwang, 'Defining the Indefinable: Practical Problems of Confidentiality in Arbitration' [2009] Journal of International Arbitration, p 609-645
[299] Cindy Galway Buys, 'The Tensions between Confidentiality and Transparency in International Arbitration (2003) American Review of International Arbitration, Vol. 14, No. 121, 2003, 135.
[300] Alamdari (n 26) 79.

cases, something that is not available in arbitration. Various arbitration institutions have been established and taken steps to alleviate this issue in an effort to make arbitration more effective for intricate financial disputes. [301] According to P.R.I.M.E. Finance's rules and the LCIA, the institutions will be permitted to publish anonymized excerpts of the awards with the consent of all parties.

Bearing in mind that there are a considerable number of disputes brought before the courts of New York as well as England and Wales, the courts are well aware of the possibility that the creditors may drift away from choosing such jurisdictions and litigation if the judges cease to be bound by the existing precedent, which may result in lack of uncertainty.[302]

3.9. Expertise

One of the most appealing aspects of arbitration is the fact that the parties are able to choose an arbitrator or a tribunal to resolve the issue, and these people do not need to be lawyers, judges or necessarily from a specific educational or professional background. This paves the way for selecting an arbitrator who has very niche expertise on the merits of the dispute, rather than the court appointing an expert and waiting for a report to be submitted to court, which may be time consuming.

In principle, there are no restrictions or obligatory criteria to become an arbitrator, but this may not be the case when it comes to institutional arbitration, instead of ad hoc arbitration, such as the LCIA or ICC. The international arbitration institutions have their own criteria when it comes to determining the person to act as an arbitrator, or simply appointing an arbitrator to one of the cases brought before them. For example, according to the ICC Arbitration Rules, the arbitrators have to remain impartial and independent, and before confirming or appointing the arbitrators, the court is under the obligation to consider the nationality, residence, and relationships

[301] Covington & Burling LLP, 'Updates to the PRIME Finance Arbitration Rules for Complex, Cross Border Financial Disputes (2021) <https://www.lexology.com/library/detail.aspx?g=bc85a54a-e26b-4af2-839e-6379c8ad9b59&l=9DEL2G7> accessed 3 October 2022.
[302] Davies (n 134) 147

with the parties' nationalities.[303] The rules also state that the court shall consider the arbitrators ability to conduct the arbitration in accordance with the ICC rules. The ICC also launched an initiative called the ICC Advanced Arbitration Academies as a professional training programme for arbitrator candidates.[304]

Another arbitration institution, the ICDR[305], sets out its own criteria and qualifications to be qualified as an arbitrator, which includes minimum of 15 years of experience, relevant educational degree and training and experience in arbitration.[306]

On the other hand, arbitrators have rather limited authority compared to judges in terms of imposing sanctions. For example, a court can easily impose a fine if one of the parties fail to fulfil its obligations under a court judgment and therefore, parties may need additional court support (i.e. obtaining a freezing order or an interim measure) to compel the other party to comply with the arbitrator's orders.[307]

In China, for example, an inexpert judiciary, unable to handle the complexities of claims arising from project finance transactions, has been flagged by market participants as a particular problem to using the domestic courts. In some instances, arbitration may offer a solution as the appointed arbitrators will ordinarily be proficient on the matters at hand, but in other cases the courts are still required for either dispute resolution or for enforcement.[308]

A problem often cited by project participants is the apparent inability of some judges to grasp the key issues in complex financial and contractual claims involving project participants which require resolution. This may happen even for some relatively straightforward debt claims. Sometimes, this apparent problem is mitigated by having the matter resolved via arbitration since arbitrators are normally well-experienced in

[303] Article 11 and 12 of ICC 2021 Arbitration Rules also, Article 13 (5) of the 2021 Arbitration Rules state that 'Where the Court is to appoint the sole arbitrator or the president of the arbitral tribunal, such sole arbitrator or president of the arbitral tribunal shall be of a nationality other than those of the parties'.
[304] 'ICC Launches Advanced Arbitration Academies' https://iccwbo.org/news-publications/news/icc-launches-advanced-arbitration-academies/
[305] ICDR is the international division of the American Arbitration Association.
[306] 'Application Information International Centre for Dispute Resolution, International Panel of Arbitrators and Mediators' <https://www.acerislaw.com/wp-content/uploads/2021/10/icdr_panel_application_information_and_form.pdf> accessed 22 December 2023
[307] Moses (n 1) 5
[308] Anthony W.Y. Chan and Elaine Yu *Project Finance in a Troubled Chinese Market International Project Finance*, Fiona Scott and Claus Peter Martens (eds) (Transnational Publishers Inc, 2000)

the types of contentious issues on which they have been appointed to arbitrate. Nonetheless, arbitration cannot solve all contentious issues, and the courts remain an important forum for resolution of disputes or remedy enforcement.[309]

3.10. Interim Measures/Summary Judgments

One of the biggest discussions regarding the potential advantages of litigation over international arbitration is the possibility to obtain a summary judgment from the court. Lack of a summary disposition that paves the way for a quicker outcome and judgment is regarded as a disadvantage especially for banking and finance transactions.[310]

This aspect becomes vital, especially for fast recovery or precaution purposes. For example, in an event of default by the borrower, the first thing that the lenders would like when they accelerate the loan would be to obtain an interim measure i.e. a freezing order from the court to prevent the debtor from transferring its assets. However, there are certain counter arguments in relation to summary judgment being considered as an advantage. First of all, challenging a summary judgment may not be that difficult, but aimed to prolong the process and avoid a judgment being handed down quickly.[311]

The second point, as frequently emphasised by the arbitral institutions, is the fact that there is a not mechanism within the arbitral proceedings to obtain interim relief prior to the constitution of an arbitral tribunal. The mandatory involvement of a court when one of the parties wishes to secure an interim measure and submit it to the arbitral tribunal is considered as a downside to international commercial arbitration for the banking sector, and such concern may be reduced by using an emergency arbitrator.[312]

[309] Anthony W.Y. Chan and Elaine Yu (n 308) 62.
[310] 'The ICC Commission Report on Financial Institutions and International Arbitration' (n 124).
[311] Han (n 137).
[312] 'The ICC Commission Report on Financial Institutions and International Arbitration' (n 124).

3.11. Cost & Time

For the past 30 years, one of the biggest selling points of international arbitration was the fact that it was faster and more cost efficient compared with litigation. However, it is fair to say that this aspect should definitely be evaluated on a case-by-case basis. International arbitration can be highly expensive[313] depending on many different variables including the type and nature of the dispute and whether there are 'substantial written submissions, factual and expert evidence, and lengthy hearings, are involved. [314]

One of the main reasons for any alternative dispute resolution to emerge had been its time efficiency.[315] The duration of a legal proceeding from the moment the filing is made until the judgment or the award is handed down can take a considerable amount of time, depending on several factors including the complexity of the dispute itself, number of procedures to be followed or how busy the authorities are in terms of the pipeline of disputes to resolve.

In 2015, LCIA, one of the biggest and most used international arbitration institutions globally, released a report disclosing the time and money spent on average on an international commercial arbitration proceeding between the years 2013 and 2015.[316] Taking all tribunals into account (including the tribunals with a sole arbitrator and an arbitral tribunal with three arbitrators), the median duration of a proceeding is reported to be 16 months and mean average is 20 months.[317]

In 2017, LCIA updated its report on costs and duration, which shows the median total duration of an arbitral proceedings still stands at 16 months and the median time for the arbitral tribunal to hand down its final award after all the submissions are made is

[313] It is important to note that these figures exclude the retainer fees payable to the lawyers, but not mentioned since the amount paid for legal representation is the same in both international arbitration and traditional litigation.
[314] Born (n 48) 85.
[315]Carol Siegel, 'Settling Out of Court: How Effective Is Alternative Dispute Resolution?' (2021) <https://openknowledge.worldbank.org/bitstream/handle/10986/11055/678050VP00PUBL0Setting0out0of0court.pdf?sequence=1&isAllowed=y> accessed 3 February 2023.
[316] LCIA, 'LCIA Releases Costs and Duration Data: Tools to Facilitate Smart and Informed Choices' (2015) <https://www.lcia.org/News/lcia-releases-costs-and-duration-data.aspx> accessed 15 February 2022.
[317] Ibid.

another 3 months. The updated data also shows that regarding cases with the dispute amount less than USD 1 million, the median total duration is 12 months.[318]

Moreover, the same report sets out the average cost of an arbitration proceeding, which is disclosed as USD 192,000 (mean) and USD 99,000 (median).[319] The updated data shows that the costs on average also stayed on the same levels, the median for 2017 being USD 97,000.[320] It is also important to highlight that LCIA states in the most recently released data that the institution's arbitration costs are considerably lower than any other leading arbitral institutions; on average 50% less regarding the tribunal fees and 40% less regarding administrative charges.

In practice however, the procedures take far longer, as the counsels are willing to exhaust any remedy possible prior to the arbitral award being handed down, just to make sure that everything has been tried[321]. At this point, it is reasonable to ask the question of whether this is also the case for any court proceedings. The answer is yes, but there is one major distinction; there is no appeal mechanism (apart from certain exceptions) for arbitration proceedings, therefore the proceedings are usually regarded as 'make it or break it'. Moreover, the international arbitration community takes its pride from their proceedings taking less time than a traditional litigation proceeding, which may not be the case in most cases.[322]

It is important to emphasise that these numbers include any dispute, whereas project finance disputes are frequently more complex and involve multiple parties and many documents. In other words, the time it takes to resolve a dispute arising from a project finance transaction might take even more time than the figures mentioned above, as it is likely to involve more parties and documents than the average dispute.

[318] Ibid.
[319] Ibid.
[320] 'LCIA Releases Costs and Duration Data: Tolls to Facilitate Smart and Informed Choices' (n 181) 2.
[321] Joerg Risse, 'Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings' [2013] *Arbitration International*, Vol 29, Issue 3, 453–466 (Risse explains how the proceedings usually are in practice, with 'two full rounds of submissions, a document production phase and witness statements, followed by a multi-day hearing and post-hearing briefs, sometimes two additional rounds').
[322] ibid 454.

3.11.1. Third party funding

Litigation funding is described as funding provided by banks, hedge funds and financial institutions, which do not have any previous link to the litigation proceeding, to pay for a portion or the whole of the legal fees and costs. In return, they receive a certain share of the recovered damages if awarded.

In essence, the funder collects the investment it made along with an agreed portion of the damages recovered. In some cases, the total amount may be capped at two or three times the amount granted by the funder in the first place. On the other hand, if the case is lost, the funder is not entitled to claim any amount from the litigant, and it loses its investment.

Arbitration funding is a relatively new concept, which is still evolving and is in the need of a framework to regulate the current issues.[323] Due to the fact that the arbitration proceedings are conducted behind closed doors, there is no concrete data regarding the use of third party funding for international commercial arbitration proceedings, but there are certain indications that show its use is increasing.[324] Bearing in mind that an arbitration proceeding is generally far more expensive than a litigation proceeding, funding may be essential for the parties to participate. In particular, if one party to an arbitration proceeding is a state, the capacity to fund an arbitration proceeding would be disproportionate between the parties. Any possibility of the arbitrator being appointed by a third-party funder for multiple arbitral proceedings, or any relationship between the arbitrator and the funder would cause a conflict of interest and therefore may disrupt the proceedings.[325]

Moreover, the present-day arbitral rules are not adequately supporting the increasing use of third-party funding in terms of how to tackle the clash of the concept of third-party funding and the principle of the independence of arbitrators. At present, third

[323] Vienna Messina 'Third-Party Funding: The Road to Compatibility in International Arbitration' [2019] *Brooklyn Journal of International Law*, vol. 45, no. 1, 434 (Vienna notes that there is still 'a lack of standard framework to address third-party funding in international arbitration proceedings. There is no question that parties in international arbitration will continue to use third-party funding. It is time, therefore, to tailor the processes for addressing issues that arise when third-party funders are involved in cross-border disputes and investor state claims').
[324] Jennifer A Trusz, 'Full Disclosure: Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration' [2013] *Georgetown Law Journal,* vol. 101, no. 6, 1651.
[325] ibid 1652.

party funding in arbitration is active in the Middle East market, whereas appetite is growing in Asia. With the new liberalisation of rules in Hong Kong and Singapore, abolishing the doctrines of champerty and maintenance, this trend is likely to increase.[326]

Third party funding in international arbitration is an issue that has been evaluated on international platforms. In 2013, the International Council for Commercial Arbitration and Queen Mary University combined forces and convened as a Third-Party Funding Taskforce. They released a report in 2018 on third party funding in international arbitration including their findings and recommendations.[327] The main aim of the report is firstly to endorse a wider understanding and knowledge about the third-party funding itself, and the 'issues it raises in international arbitration'. The second and more prominent aim of the report is 'to facilitate greater consistency and more informed decision-making in addressing issues relating to third party funding'.[328]

The report also sets out a due diligence checklist, a list of questions for the parties of third-party funding, both funders and funded parties, to take into consideration prior to entering into a third-party funding transaction. These questions aim to eliminate any potential future legal issues. First part of the questions is in relation to the potential funder's 'legal and financial/capital structures', and the questions include whether the funder is publicly listed, how the money will be raised and whether the funder is being externally audited on a regular basis. The subsequent section is with regards to the funder's 'specific obligations to a party', asking which types of costs are included, or 'What aspect of arbitration or of the enforcement is possibly not included?'. The third section is about the funding agreement itself, aiming to identify the parties of the agreement, calculation of remuneration, or deciding who will undertake the costs for the enforcement of the award. Lastly, the checkpoints also question the funder's professional liabilities, mainly in relation to the funder's internal code of conduct.[329]

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[326] Aspen RE, 'Litigation Funding I Global Trends and Outlook', <https://www.aspen.co/globalassets/documents/reinsurance/whitepapers/litigationfunding.pdf> accessed 30 March 2021.

[327] International Council for Commercial Arbitration, 'The ICCA Reports No. 4: ICCA-Queen Mary Task Force Report on Third Party Funding' <https://www.arbitration-icca.org/publications/Third-Party-Funding-Report.html> accessed 3 February 2023.

[328] Ibid.

[329] Ibid.

3.12. Multiparty (Joinder)

Having more than two parties in a dispute is one of the biggest disadvantages of international arbitration, since it may not be possible to include all parties as joinder and it is not usually possible to include a party to the arbitration proceedings if such party had not given consent to take the dispute before an arbitral tribunal.[330]

Project finance transactions commonly include at least 15 to 20 parties, which all have a significant and distinctive role to conclude the transaction.[331] While some of the transactions include an agreement signed with many parties, such as the loan agreement with a syndicate of lenders, some of the agreements are executed between two parties, such as the offtake agreement. Even though there are many different contracts that are signed individually between the parties concerned (and are binding between such parties), some of the disputes might have a contingent effect on different parties, which would affect another participant of the project itself, within the chain of transactions.[332] This might also lead to a situation where there is more than one arbitration claim revolving around the same dispute. In order for these 'parallel arbitration claims' to progress in a speedy and non-problematic manner, the parties might consider including another affected party as a joinder, a third independent party to intervene, or consolidate the arbitration proceedings altogether, under one international commercial arbitration proceeding and merged under one arbitral tribunal hearing.[333]

Project finance loans are usually considerably high in value, which means the loan is syndicated by several creditors who are all parties to the agreement. Moreover, there are many other documents and transactions involving many parties like the sponsors, contractors, parties to the offtake agreements etc. As Hwang points out:

> One of the main reasons is that, where there is a web of contracts (sometimes called string contracts) upstream and downstream, it makes sense for the parties to resolve their disputes before one tribunal, and the only tribunal with

[330] Moses (n 1) 5.
[331] Alamdari (n 26) 61.
[332] Ibid.
[333] Ibid.

> power to consolidate or join third parties without the consent of all parties concerned will normally be a national court, since the issue of multiple party arbitrations remains an unsolved one, despite efforts to revise institutional rules to make consolidation and joinder easier.[334]

Since this is considered to be a major issue, especially for cross-border complex financial disputes, the institutions who particularly focus on the financial transactions started to redraft their rules, allowing third parties to be included in the process as a joinder.

The ICC ADR Commission Report says parties to an arbitration have the liberty to consolidate several disputes that arise from separate contracts under a 'Global Master Arbitration Agreement'. [335] That said, the report also recognises that a financial institution may not be prepared to take part in a dispute resolution process that arises from multiple contracts and, as such, that consent must be explicitly granted. [336] P.R.I.M.E. Finance's recently redrafted rules[337] stipulate that the involvement of third parties is permitted in regard to any issues relevant to the proceeding[338].

During a panel in 2013, Dr Inka Hanefeld discussed the extent of inclusivity regarding the arbitration agreements for project finance disputes, asking the questions:

> […] to what extent can arbitration agreements in project finance settings be inclusive, i.e., be valid for all disputes, for all contracts, for all questions among all parties to the project? And to what extent should arbitration agreements be

[334] Michael Hwang, 'Commercial courts and international arbitration—competitors or partners?' [2015] Arbitration International, Vol 31, Issue 2, 195.
[335] 'ICC ADR Task Force Report' (n 24).
[336] Ibid (Consolidation will not be forced upon the parties if the specific circumstances 'underlying the banking transaction' make it preferable to hear individually and separately from the various related contracts. For example, this situation may arise in a project finance transaction where the borrower company's duty to repay the project debt will not be affected by the contract in question.).
[337] Covington & Burling LLP (n 301) (The article written by the Covington & Burling LLP state that Articles 31 and 32 of the Proposed Rules provide for multi-party joinder to a single arbitration agreement and the consolidation of related proceedings stemming from different arbitration. Meanwhile, Articles 34 and 34 permit for a single arbitration process to be convened that relates to multiple related contracts and for parallel proceedings to be coordinated and heard by the same arbitrators, even without the arbitrations being formally consolidated. Such provisions, aimed at making arbitration more efficient and outcomes more consistent, will work best when the possibility they may later be relied on is taken into consideration at the time of writing the original agreements).
[338] Ibid.

exclusive, i.e., outsource some matters from the arbitral tribunal to external service providers such as valuation experts?[339]

In this sense, Hanefeld noted that for the multi-party and multi-contract cases, the drafting of the arbitration agreement or the clause by using 'compatible arbitration clauses and confer explicit powers of joinder and consolidation on the arbitrators if this is not foreseen in the rules [that the parties have chosen such as P.R.I.M.E. Finance Rules]'.[340] In terms of outsourcing, she noted that appointing an expert for the valuation of project finance assets either by the arbitral tribunal or the parties might be an alternative method.

On a separate note, one doctrine that paves way for non-signatories to be bound by arbitration agreements or clauses, which is closely tied with the multiparty nature of a project finance transaction is the 'group of companies' doctrine. The group of companies doctrine explores the extent of the applicability of an arbitration agreement when one or more of a group of companies enter into an arbitration agreement, while some of the companies under the same group are non-signatories.[341] The doctrine permits the non-signatory companies to be bound by the arbitration agreement signed by the other group companies, if certain conditions are met.[342] As extending the applicability of an arbitration agreement to a non-signatory is a highly substantial decision, there are certain additional conditions to be met apart from being a group company. Firstly, even though the names of certain group companies are not expressly mentioned as a party under the arbitration agreement, the 'parties' will in the sense that the parties meant all units of the group to be party to the contract without attaching importance to the form of the contract'.[343] Moreover, it should be clear that the party who executed the agreement was acting on behalf of the whole group, instead of just for itself.[344]And lastly, the non-signatory group

[339] 'Panel 3: Multi-Party Arbitration Issues in International Project Finance Arbitration' [2013] *New York University Journal of Law and Business,* vol. 9, no. 3, 764.
[340] Ibid.
[341] Pietro Ferrario, 'The Group of Companies Doctrine in International Commercial Arbitration: Is there any reason for this doctrine to exist?' [2009] Journal of International Arbitration Vol 26, Issue 5 pp. 647-673.
[342] ibid
[343] ibid
[344] ibid

companies should have actively participated in the process of 'preparation, negotiation, enforcement and termination' of the arbitration clause.[345]

In practice, the group of companies doctrine's adoption varies in different jurisdictions. For example, under the relevant Turkish legislation, the position of non-signatories is not covered, and there is no case law to set a direct precedent as to the group of companies doctrine.[346] However, based on an analysis of numerous Turkish Supreme Court decisions it is possible to say that an arbitration agreement might be extended to a non-signatory 'in the event of incorporation by reference, assignment and subrogation'.[347] However, certain other doctrines, acceptance of which would result in a non-signatory to be bound by an arbitration agreement, such as third party beneficiary, guarantee, or agency 'with the actual express authority', are not accepted.[348]

Although one of the main characteristics of a project finance transaction, as explained in the previous chapters, is the full recourse to the SPV but limited recourse to the parent companies or the other affiliated companies, the group of companies doctrine would be relevant to project finance transactions, in a situation where one of the group companies provided a corporate guarantee to the lenders.

3.13. Conclusion

After outlining the concept of project finance in Chapter 2, Chapter 3 of this thesis focused on the advantages and disadvantages of international commercial arbitration in comparison with traditional litigation as an alternative dispute resolution mechanism. This chapter provided the key information in terms of the proposal to improve the use of international commercial arbitration for project finance disputes, which is evaluated in Chapter 4 of this thesis. In order to come up with a solution to the core research questions, it is vital to understand what is considered as an

[345]Ferrario (n 341)
[346] Gizem Halis Kasap, 'Etching the Borders of Arbitration Agreement: the Group of Companies Doctrine in International Commercial Arbitration under the U.S. and Turkish Law' [2017] University of Bologna Law Review, Vol 2, No,1, p 87-113.
[347] ibid
[348] Ibid

advantage or a disadvantage in terms of parties' choice of dispute resolution mechanism.

While there are several general advantages and disadvantages of international commercial arbitration, regardless of the type of the dispute, such as neutrality of the arbitral forum or the finality of arbitral awards, this chapter focussed on the upsides and downsides of international commercial arbitration for financial disputes, with a specific focus on project finance transactions. Firstly, this chapter identified that party autonomy, which is one of the biggest upsides provided under the concept of arbitration has its own limits in practice. Secondly, this chapter recognised that neutrality is a very important aspect for project finance transactions, as the creditor-side usually has the upper hand when choosing the dispute resolution practice for a project finance transaction. Banks have tended to prefer litigation over arbitration, based on their suspicion that arbitral tribunals tend to split the arbitral award between the parties, rather than basing their decisions on facts.

Thirdly, this chapter also identified that, while some arbitration institutions do not explicitly state that an arbitral award is binding, some institutions, such as the LCIA, define the awards as final and binding. As mentioned in the chapter, in practice, the institutional rules and their effectiveness is closely related to the national laws, regulations and practice of the country where the enforcement application is made.

Fourthly, this chapter also noted that one of the most relevant aspects is bankruptcy and the inevitable involvement of the local courts and the lack of competence of the arbitral tribunals, mostly because of the lack of an international bankruptcy regime or legislation. This aspect is significant when it comes to a financial transaction, especially a project finance transaction, since the lenders that provide the funding of a project are always very cautious about the possibility of a bankruptcy or a possible liquidation of the project company and the bankruptcy component is important to make sure that the lenders can receive their money back and position themselves correctly in the waterfall of payments, which cannot be resolved through an international commercial arbitration proceeding.

As a fifth advantage, this chapter identified that enforceability of the arbitral awards, especially the enforcement of security is very closely tied to the project finance world. The New York Convention is a key tool when it comes to the recognition and enforcement of an arbitral award, and as explained in the chapter, it provides a tremendous ease and advantage to all parties involved in the arbitration proceedings, making it as easy, and sometimes even easier, as the recognition and enforcement of a court judgment. Moreover, this chapter also touched on the enforcement of court judgments in the UK post-Brexit, as this issue remains unclear and needs further arrangements as the UK, as a former member state of the EU, is not a party to certain EU-related legislations that were previously applicable.

Sixth important comparison between international commercial arbitration and traditional litigation identified in this chapter was confidentiality, which also ties in closely with seventh item, the ability to access previous decisions (precedents). On one hand, the international commercial arbitration can be considered as advantageous in terms of not revealing all the information and merits of the dispute and therefore benefit from the dispute being resolved behind closed doors. On the other hand, not being able to have access to previous arbitral awards to set an example might be considered as a disadvantage. As explained in this chapter, rules of international arbitration institutions and case law in different jurisdictions suggest that parties should explicitly insert a clause in their arbitration agreements that the arbitral proceedings should be confidential, or specifically choose certain rules that provide the confidentiality aspect automatically. This chapter, alongside Chapter 4, also provided information about the recent efforts of the arbitral institutions (such as P.R.I.M.E. Finance) to make the arbitral awards public.

The eighth aspect identified in this chapter was the ability to choose a person or a tribunal who have extensive knowledge and expertise about the merits of the dispute.

The cost and time of an international commercial arbitration procedure versus a litigation proceeding, alongside the concept of third-party funding were identified as the ninth and tenth comparisons in this chapter. For both dispute resolution mechanisms, in practice, the procedures tend to take longer than what is anticipated by the courts or arbitral tribunals, as the parties tend to exhaust every possible

remedy that is available to try before the award or the judgment is handed down. Moreover, due to its complex legal nature, as mentioned in this chapter, a dispute arising from a project finance transaction might even take more time. In terms of third party funding, arbitration funding is still a new concept, and the institutional arbitration rules still do not provide enough support to regulate the current challenges of third party funding in practice, as noted in this chapter.

There are two remaining major matters that are closely connected to the nature of a project finance transaction, summary judgments and the involvement of multiple parties. The international-level efforts by financial arbitral institutions to make commercial arbitration more appealing in terms of creating an opportunity to have interim arbitral awards and including multi parties in an international commercial arbitration proceeding will be covered in the next chapter. Moreover, the 'group of companies' doctrine, which allows non-signatory companies that are a part of a group of companies to be bound by an arbitration agreement executed by other companies within the group, is closely related to project finance transactions, especially in terms of the corporate guarantees provided under the security arrangements. This doctrine's applicability varies from one jurisdiction to another.

This chapter provided the basis to the next two chapters, since in order to propose a solution to the current unpopularity of the use of international arbitration for project finance disputes, it is crucial to outline the reasons behind it.

4. Chapter Four – Use of international Arbitration for Project Finance Disputes

4.1. Introduction

The question of whether there is room for growth for international arbitration being more commonly used for project finance disputes is a very important, but complex one. There are multiple reasons why litigation is still a more popular choice, including the nature of the project finance documents, concept of security documents and their specific enforcement issues, certain disadvantages of international commercial arbitration which are elevated in a project finance transaction context, all of which are discussed in a detailed way in the previous chapters.

Before setting forth a possible solution to this problem, or at least certain improvements to make international commercial arbitration for project finance transactions more attractive which will be analysed under a case study in Chapter 5, it is important to demonstrate the current situation in practice; in terms of what kind of clauses are used when choosing a dispute resolution mechanism.

Therefore, this chapter will firstly focus on the use of international commercial arbitration in financial disputes, which will also elaborate the different types of international commercial arbitration clauses that are inserted into the financial transaction documents, backed by court decisions from different jurisdictions as precedents. Then, the chapter will focus on the enforcement of arbitration awards in different jurisdictions, and especially the enforcement of the awards arising from financial disputes.

Secondly, the concept of inserting a unilateral clause, which gives one party the exclusive right to either take the dispute before an arbitral tribunal or a court, and how it is perceived in terms of its enforcement will be introduced in this chapter. Unilateral clauses carry a significant importance, as there are certain discussions around their enforceability. This is particularly relevant to financial disputes, as the

lenders to a financial transaction tend to opt in a unilateral clause, which can cause certain issues during enforcement.

This chapter will also analyse the efforts both on an international and domestic level, alongside relevant legislations and commissions that work for the cause.

Moreover, it is also important to take the efforts to improve the use of litigation into consideration. This chapter will also evaluate certain local and international efforts to make litigation as the method of dispute resolution more attractive to parties of a financial transaction. The aim of Chapter 4 is to set out the issues and recent circumstances in practice, and how the arbitration clauses work, alongside describing any issues that arise during the enforcement stage of an arbitral award.

4.2. Background

The use of international commercial arbitration as an alternative dispute resolution for project finance disputes has been a highly debated hot topic, especially for the past decade, as analysed throughout this thesis. There are a couple of reasons behind this, including developments in the international financial arbitration field, with new establishments starting to find themselves a respected place in the sector, the magnitude and volume of project finance transactions getting bigger every year, and the efforts to improve the financial litigation.

Parties to a project finance transaction can basically choose either the domestic courts or an international arbitral tribunal to resolve their potential disputes, or a combination of the two, which will be discussed in detail in this chapter. In terms of choosing traditional litigation, although there is a tendency for the parties to prefer the courts where their business is located, they might also choose to select the courts of another party to the transaction based on ‘the legal advantages attached to the possibility of obtaining discovery or to the future enforcement of a judgment in that country’ and the general legal nature of project finance transactions that some of the

underlying agreements must be governed by domestic laws.[349] Choosing a specific jurisdiction for a claim to be litigated, based on which jurisdiction is deemed the most favourable toward achieving the desired decision (commonly known as 'forum shopping'), can also be the case for arbitration, when parties choose one arbitral forum over another via an arbitration agreement. [350]

International commercial arbitration is one of the fastest growing sectors with an overwhelmingly increasing number of parties of any commercial transaction taking the arbitration route to resolve their disputes all around the world.

The world has witnessed a considerable number of arbitral institutions being formed and providing guidance, setting out their own rules, putting a significant amount of effort into promoting the fundamentals of arbitration and its advantages. As a result, international commercial arbitration has been widely used by the parties of a transaction mainly due to its speed, neutrality, confidentiality, and the expertise offered by the arbitrators.

Yet despite the fact that several surveys and pieces of research reflect this rise of interest in many different sectors including construction and energy, international arbitration has failed to become as popular for financial disputes.[351]

4.3. Use of international commercial arbitration in finance disputes

Despite the fact that international commercial arbitration is used more frequently as an alternative dispute resolution mechanism for financial disputes, it is still an

[349] Dugue (n 37) 1072 (Dugue also mentions that this choice carries a twofold jurisdictional risk, one being the choice of an unfavourable forum, along with ending up with many different jurisdictions for each and every agreement under the project finance transaction, and the second one being the risk of parallel proceedings).
[350] Franco Ferrari, *Forum Shopping in the International Commercial Arbitration Context: Setting the Stage* (Otto Schmidt/De Gruyter European Law Pub, 2013)
[351] Drahozal and Ware (n 2) (Drahozal and Ware cite a study conducted by professors Theodore Eisenberg, Geoffrey Miller and Emily Sherwin finding out that the use of international arbitration for disputes concerning 'material corporate contracts of telecommunications and financial services' is very little).

'exception rather than a rule'.[352] There are many different reasons behind this, which are evaluated in greater detail throughout the previous chapters.

It is also important to mention that due to the considerable variety of financial transactions, the use of international arbitration for each and every type of financial transaction differs massively.[353] Some financial transactions just include a bilateral credit agreement with a lender and a borrower as parties, whereas some of the complex financial transactions involve multiple parties, agreements and in some cases, mandatory involvement of certain jurisdictions.

To be more specific, in terms of project finance transactions, ICC Task Force's Supplementary[354] state that although arbitration garnered more attention for project finance transactions compared to other forms of lending transactions, there are only a few financial institutions that 'systematically' include an arbitration clause to its project finance documents.[355] The report notes that the main reason behind this elevated interest is because of the fact that a project finance transaction will often include either parties or security which is located in a jurisdiction where the creditor side of the transaction thinks it would not be equipped sufficiently to resolve a dispute that might arise from such transactions.[356]

In other words, the interest in international commercial arbitration exists, even more than it does for other forms of financial transactions, but the use is still not as common. These indications are very crucial, as it means it is not technically impractical to use international commercial arbitration as an alternative dispute resolution for project finance disputes, and most importantly, there is room for improvement, unless the problems in theory and practice are identified.

Before getting into the concept of bilateral clauses, or the enforcement of arbitral awards, it is important to take a look at some of the relevant court judgments that include recognition or enforcement of an arbitral award regarding a financial

[352] Rina See and Steven P Finizio, 'The Use of International Arbitration by Financial Services Institutions: Another Look' (2021) <https://www.wilmerhale.com/en/insights/publications/20210819-the-use-of-international-arbitration-by-financial-services-institutions-another-look> accessed 3 February 2023.
[353] ibid.
[354] 'Supplementary Materials to the ICC Commission: Financial Institutions and International Arbitration' (n 169).
[355] Ibid.
[356] Ibid.

transaction, which were either successful or not, for certain reasons mentioned below.

In 1997, *Bankers Trust International plc and PT Jakarta International Hotels & Development*[357] entered into multiple swap transactions under the ISDA Master Agreement, which were governed by English law and also had an arbitration clause stating that any dispute arising from the agreement should be resolved by LCIA.

In 1999, PT Jakarta applied to Indonesian Courts claiming substantial damages and indemnification from Bankers Trust International. Subsequently, Bankers Trust initiated proceedings against PT Jakarta in London High Court seeking an injunction to prevent PT Jakarta from pursuing any legal claims in Indonesian courts, since the agreements between them contained an LCIA arbitration clause, which was granted by Mr Justice Croswell.[358] Bankers Trust International plc and PT Jakarta is one of the examples that show the effectiveness of an arbitration clause, which was inserted into a financial document, before the United Kingdom courts. Since the parties decided to resort to international commercial arbitration in the event of a dispute, one of the parties who decided to bring the case before a court was prevented from taking the issue further before such local court and was ordered to take it before the predetermined platform, LCIA.

There are also certain examples where there is a substantial difference between the amount of the arbitral awards granted for very similar disputes. For example, two arbitral awards were handed down by the same LCIA arbitral tribunal consecutively in 2007 and 2008 regarding the issue of repayment under two identical facility agreements executed between a lender based in Europe and a borrower located in East Europe - the first award was in the amount of USD 10.4 million plus interest, whereas the second award was in the amount of USD 25.8 million plus interest.[359] The next section of this thesis will provide further examples of case law in relation to the recognition and enforcement of foreign arbitral awards in different jurisdictions.

[357] [1999] 1 Lloyd's Rep 910 (QB Comm Ct).
[358] Joanna Gray, 'Bankers Trust Company and Bankers Trust International plc v PT Jakarta International Hotels & Development', [1999] Journal of Financial Regulation and Compliance, Vol. 7 Iss 3, 271 – 273.
[359] University of Cologne 'Arbitration in Banking and Finance: Selected Practical Examples' <http://arbinfinanz.uni-koeln.de/practical-examples_ID3> accessed 3 February 2023.

4.4. Recognition and enforcement of financial arbitration awards in different jurisdictions: case studies

As explained before, it is not possible to access the contents of an international commercial arbitration award easily, as the award itself is subject to confidentiality. However, when it comes to the recognition and enforcement of an arbitral award, for instance, to obtain a freezing order on the borrower's assets or to enforce a share pledge agreement, the parties would be required to bring the award before the courts. Also as explained in detail in Chapter 3, an arbitral award is generally final and binding, so the parties do not have the option to appeal the award. Therefore, the avenues when the parties would resort to litigation would be when they need to obtain an interim measure, or to get the award recognised and enforced. Unless there is an exceptional decision by the courts, on the request of the parties, to keep the proceedings, or the enforcement decision private, the documents and the actual hearings are public. There are many examples of parties securing a judgment from the court to enforce the award in the relevant jurisdiction, but there are also many situations where the enforcement phase was problematic. This section will go through certain case studies from all around the world, where one of the parties to the dispute has managed to secure an enforcement decision from the courts, alongside examples where parties had faced challenges during the recognition and enforcement of international commercial arbitration awards, some of which are still ongoing, arising out of financial disputes (project agreements, financial arrangements or security agreements) and the underlying reasons.

4.4.1. Shandong Century Sunshine Paper Group Co Ltd v Deutsche Bank

This case is an example of a local court rejecting the enforcement of a financial arbitral award. A China-based paper company, Shandong Century Sunshine Paper Group Co Ltd (Shandong Paper) entered into an agreement with the Chinese branch of the global bank Deutsche Bank.[360] Under the agreement, the parties agreed on a 'US dollar-denominated structured swap linked to US dollar LIBOR and euro

[360] 'ISDA Whitepaper: China's Derivatives Market and Judicial Trends' (ISDA China Whitepaper) (2018) <https://www.isda.org/a/9pREE/Chinese-Derivatives-Market-and-Legal-Trends.pdf> accessed 18 May 2022.

EURIBOR'.[361] However, Shandong Paper failed to fulfil its obligations under the swap agreement and hence, failed to make a payment when due, which resulted in Deutsche Bank terminating the agreement promptly.[362] On the back of termination, Deutsche Bank China Branch decided to initiate legal proceedings against the company and applied to the China-based arbitration tribunal, CIETAC Shanghai sub-commission. The arbitral award granted was in favour of Deutsche Bank.[363]

Up until this point, the process is a similar one to obtaining a judgment from any court. However, the problems occurred during the enforcement stage. When Deutsche Bank applied to the local court, Shandong Weifang Intermediate People's Court, seeking the enforcement of the arbitral award, such request was rejected.[364] The paper company claimed that Deutsche Bank China Branch was 'reportedly involved in the manipulation of LIBOR and EURIBOR'[365], which was not disclosed to the sub-commission that granted the award and noted that this disclosure would have changed the course of the arbitration proceedings and therefore could have affected the result.[366] Subsequently, Deutsche Bank appealed the decision to Shandong High People's Court, and the appeals court decided that the case should be re-heard by the lower court. After re-hearing the case, the Shandong local court once more rejected the enforcement of the arbitral award.[367]

4.4.2. Yukos Capital v Rosneft

Yukos Capital v Rosneft is a prime example of how the local courts can refuse to recognize and enforce a court decision, given by another court to annul an arbitral award, based on public policy grounds. The legal proceedings were initiated in multiple different jurisdictions, but the most relevant judgment in terms of this specific issue was handed down by the English Court of Appeals in 2012, which is explained in detail below.

[361] 'ISDA China Wallpaper' (n 360).
[362] ibid.
[363] Ibid.
[364] Ibid.
[365] Ibid.
[366] Ibid.
[367] Ibid.

Before going into the details of the case, it is important to provide a short background of the main dispute between Yukos Oil Company and the government of the Russian Federation, as the proceedings regarding the enforcement of the arbitral awards mentioned below stem from the main dispute.

The former shareholders of Yukos Oil Company initiated several litigation and arbitration proceedings against the Russian government, claiming that due to lack of good faith of the local courts of Russia in initiating tax-related criminal proceedings against the company, Yukos went bankrupt. The former shareholders claimed damages from the government. Amongst the many different legal proceedings, the largest one, amounting to USD 100 billion, was launched in 2007 before the Permanent Court of Arbitration in the Hague. The arbitration tribunal handed down its judgment in favour of the former Yukos shareholders and decided Russia to pay more than USD 50 billion in damages. Subsequently, Russia appealed the decision, which was overturned by a district court in Hague, and upheld by the Hague Court of Appeal. The case was brought before the Dutch Supreme Court, and the Supreme Court decided to strike down the USD 50 billion court decision and referred the case back to the Amsterdam Court of Appeal. While this case is dubbed the largest arbitration award granted, the case study for this research paper is not the main proceedings between the former Yukos shareholders and Russia, since the dispute between the two parties does not arise out of a financial or project agreement, but the arbitration proceedings that were initiated by Yukos Capital.

Yukos Capital, based in Luxembourg, is a company run by the former management of Yukos and acts for all the former shareholders. In 2016, Yukos Capital finalised its merger with a British Virgin Islands-incorporated company called Miwok Wealth PIC Ltd, and subsequently, Miwok Wealth PIC Ltd, as the surviving entity, changed its name to Yukos Capital.[368]

The defendant in the case, Rosneft Oil Co. is a Russia-based state-owned company that bought the majority of Yukos' assets, which included a subsidiary of Yukos,

[368] 'Tribunal awards damages to Yukos Capital, finding that Russia expropriated its investment, while two arbitrators partially dissent on quantum' <https://www.iisd.org/itn/en/2022/07/04/tribunal-awards-damages-to-yukos-capital-finding-that-russia-expropriated-its-investment-while-two-arbitrators-partially-dissent-on-quantum/> accessed 19 March 2023.

Yuganskneftegaz (YNG).[369] Yukos Capital initiated arbitration proceedings before an ICC arbitral tribunal seated in Russia over several loan agreements executed between Yukos Capital and YNG. Yukos Capital secured four arbitral awards from the ICC seated in Russia in 2006, amounting to USD 425 million, and by the time the awards were handed down, Rosneft was the owner of YNG. By way of this acquisition, Rosneft became the universal successor to Yukos Capital's rights granted under the arbitral award.[370]

As a response, Rosneft applied to local Russian courts in an effort to set the arbitral awards aside and managed to secure an order from the local courts granting the application, in a series of decisions, dubbed as the annulment decisions. Yukos Capital claimed that the awards granted were 'biased and pre-determined'.[371] While the local proceedings were ongoing, Yukos Capital made an application to the Dutch courts seeking enforcement of the awards. In 2009, the Amsterdam Court of Appeals handed down its judgment, refusing to recognise the Russian court's annulment decisions based on the New York Convention, stating that the Russian court's decision to set the awards aside was partial. The award was paid in August 2010 to Yukos Capital, following the Dutch Court of Appeals' decision.[372]

Meanwhile, Yukos Capital applied to the English courts in 2011, for the recognition and enforcement of the four arbitral awards and seeking to recover the interest accrued between the time the four arbitral awards were granted in 2006 and when the USD 425 million was paid in 2010. The interest sought by Yukos Capital amounted to in excess of USD 160 million.[373]

Rosneft, as the defendant, wanted the English courts not to enforce the awards based on three grounds, including the fact that they were already set aside by the Russian courts and that the enforcement would result in an unlawful tax evasion scheme. On the other hand, the Yukos Capital claimed that the Dutch Court of Appeals handed down a judgment in favour of them, which was the correct decision,

[369] Background information obtained from Yukos Capital S.a.r.L v OJSC Rosneft Oil Company [2011] EXHC 1462 (Comm)
[370] Ibid.
[371] Ibid.
[372] Ibid.
[373] Ibid.

and wanted the English Courts to decide accordingly. The London High Court decided in favour of Yukos Capital, and the decision was appealed by Rosneft.

During the appeal process, Rosneft added one more point to its defence, which was not mentioned during the arbitration proceedings, and claimed that the underlying contract which was the main agreement subject to the arbitration proceedings 'was part of an unlawful tax scheme operated by the original parties to the contract when they were associated companies within a single group'.[374] Rosneft claimed that the loan agreements under the scheme were based on the manipulation of Yukos's oil trading, to maintain profits in parts of Russia where the tax imposed is lower, hence resulting in YNG not being able to collect the revenues to which it was entitled.

One of the questions that the English Court of Appeals had to answer while handing down its judgment was:

> When, on a claim to enforce a foreign arbitration award, there is competing reliance on decisions of the state where the award was made and of another state where the award is taken for enforcement, and when issues of public policy may be said to be involved, should the English court be deciding any issue of public policy for itself, or should it be content to abide by the foreign courts' decisions, and if so, which one?

In March 2012, the Court of Appeals handed down its judgment on two main issues: the question of estoppel and the question of the act of state and non-justiciability. On the issue of estoppel, the court upheld Rosneft's appeal and said the concept of public policy is different in each country. Therefore, a country might have different standards and legislation with respect to what is considered as partial and dependent, when a judgment or an award of another country is brought before them.[375] The court noted that if one country, in this case the Netherlands, were to

[374] Yukos Capital S.a.R.L v OJSC Rosneft Oil Company [2012] EWCA Civ 855.
[375] ibid. (The court also noted that: 'It is also a matter of high policy to determine the circumstances in which this country should recognise the judgments of a state where the interests of that very state are at stake. […] It is our own public order which defines the framework of any assessment of this difficult question; whether such decisions are truly to be regarded as dependent and partial as a matter of English law is not the same question as whether such decisions are to be regarded as dependent and partial in the view of some other court according to that court's notions of what is acceptable or otherwise according to its law. It is thus clear that cogent evidence is

refuse the recognition of another country's decision to annul an award, the evidence of partiality and dependence should be very convincing, and a case brought before the English courts, in the jurisdiction of England, should decide whether to recognise a foreign decision or not, based on its own legislation and precedents.[376]

On the second issue, the Court of Appeals refused Rosneft's appeal, and decided that an English court can decide on whether the Russian court decision annulling the award should be recognized and enforced in England, as the act of state doctrine would not preclude the courts of England, which is subject to the New York Convention, to do so.[377]

4.4.3. PrivatBank v Bondholders

PrivatBank case is a complex one that includes proceedings in both arbitral tribunals and the courts. It demonstrates a failed attempt by the bondholders of the Ukrainian lender to secure an award in their favour. The Ukraine based bank, PrivatBank, was nationalised in 2016. After nationalisation, the bank claimed that the former owners of the bank, Igor Kolomoisky and Gennadiy Bogolyubov committed a multi-billion dollar fraud and bailed in USD 1.1bn total liabilities, including its USD 595million English law-governed bonds.

Under the relevant bond documentation, the bondholder and the bank had previously chosen arbitration as their preferred method of dispute resolution and chose LCIA as the arbitral tribunal to evaluate any potential dispute. Following the nationalisation of PrivatBank, a group of the lenders' bailed-in senior bondholders initiated an arbitration proceeding against the bank before the LCIA. In June 2019, the LCIA tribunal conditionally ruled[378] that those senior noteholders who could prove that they were unrelated to the fraud perpetrated against the bank should be repaid.[379] On 16

required before it is possible to call a foreign court decision partial and dependent. The relevant degree of cogency may well differ in different countries.').

[376] Ibid

[377] Ibid

[378] 'PrivatBank's Statement on 2010 and 2013 Eurobonds Arbitration Proceedings' <https://en.privatbank.ua/news/2019/10/11/1036> accessed 18 May 2022

[379] Unfortunately, this arbitral award was not publicly available and therefore, only a limited amount of information can be provided.

March 2020, the London High Court handed down a judgment[380] granting permission to enforce the partial final award, and therefore a limited number of bondholders secured a court decision permitting the trustee of the bank to make the payment they demanded.

However, the arbitral award had one more condition: the award noted that PrivatBank would only be required to pay the notes if the bank's 'bail-in defence' was unsuccessful. In essence, the 'bail-in defence' advanced by PrivatBank was that it should not be obliged to repay the English law-governed bonds if the Bank of England recognized the bail-in of the notes. In May 2021, the Bank of England decided to recognise PrivatBank's bail-in of English law governed bonds.[381] This decision was a major blow to noteholders securing repayment had a massive impact on the course of the proceedings, as the bondholders are now facing an obstacle to receive payment from the Ukrainian state-owned lender, even though they hold a valid enforcement order from a UK local court.[382]

4.4.4. Tristan Oil v the Republic of Kazakhstan

This case, also known as the Tristan Oil case, is a situation where one of the parties, the Republic of Kazakhstan, is trying to block the enforcement of an arbitral award in many different jurisdictions for the past several years. The claims relate to the Republic Kazakhstan's long-running legal battle against Anatolie and Gabriel Stati (Stati family), and their business in headquartered in Moldova. The Stati family claimed that the government expropriated their privately owned energy assets located in Kazakhstan, which were backed by a bond issued by their company, Tristan Oil. After the expropriation, Tristan Oil bonds defaulted in 2010. On the other hand, the Republic of Kazakhstan argued that this was a fraud committed by the Stati Family to embezzle the proceeds of the Tristan Oil bonds.[383]

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[380] *Madison Pacific Trust v Shakoor Capital* [2020] EWHC 610 (Ch)

[381] 'PrivatBank Bail-in: Bank of England Recognises Bail-in by National Bank of Ukraine' <https://www.bankofengland.co.uk/news/2021/may/privatbank-bail-in-boe-recognises-bail-in-by-national-bank-of-ukraine> accessed 18 May 2023.

[382] There are ongoing legal proceedings against the former shareholders of PrivatBank before the London High Court. The hearings are scheduled for June 2023. On a separate note, there might be a last resort for the bondholders to try to enforce the award in Ukraine, which is not possible at the moment due to the ongoing war between Russia and Ukraine.

[383] 'The Fraud' <https://kzarbitration.com/the-fraud/> accessed 4 February 2023 (The website, which belongs to the Republic of Kazakhstan, dedicated to the dispute, notes that 'starting in 2006 (or earlier), Moldovan oligarch

In 2010, the Stati Family initiated arbitration proceedings before an arbitral tribunal at the SCC and secured a USD 497million arbitral award against the sovereign in 2013. As of March 2023, the award stood at roughly USD 546 million, including accrued interest and costs.[384]

Both the Stati family and the sovereign pursuing their own legal battle across multiple jurisdictions. The Stati family applied several different courts, seeking for the recognition and enforcement of the award in various countries, while Kazakhstan is fighting back, trying to overturn the enforcement decisions. The first jurisdiction where the Republic of Kazakhstan initiated its efforts to set the award aside was in Sweden, where the arbitration proceedings took place. On 19 March 2014, the government started the proceedings before the Svea Court of Appeal, followed by an invalidation claim. The Svea Court of Appeal dismissed the sovereign's request, and the dismissal judgment was upheld by the Supreme Court of Sweden on 18 May 2020, refusing to re-open the proceedings based on new evidence.[385] The Supreme Court of Sweden's decision meant that all of Kazakhstan's chances of appeal against the recognition and enforcement of the arbitral award were exhausted.

Meanwhile, in 2014, the Stati family applied to the English courts. The English court granted the award *ex parte*, but allowed Kazakhstan to apply to the courts to set the order aside. On 7 April 2015, Kazakhstan filed an application to set the *ex parte* judgment aside, claiming that there was not a valid arbitration agreement between the parties, that the arbitral tribunal was not validly formed, and lastly, that there were several procedural errors that prevented the sovereign to present its case to the SCC tribunal.[386]

In the meantime, Kazakhstan secured a judgment from the US courts on the back of an application for judicial assistance, forcing the Stati family to produce certain documents. Kazakhstan then claimed that these documents revealed fraud and

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and his son Gabriel embarked on a fraudulent scheme that defrauded international investors of their money, falsified financial statements, and recruited the victims of the fraud to pursue international arbitration against the Republic of Kazakhstan to recoup from the state the monies the Statis had stolen themselves').

[384] 'Tristangate' <https://www.tristangate.com> accessed 3 March 2023.

[385] 'Sweden' <https://kzarbitration.com/jurisdiction/sweden/> accessed 3 March 2023.

[386] Anatolie Stati, Gabriel Stati, Ascom Group SA, Terra Raf Trans Trading Co Lts v The Republic of Kazakhstan [2017] EWHC 1348 (Comm).

came back to the UK courts in August 2015 to amend its application to add another claim that the enforcement of the arbitral award would be against English public policy due to the alleged fraud. The US court denied Kazakhstan's request to amend its claim by including the fraud allegations. Meanwhile, the award was recognized in many jurisdictions including the US, Italy, Luxembourg, Belgium, the Netherlands, and France. [387]

At this point, things took a surprising turn, as an English court decided that there was 'a sufficient prima facie case' that the SCC arbitral award was obtained by fraud conducted by the Stati family and decided the matter should go to trial. For the first time since Kazakhstan initiated legal proceedings, a judicial authority recognised the possibility of fraud involved. Subsequently, the Stati family decided not to pursue their legal efforts in the UK and applied to the English Court of Appeal to withdraw their case. In August 2018, the English Court of Appeal allowed the Stati family to terminate their recognition and enforcement efforts in the UK.[388]

Following the UK judgment, in November 2021, a Belgian court ruled that the award is unenforceable as it was obtained by fraud.[389] Moreover, the decision given by the Amsterdam Court of Appeal in favour of the Stati family was overturned, based on procedural grounds and this January, the Amsterdam District court decided to reject the recognition and enforcement of the SCC award on the basis of alleged fraud.[390] On the other hand, in February 2022, the Italian Supreme Court rejected Kazakhstan's appeal against an enforcement decision in the Statis' favour.[391]

The arbitration award, which was final and binding, has been objected to in various different jurisdictions, and seemingly is deemed unenforceable in different countries, whereas some countries decided in favour of the enforcement.

[387] 'Jurisdiction' <https://kzarbitration.com/jurisdiction/> accessed 3 February 2023.
[388] Anatolie Stati, Gabriel Stati, Ascom Group SA, Terra Raf Trans Trading Co Lts v The Republic of Kazakhstan [2019] EWHC 1715 (Comm).
[389] 'Belgium' <https://kzarbitration.com/jurisdiction/belgium/> accessed 3 February 2023.
[390] 'Netherlands' <https://kzarbitration.com/jurisdiction/netherlands/> accessed 3 February 2023.
[391] 'Italy' <https://kzarbitration.com/jurisdiction/italy/> accessed 3 February 2023.

4.4.5. The Federal Republic of Nigeria v Process & Industrial Developments

One of the highest amounts granted under an arbitral award in the energy sector that is currently being trialled before the English High courts for a dispute over its enforcement is between the Federal Republic of Nigeria and Process & Industrial Developments (P&ID). The court proceedings before the English High Court came to an end during the first week of March 2023, and the decision of the court is currently awaited.

In 2010, a company incorporated in the British Virgin Islands, and the Federal Republic of Nigeria entered into a Gas Supply and Purchasing Agreement.[392] Under the agreement, the government was under the obligation to provide wet gas for free, which then would be processed by P&ID into lean gas. In return for providing the wet gas at no cost, 85% of the lean gas would be returned to Nigeria. P&ID decided to terminate the project, claiming that Nigeria failed to provide the wet gas, and applied to the arbitral tribunal asking for damages, including development costs, missed opportunities and revenue. In January 2017, the arbitral tribunal granted a USD 6.6 billion arbitral award[393] in favour of P&ID plus a 7% annual interest starting from March 2013. The total claim, including the accrued interest is more than USD 11 billion.

Following the arbitral award, Nigeria refused to pay the amount granted to P&ID under the award, claiming that the gas supply and purchasing agreement was procured by bribes. This claim was backed by the English courts in 2020, when the High Court found that there was a strong prima facie evidence supporting Nigeria's claim.

In his judgment, Sir Ross Cranston J., sitting as judge, stated that Nigeria had established a 'strong' prima facie case that the original contractual agreement had been secured via the payment of bribes to government officials as part of a wider scheme to defraud the sovereign. He added that there is a also strong prima facie

[392] The Federal Republic of Nigeria v Process & Industrial Developments Limited [2020] EWHC 2379 (Comm).
[393] Unfortunately, this arbitral award was not publicly available and therefore, only a limited amount of information can be provided.

case that the main witness in the original arbitral hearing on behalf of P&ID gave perjured evidence in the arbitration and that the company was not equipped to perform its contractual undertakings. As such, Cranston J. noted that permitting enforcement of the arbitral award would threaten both the arbitration system but also the court system, as to 'enforce an award in such circumstances would implicate it in the fraudulent scheme'.

The Federal Republic of Nigeria has also secured judgments from the US and the British Virgin Islands courts to 'obtain discovery to support its fraud allegations against P&ID'.[394]Currently, the case is on trial in England, as P&ID initiated legal proceedings against the government, while Nigeria claims that the award should not be enforced because the gas contract was granted to P&ID by corrupt means.

4.4.6. International Trading and Indus. Inv. Co. v. DynCorp Aerospace Technology

This particular case between ITIIC and Dyncorp is a prime example of a local court deciding not to enforce, and even annul an arbitral award on its merits, due to lack of familiarity with the concept of international commercial arbitration and failing to amend its local laws and regulations in line with the New York Convention as a contracting party.[395]

Dyncorp, a US-based logistical support and security services company, entered into an agreement in 1998 with ITIIC, a Qatar-based company, under which Dyncorp had undertaken the obligation to build, operate and maintain a licensed branch in Qatar. In return, ITIIC was to assist Dyncorp with obtaining all the necessary licenses and permits required for the branch. The parties decided that the agreement shall be governed by the laws of Qatar, and for any potential disputes to arise between the parties, ICC was chosen as the arbitral tribunal to resolve the dispute. The parties did

[394] Ibid *also see* 'Skeleton on Behalf of the Federal Republic of Nigeria (FRN)' <https://nigeria-pandidcase.org/wp-content/uploads/2022/07/Skeleton-on-behalf-of-the-FRN-for-15-July-Hearing-final.pdf> accessed 12 March 2023.
[395] Mohtashami and Lawry-White (n 246) 429.

not specify the seat of arbitration, and the law applicable to the procedure was the ICC regulations.[396]

In 2001, DynCorp sent a letter to ITIIC, requesting to terminate the contract. ITIIC claimed that DynCorp did not have the right to terminate the contract, as the contract stated its duration was agreed as sixty months and was due to continue to be in effect unless terminated by either party. Hence, ITIIC claimed that the contract could be terminated in 2003. DynCorp, on the other hand, claimed that any either party had the right to terminate the contract by giving a 90 days' notice to the other party.[397] When a dispute arose between the parties, ITIIC initiated arbitration proceedings before the ICC. ICC chose Paris to seat the arbitration, as there was no exclusive choice made under the agreement. In 2006, an ICC arbitral tribunal handed down its judgment, stating that DynCorp breached its obligations under the duration arrangements of the contract. The arbitral tribunal ordered DynCorp to pay USD 1.1 million plus 5% interest, alongside legal costs and fees paid by ITIIC.

In the same year, ITIIC made an application in Qatar for the recognition and enforcement of the award, and DynCorp applied to the local Qatari courts seeking for a stay of the arbitral award, claiming that the arbitration proceedings had procedural defects. When DynCorp's request was denied by the court of first instance in Qatar, the American company took the case before Qatar's Court of Appeal, this time appealing the merits of the award, as the Qatari laws allowed an appeal application against an arbitral award.[398] In its appeal application, DynCorp claimed that the Arabic version of the contract did not expressly mention that an award granted would be final and binding unlike its English version. The Court of Appeal upheld the lower courts' decision but decided to vacate the award granting 5% interest to ITIIC. Lastly, DynCorp applied to the Qatari Court of Cassation, and secured a judgment in favour of itself. The Court of Cassation annulled the award and decided that 'the arbitrator failed to follow Qatari law by improperly interpreting the 1998 Agreement in light of the parties' intentions'.

[396] 'International Trading v. Dyncorp Aeorspace Technology' < https://casetext.com/case/international-trading-v-dyncorp-aerospace-technology> accessed on 26 March 2023.
[397] 'International Trading v. Dyncorp Aeorspace Technology' (n 350).
[398] Mohtashami and Lawry-White (n 246) 429.

In 2009, ITIIC brought the award before the US Courts, seeking a confirmation of the award. Meanwhile, DynCorp applied to French courts asking to set the awards aside. While the US proceedings were ongoing, the Paris Court of Appeals decided to reject DynCorp's application, and until the French judgment was rendered, the US court stayed the legal proceedings. After the French court decided on the case, the US court delivered its judgment saying it evaluated the case, and whether to recognize and enforce the ICC arbitral award, based on Article V of the New York Convention, which are the exceptions set forth to deny or defer the enforcement action. The US court also decided to reject DynCorp's application and upheld the enforcement of the ICC award.

Under the New York Convention, it is not possible to review an arbitral award, based on its merits, as the award itself is final and binding, and if there is a conflict between the New York Convention and a contracting party's local laws and regulations, then New York Convention would prevail. Therefore, the Qatari Court of Appeal accepting to review the award on its merits, and the Court of Cassation to decide against the merits of the award is against the New York Convention's practice.[399] Regarding this specific case, Mohtashami and Lawry-White noted that:

> Unlike the Qatari judges, Judge Walton recognized the US courts' status as a court of secondary jurisdiction vis-à-vis a Convention award and drew a distinction between grounds on which such an award could be vacated (by the courts of the seat of the arbitration) and the grounds available to it (as a court of secondary jurisdiction) on which to refuse recognition and enforcement. This is a fundamental distinction that the Qatari courts failed to observe.[400]

4.4.7. Pearl Petroleum Limited and others v Kurdistan Regional Government of Iraq

One of the more high-profile cases in the last decade that resulted in a settlement between the parties on the back of successful efforts to get a USD 2 billion arbitral

[399] Mohtashami and Lawry-White (n 246) (Mohtashami and Lawry-White note that 'In the circumstances, the Qatari courts' decision to review the merits lending to the eventual annulment of the Award is regrettable and manifests an obvious lack of familiarity with the Convention.').
[400] Ibid.

award enforced was between three companies and the Kurdistan Regional Government of Iraq (KRG). In 2007, Pearl Petroleum Limited, Dana Gas PJSC and Crescent Petroleum Company International Limited and KRG executed a Heads of Agreement.[401] The companies' main obligations were to conduct the development and utilisation of natural gas resources, construction of a pipeline for the gas to be carried and accordingly supply gas to the power stations located at the KRG, namely Erbil and Baizan. Under the agreement, KRG's main obligations were to grant the companies the exclusive right to develop and produce petroleum in the field of Khor Mor and Chemchemal for at least 25 years. Dana Gas Companies were entitled to own, market and export the gas recovered from the gas stream and the proceeds were to be used for the recovery of their expenses and remuneration. It has also been agreed under the Heads of Agreement that in the event of a failure to export and distribute the gas by the companies due to any act or omission of government and/or for political reasons beyond control of the companies, then the KRG is under the obligation to compensate the loss.[402]

In 2009, companies claimed that they were not able to export and market the petroleum, and therefore the KRG was under the obligation to acquire the products and there has been an underpayment in a sum of USD 1.12 billion whereas the KRG stated as a counterclaim that the companies indeed were able to market and export the products and the companies were selling the products to third parties and provided the products to the KRG and the KRG is not under the obligation to purchase the products from the Companies and pay money in return, and the money which was being paid to the companies were discretionary and repayable cash advances.[403] At the time of the dispute, the Companies claimed that they have an exclusive right which would prevent any other company from developing and produce petroleum within these areas, but this claim was objected to by the KRG stating that their rights are limited to their expense recoveries and their remuneration.

[401] Pearl Petroleum Company Limited, Dana Gas PJSC, Crescent Petroleum Company International Limited v The Kurdistan Regional Government of Iraq, Royal Courts of Justice [2015] WLR (d) 476
[402] Background information about the dispute can be found at LCIA Partial Arbitral Award Case no: 132527 <https://www.italaw.com/sites/default/files/case-documents/italaw10249_0.pdf> accessed 2 February 2023.
[403] LCIA Partial Arbitral Award Case no: 132527 <https://www.italaw.com/sites/default/files/case-documents/italaw10249_0.pdf> accessed 2 February 2023.

The dispute was initially tried to be resolved by mediation as agreed under the Heads of Agreement, but the KRG refused to participate. The case was brought before the LCIA arbitral tribunal in October 2013. While the arbitral proceedings were ongoing, an application was made by the companies for an interim measure to be taken by the arbitral tribunal for the KRG to resume the payments for the lifted products before the arbitral tribunal was to reach a final decision because the non-payment was causing severe financial damage to the companies and it was claimed that the non-payment by the KRG was intended to put the companies in financial distress, causing non-operation and accordingly a potential bankruptcy, which would lead to the termination of the contract.[404]

On 16 May 2014 the arbitral tribunal accepted the request of the companies for an interim measure and ordered the KRG to make payments to the companies as of 21 March 2014, just like the time before 2013 when the payments were duly made by the KRG before the mediation and arbitration proceedings were initiated.[405] The arbitral tribunal set forth that since the award would not be finalised before mid-2015, it would severely affect the financial status of the companies and therefore may cause insolvency of Pearl. The tribunal ordered the KRG to pay approximately 70% of the invoiced amount which the KRG did not comply with. Therefore, the companies brought the issue before the tribunal on 23 July 2014 one more time demanding the payment of the outstanding amount and the future payments whereas the KRG objected to the application.[406]

On 4 September 2014, the tribunal dismissed the claims of the KRG and ordered a sum of USD 100 million to be paid to the companies within 30 days. Upon the failure of payment by the KRG, the companies obtained the tribunal's approval to bring the case before court. The award – which ordered the KRG to pay a sum of USD 100 million to the companies – was brought before court for its enforcement on 17 October 2014. The KRG resisted the enforcement and made a cross application disputing the court's jurisdiction or claiming that the court should not exercise its jurisdiction based on the grounds that the KRG is immune from such jurisdiction pursuant to the State Immunity Act. One of the main arguments that has been

[404] LCIA Partial Arbitral Award (n 403).
[405] Ibid.
[406] Ibid.

evaluated by the High Court of Justice is whether the KRG can be considered as a state, or a separate entity under the State Immunity Act and it has been decided by the High Court of Justice that the KRG does not have such immunity with respect to the order requested to be made by the court and approved the enforcement of the peremptory order given by the arbitral tribunal.

During the period when the High Court was reviewing the issue and before the High Court's decision was finalised, the arbitral tribunal reached a decision (partial final award) on 30 June 2015[407], stating that (a) the companies had an exclusive right to develop and produce petroleum in the field of Khor Mor and Chemchemal for at least 25 years; (b) the KRG does not have any property rights over the products processed by the power plants that the Companies have built; and (c) the Companies were unable to export and market the products and/or for political reasons beyond their control. 1 The tribunal decided that the Companies were right in terms of their claims, however no monetary award was made (with respect to a sum of USD 1.9 billion) until the next scheduled meeting on 21 September 2015.

Following the hearing held on 21 September 2015, a second partial final award was made by the arbitral tribunal ordering the KRG to pay approximately USD 1.96 billion[408]and a third partial final award was made on 30 January 2017[409] with respect to the period between 30 June 2015 and 31 March 2016 for an amount of USD 121 million, bringing the total to more than USD 2 billion plus interest.

Subsequently, the companies applied to the US[410] and DIFC courts for the recognition and enforcement of the arbitral awards. In May 2017, the companies secured an ex parte order from the DIFC courts granting recognition of the award, followed by a decision to uphold the recognition decision in August 2017. Following the successful enforcement efforts by the companies, and the KRG facing a potential

[407] LCIA Partial Arbitral Award Case no: 132527 <https://www.italaw.com/sites/default/files/case-documents/italaw10249_0.pdf> accessed 2 February 2023.
[408] LCIA Case no: 132527 Second Partial Final Award https://www.italaw.com/sites/default/files/case-documents/italaw10251.pdf accessed 2 February 2023.
[409] LCIA Case no: 132527 Third Partial Final Award < https://www.italaw.com/sites/default/files/case-documents/italaw10250.pdf> accessed 3 February 2023.
[410] 'Pearl takes arbitration victory against KRG to US Court' <https://www.pearlpetroleum.com/pearl-takes-arbitration-victory-krg-u-s-court.html> accessed 12 March 202.

asset seizure, Pearl Petroleum and the KRG reached a full and final settlement for USD 2.2 billion on 30 August 2017.[411]

4.4.8. Overview of the cases

The seven cases analysed under this section are selected examples of recognition and enforcement of financial arbitration awards in different jurisdictions and under different legislations after 2010. The first case law, *Shandong Century Sunshine Paper Group Co Ltd v Deutsche Bank* is an example where the local courts of China refused to enforce a financial award based on the fact that one of the parties, Deutsche Bank, failed to disclose certain information that would have changed the outcome of the arbitral award, even though the bank held a final and binding arbitral award from an arbitral institution. Similarly, in Yukos Capital v Rosneft, following a significantly lengthy litigation process, the English courts decided not to recognise and enforce an arbitral award based on public policy grounds. One of the statements made in the judgment was the court noting that public policy grounds might differ completely in different jurisdictions. This is an issue to take into consideration on a jurisdiction-by-jurisdiction basis in terms of the jurisdiction where the arbitral award is rendered and potential jurisdictions to enforce the award in the future, especially for project finance transactions, as by nature, project finance transactions might involve enforcement in several different jurisdictions.

Furthermore, *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Trading* case is also an example where the enforceability of an arbitral award was challenged before several local courts in different jurisdictions and was decided to be unenforceable by some courts, whereas different jurisdictions decided to refuse the efforts to set the arbitral award aside. Similarly, in the case of *The Federal Republic of Nigeria v Process & Industrial Developments*, the litigation proceedings of which is still ongoing before the courts in the UK, as one of the parties alleges that the underlying agreement was procured by bribes. Lastly, the *International Trading and Indus. Inv. Co. v. DynCorp Aerospace Technology* case is an example where a local

[411] 'Operations KRI – Settlement' <https://www.danagas.com/operations/kri/settlement/> accessed 12 March 2023.

court annulled an arbitral award on its merits, disregarding the fact that an arbitral award is final and binding under the New York Convention.

On the other hand, there are some successful enforcement efforts, such as *Pearl Petroleum Limited, Dana Gas PJSC and Crescent Petroleum Company International Limited v KRG,* which resulted in a settlement between the parties.

PrivatBank case, is a different example where the bondholders managed to secure an enforcement decision from the UK courts regarding an LCIA arbitral award, but decision from the Bank of England changed the course of enforcement efforts and resulted in bondholder failing to recover their investments.

4.5. Hybrid Approach

The hybrid approach, also known as the unilateral jurisdiction clause, is a dispute resolution clause that gives one of the parties the exclusive right to choose either arbitration or litigation to resolve the issue. In other words, one of the parties, which is usually the non-lender side, agrees that a possible dispute will be resolved through the means of international commercial arbitration, while the other party, which is usually the lender, has the exclusive the right to choose between international commercial arbitration or a pre-agreed litigation platform to resolve the dispute.[412]

Although the hybrid approach is a way to include international commercial arbitration as an alternative dispute resolution for the parties, there is an issue of imbalance, as the clause gives one of the parties the advantage to choose their dispute resolution platform based on the nature of the dispute, or on a case-by-case basis, depending on a possible more advantageous outcome. Unilateral clauses have the potential to be included in certain project finance agreements, as there are many different transactions that have lenders on one side. As previously mentioned, choosing the dispute resolution venue based on a potentially more advantageous outcome is also known as forum shopping. Types of forum shopping include choosing a favourable

[412]John Dewar, 'Why the World Needs Project Finance (and Project Finance Lawyers…)' (2021) <https://iclg.com/practice-areas/project-finance-laws-and-regulations/1-why-the-world-needs-project-finance-and-project-finance-lawyers> accessed 3 January 2022) (Dewar notes that certain aspects of arbitration, such as lack of interim reliefs and the 'perceived tendency of arbitrators to arrive at compromise positions', the creditors typically demand that the finance documents should have an arbitration clause for their own benefit, which would retain the possibility to choose the local courts to resolve the dispute, while the other party has no choice).

jurisdiction over another to litigate a claim or enforcing a unilateral jurisdiction clause and choosing between arbitration and litigation based on the type of dispute. Although both situations are considered as forum shopping, the type of forum shopping has an impact on its 'acceptability or permissibility'.[413] In some instances where the parties agree upon a unilateral clause what gives the party to choose between arbitration or litigation as its dispute resolution platform, forum shopping is used by the party who has the upper hand in choosing the most advantageous platform to postpone the arbitral proceedings or temporarily disrupt the procedure by initiating a litigation procedure before courts.[414]

One of the more prominent jurisdictions when it comes to recognising and validating a unilateral clause is the United Kingdom. There have been several precedents in which the authorities decided that a unilateral clause is enforceable, although it gives one of the parties an advantage from the start. In *Law Debenture Trust Corporation Plc v Elektrim SA & Anor*[415]*,* Law Debenture initiated legal proceedings, in its capacity as the trustee for various bondholders of bonds issued by Elektrim SA, before the English courts, seeking to enforce payment due under the bonds. The trust deed was governed by English law, and contained provisions which would provide for arbitration in certain events. However, the jurisdiction clause was unilateral; meaning although the parties agreed to resolve any dispute under the UNCITRAL Arbitral Rules, it gave Law Debenture and the bondholders an exclusive right to apply to English courts to resolve the dispute.

Although the jurisdiction clause usually stipulates either arbitration or litigation as the dispute resolution mechanism, a unilateral clause offers a 'multi layered' structure and offers one of the parties to choose whether to resort to arbitration or litigation.[416] A unilateral or hybrid jurisdiction clause emerged from the 'growing need for designation of specific means to ensure enforcement against assets of debtors in a world where assets may be located in several jurisdictions and very quickly relocated'.[417]

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[413] Ferrari (n 350)
[414] Ferrari (n 350)
[415] *Law Debenture Trust Corporation Plc v Elektrim SA & Anor [2010] EWCA Civ 1142*
[416] Deyan Draguiev, 'Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability' (2014) Journal of International Arbitration 31, no. 1, 22-23.
[417] Ibid 19.

The main question raised by the parties was regarding the extent to which these proceedings should be stayed to allow for arbitration. And more importantly, the parties also asked to what extent the court, rather than the arbitral tribunal, should determine what should and should not go off to arbitration. Mr Justice Mann decided that although the unilateral clause gives Law Debenture an advantage, so do many contractual provisions and that Law Debenture 'has the right to start [court] proceedings despite the arbitration proceedings' and 'no case has been advanced that it has waived that right'.

In a similar situation, *NB Three Shipping Ltd v Harebell Shipping Ltd*[418], another English High Court judge Mr Justice Morrison decided that there is no contradiction in giving one party 'better' rights than the other and the 'arbitration option carried with it the right to stop any court proceedings which had been started first'.

Although the hybrid jurisdiction clauses have been validated in certain situations by the UK, the US and Australia have not yet set a precedent in terms of accepting such clauses.[419] Moreover, while in some countries the courts have refused to enforce the optional clauses, there are also many jurisdictions where the enforceability of a unilateral arbitration clause remains untested.[420] In terms of Turkish legislation, unilateral jurisdiction clauses are considered as invalid, as they are considered a violation of public policy rules.[421] Kinikoglu and Parmaksiz, partner and senior associate of a Turkey-based law firm Moral & Partners, noted in a Q&A publication conducted by the British Chamber of Commerce Turkey, that the unilateral jurisdiction clauses violate the public policy rules governed by Turkey's International Private and Procedural Law, as such clauses 'restrict the right of litigation'.[422] Moreover, Kinikoglu and Parmaksiz also note Article 36 of the Turkish Constitution which regulates the 'right to fair litigation both for claimants and defendants', and also

[418] [2005] 1 Lloyds Rep 509.
[419] Draguiev (n 416) 26.
[420] '2013 ISDA Arbitration Guide' <https://www.isda.org/a/6JDDE/isda-arbitration-guide-final-09-09-13.pdf> accessed 2 November 2021.
[421] Efe Kinikoglu and Ugursan Yigit Parmaksiz 'Practial Law Q&A: Governing Law and Jurisdiction Clauses in Turkey' (2020) <www.bcct.org.tr/news/practical-law-qa-governing-law-and-jurisdiction-clauses-in-turkey/68730> t accessed 10 October 2022.
[422] ibid.

the same principle dubbed in Article 6 of the European Convention on Human Rights, which Turkey is a party of.[423]

On the other hand, the Turkish Court of Appeals sent mixed signals, with inconsistent precedents handed down within the last decade. In 2012, the Turkish Court of Appeals decided that an arbitration clause that encompasses both arbitration and court litigation was null and void.[424]In a different case, the court's approach was the same, as the decision noted that a unilateral jurisdiction clause was not valid, and the intention to resolve the dispute with arbitration was not clear, as one of the parties was given the opportunity to choose either arbitration or litigation.[425] However, in 2016, a different civil chamber of the Court of Appeals decided that a unilateral jurisdiction clause, providing one of the parties the opportunity to 'bring proceedings before a foreign court as well as before the court of the other party's country/places of business', was valid and enforceable.[426] Although this decision should not be regarded as a contradicting decision to the earlier Turkish precedent, this latest court ruling is interpreted by some as a potential future green-light towards unilateral jurisdiction clauses.[427]

There are several court judgments in favour of the unilateral jurisdiction clauses in the continental jurisdictions such as Germany, Italy and Spain, but several countries including France, Russia and China have ruled against the validation of the unilateral jurisdiction clauses.[428]

Due to the ambiguity in terms of the enforceability of a unilateral clause in different jurisdictions, the arbitration clause should be drafted very carefully in order to avoid any potential problems.[429] At this point, it is very important to consider the potential jurisdictions in which parties likely to seek to enforce their arbitral award. If the jurisdiction of enforcement is somewhere that the unilateral clause will not be

[423] Ibid.
[424] Norton Rose Fulbright, 'Asymmetric arbitration agreements' < https://www.nortonrosefulbright.com/en-tr/knowledge/publications/a9d324be/asymmetric-arbitration-agreements> accessed 10 October 2022.
[425] Ibid.
[426] Ibid.
[427] Ibid.
[428] Draguiev (n 416) 28.
[429] '2013 ISDA Arbitration Guide' (n 420).

considered valid, it would create significant problems to the party which was granted an award in favour of them.

Although it is not completely possible to foresee where the enforcement will be sought, as the asset recovery efforts might result in enforcement in different jurisdictions based on where the borrower's assets are located, it is possible to consider the probable jurisdictions (i.e., where the bank accounts are located, the borrower's host country, any other asset that is pledged under a security agreement, the personal assets of the guarantors under a personal guarantee) where an enforcement might be sought.

The case study in Chapter 5 will also take the issue of enforcement of unilateral clauses into consideration, as the proposed pool system would also flag the possible jurisdictions where the unilateral clause is not considered valid, so that the parties would be warned prior to inserting such clause into their agreements.

4.6. Recent Developments on the litigation side

While there is a very noticeable effort in terms of promoting the use of international commercial arbitration for financial disputes, there are also recent developments to improve the use of litigation for such disputes. It is important to evaluate the efforts on the litigation platforms, both local and international, as the improvements to these litigation systems for dealing with financial disputes have the potential to push the parties to a dispute to choose litigation measures rather than international commercial arbitration to resolve their disputes.

There has been a considerable amount of effort from a litigation perspective in general, as the courts are incentivised to offer a more efficient, consistent and sophisticated solution by moving to adopt those advantages that were previously solely applicable to arbitral proceedings. This gives the courts the upper hand

because they already hold certain major advantages in their hands in terms of 'a heavily subsidised judiciary, high predictability and interim relief'.[430]

There have been certain efforts by the local authorities of some countries on a local jurisdiction level, such as the Financial List – 'a specialist cross-jurisdictional list set up to address the particular business needs of parties litigating on financial matters' [431] – introduced by the United Kingdom. The Financial List is aiming to build 'on its reputation as a global centre for financial litigation'[432].

Moreover, some efforts in the Middle East for the use of litigation for financial disputes, by creating an 'offshore'' jurisdiction where the applicable law is not their local law and therefore, for example, is not governed by Sharia law. Dubai[433], Abu Dhabi[434] and Qatar[435] all have their own financial centres, with an offshore jurisdiction system. All of the international offshore courts have proven highly significant, especially in terms of blending international common law principles with the local legislation, something which has a crucial importance especially on the enforcement stage. There have been many cases originating from the Middle East region that were handled in litigation procedures far away, in New York and London, due to lack of an offshore jurisdiction and reputable courts to handle these cases.

There are also legislative efforts to make the recognition and enforcement of court judgments and decisions, such as the Hague Convention.

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[430] Nyarko (n 26)
[431] 'The Financial List' < https://www.gov.uk/courts-tribunals/the-financial-list> accessed 5 November 2021.
[432] 'The Financial List: Resolving financial markets disputes in London' <https://www.nortonrosefulbright.com/en/knowledge/publications/0ee0087d/the-financial-list-resolving-financial-markets-disputes-in-london> accessed 31 May 2022.
[433] Michael Strong and Robert Hilmer, 'The Legal Autonomy Of The Dubai International Financial Centre: A Scalable Strategy For Global Free-Market Reforms' [2009] Blackwell Publishing, Oxford,Vol 29, Issue 2, 37-38 (Dubai International Financial Centre (DIFC) was formally launched in 2004 and is considered to be one of the most innovative of such efforts, creating a 'financial free zone in Dubai in which a British judge administers British common law within the zone, while outside the zone UAE law applies')
[434] 'ADGM Courts' <https://www.adgm.com/adgm-courts> accessed 12 March 2023
(The Abu Dhabi Global Market (ADGM) Courts serve as fully digital courts providing public hearings to be followed remotely online. ADGM Courts directly apply English common law to their disputes and aims to complement arbitration proceedings).
[435] Qatar International Court and Dispute Resolution Centre - About Us' <https://www.qicdrc.gov.qa/about-us> accessed 12 March 2023 (Qatar International Court and Dispute Resolution Centre (QICDRC) is based in the Qatar Financial Centre (QFC), which as established courts, mediation services and an arbitration tribunal to resolve the financial disputes.

4.6.1. Hague Convention on Choice of Court Agreements

The Hague Convention was concluded in June 2005, and it aims to promote the use of litigation for international trade and investment disputes alongside promoting the multi-jurisdictional enforcement of judgments.[436] The Choice of Court Convention is basically the litigation version of the New York Convention for the recognition and enforcement of arbitral awards, as it has a similar effect.[437] The contracting parties to the Hague Convention are the 27 European Union members, alongside the UK, Montenegro, Singapore and Mexico.[438]

The Hague Convention has three main rules, which are; (a) the court chosen by the parties must hear the dispute, (b) if a court is not chosen exclusively by the parties, then it should suspend or dismiss any proceeding brought before it (which is aimed to prevent parallel proceedings) and (c) the judgments handed down by the chosen court must be recognised and enforced in other contracting parties.[439]

In terms of project finance transactions, Article 2 of the Hague Convention is highly relevant, as it sets out the types of agreements that would need to be resolved by mandatory jurisdiction.[440] In other words, certain agreements which are also used frequently for project finance disputes, are specified under the Hague Convention as the issues that would be mandatorily resolved by the local jurisdiction due to a strong public interest, which is the host country. These types of agreements include, but are not limited to, employment contracts, insolvency issues, rights in rem in immovable property, and tenancies of immovable property.[441]

Taking the scope of mandatory jurisdiction into consideration while choosing the most convenient dispute resolution mechanism is highly important, as for example, bankruptcy or insolvency matters have a high probability of coming into play for, by

[436] HCCH, 'Convention on Choice of Court Agreements' <https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf> accessed 3 February 2023.
[437] Ibid.
[438] 'Status Table' <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> accessed 25 March 2023.
[439] Ibid.
[440] Daniel Reichert-Facilides, 'The Project Finance Law Review: Dispute Resolution and Conflict of Laws Risks' (2022) <https://thelawreviews.co.uk/title/the-project-finance-law-review/dispute-resolution-and-conflict-of-laws-risks> accessed 27 May 2022.
[441] ibid.

way of example, a project company that is unable to repay its debt to its creditors. Lenders in a project finance transaction, as explained in detail above, are protected by several security arrangements over the bank accounts, shares, commercial properties of the special purpose vehicle, set up to undertake the construction and development of the specific project (and sometimes also supported by personal guarantees provided by the shareholders of the SPV). However, if the lenders are not able to recover their lending through the enforcement of such security agreements, the subsequent step to be taken would be to force the company to declare bankruptcy, and therefore liquidate the company assets.

As mentioned, in section 3.5 *Bankruptcy*, arbitral tribunals are not authorised to initiate an insolvency procedure or ignore a local court ruling deciding to initiate insolvency proceedings. An arbitral tribunal can only decide on the specific issues that do not fall under the exclusive jurisdiction scope of a court. Hence, the involvement of a court in the event of insolvency or bankruptcy can be inevitable and would be the only choice for the creditors to recover their money.

Although the Hague Convention is considered to be a very significant regulation for the enforcement of court decisions, the scope of the convention in terms of territory is very narrow. The convention would only be applicable to the enforcement situations where the parties have agreed on an exclusive jurisdiction clause, and that clause would only grant the jurisdictional authority to the courts of one of the contracting states.[442]

4.6.2. Brussels I and Lugano Convention

Both Brussels I and the Lugano Convention are other main conventions focusing on jurisdiction and the enforcement of judgments in civil and commercial matters. Brussels I was signed in 2012, whereas the Lugano Convention was signed on 16 September 1988.[443] The Lugano Convention is substantially the same as Brussels I, with a more extended regional scope.[444] As explained above, 27 of the 32 contracting

[442] Kulińska (n 275).
[443] Lugano Convention
[444] Kulińska (n 275).

parties of the Hague Convention are the EU Member States, and therefore, apart from a couple of countries, the Hague Convention regulates the enforcement of court judgments between the EU members. On the other hand, the 2007 Lugano Convention is for the recognition and enforcement of both civil and commercial judgments between the EU members and the EFTA states[445].

4.7. Conclusion

Following the first three chapters evaluating the basics of a project finance transaction, its components and its use, alongside the advantages and disadvantages of international commercial arbitration as opposed to litigation – this chapter was an overview regarding the use of international commercial arbitration for project finance disputes.

This chapter has identified that the use of international commercial arbitration for financial disputes in general continues to be considered the exception rather than the rule for parties to opt in to international commercial arbitration as a dispute resolution mechanism for financial disputes. In terms of project finance transactions, there are a couple of reasons highlighted in the ICC Task Force's Supplementary[446], as to why litigation is still the preferred method of dispute resolution. These concerns include the fact that the creditors still tend to think that certain components (i.e. parties or the assets that the project is secured against) would be located in a challenging jurisdiction in terms of not being well-equipped to resolve such disputes.

Chapter 4 also covered the recognition and enforcement of financial arbitration awards in different jurisdictions from a selection of case studies[447] which were identified to demonstrate how the courts handle arbitration clauses. While conducting the analysis of case law across different jurisdictions, specifically regarding arbitral awards rendered after 2010, this chapter identified some examples that were successful, such as *Pearl Petroleum Limited, Dana Gas PJSC and Crescent*

[445] EFTA States are Iceland, Liechtenstein, Norway and Switzerland.
[446] 'Supplementary Materials to the ICC Commission: Financial Institutions and International Arbitration' (n 169).
[447] Please see 1.4 *Research Methodology* for further criteria and explanation as to why these cases were specifically chosen.

Petroleum Company International Limited v KRG. Bankers Trust International plc and PT Jakarta International Hotels & Development. This chapter also identified case law where a local court rejects the enforcement of a financial arbitral award, such as *Shandong Century Sunshine Paper Group Co Ltd v Deutsche Bank* and *Yukos Capital v Rosneft*.

Moreover, the two prominent cases, both *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Trading* and the *P&ID v the Federal Republic of Nigeria* were identified in this chapter, which show how an arbitral award, even though it is final and binding, may prove to be ineffective, if the courts are convinced that the award itself is unenforceable. *PrivatBank* case, on the other hand, is an example noted in this chapter where the bondholders were not able to succeed in recovering their investments on the back of an arbitral award, even though they secured an order from the English Courts for the enforcement of the award. Lastly, the *International Trading and Indus. Inv. Co. v. DynCorp Aerospace Technology* case identified in this chapter is an example where a local court annulled an arbitral award on its merits, disregarding the fact that an arbitral award is final and binding under the New York Convention.

Different case law identified and analysed under this chapter showed that there is still a lack of predictability and certainty around the recognition and enforcement of arbitral awards for financial disputes, as some of the cases detailed above are examples of failure to enforce a final and binding arbitral award, while some cases show that one arbitral award can be enforced in a jurisdiction, whereas another jurisdiction might refuse to enforce the award based on its own legal framework or public policy grounds.

Moreover, as the use of arbitration clauses in financial transactions became more frequent, the concept of a unilateral clause (also known as the hybrid approach) was introduced. The unilateral clause gives one of the parties, usually the lender, an exclusive right to choose between a litigation or an international commercial arbitration platform to resolve the dispute, whereas the other party is not given the same choice.

This chapter concluded that although some jurisdictions, through their court decisions, allowed the parties to include a unilateral clause in their financial disputes, there are certain jurisdictions which do not recognise such an arrangement. The United Kingdom is one of the jurisdictions that has judicial precedent in terms of recognising and validating a unilateral clause, certain other common law jurisdictions, such as the US and Australia do not have similar unilateral clause-friendly precedent. On the other hand, Turkey does not recognise unilateral clause, as it is considered to violate the country's public policy rules, although there are contradictory decisions handed down by the Turkish Court of Appeals on the issue. This chapter noted that as the enforceability of a unilateral clause differs based on the jurisdiction, it is a crucial element to take into consideration prior to drafting the arbitration clause.

Meanwhile, this chapter also noted that there is a considerable effort to improve the use of litigation for financial disputes, both on a local and an international level, such as the UK's Financial List, and the DIFC, alongside improvements to the litigation system for financial disputes such as the Hague Convention, Brussels I and Lugano Convention.

Chapter 4 acted as a bridge between the theory and practice, laying the groundwork for the case study to be introduced in the next chapter, proposing a solution to the existing problem.

5. Chapter Five – Global approaches as to the improvement of the use of international arbitration for project finance disputes

5.1. Introduction

The more that trade and commerce has become globalised, the more cross-border transactions have increased.[448] More cross-border transactions meant more cross-border disputes, and therefore the need to have international organisations to resolve cross-border disputes started to emerge.

The identification of the advantages and disadvantages of international commercial arbitration for financial disputes, as compared to the conventional method of dispute resolution – court litigation – is not a new topic to be discussed and analysed by the market participants and scholars. As the use of international commercial arbitration started to increase, such pros and cons have started to be identified. As the advantages and disadvantages of the use of international commercial arbitration have been analysed in a more comprehensive way within the last decade, the financial arbitration institutions, financial dispute resolution centres and the commercial arbitration institutions that encompass financial disputes under their umbrella, have started addressing the main issues and have been trying to shape their rules and approaches with the aim of improving the use of arbitration for financial disputes, such as P.R.I.M.E. Finance and CIETAC's revised arbitration rules, introducing concepts including joinder and consolidation of arbitral proceedings to their legal framework.

As the efforts to establish financial arbitration institutions to meet the needs of this growing sector started increasing, such institutions, alongside some others, have been working on their own rules to minimise the downsides of arbitration (which is discussed in detail in Chapter 3), such as the risk of parallel proceedings, interim judgments (awards) and the need for expertise.[449]

[448] Alamdari (n 26) 72.
[449] Parsons and Paul (n 146).

There are several international arbitral institutions, such as the ICC, ISDA and LCIA that offer their expertise, model laws and arbitral tribunals for general commercial purposes and which have a special interest in financial disputes. Some have departments specialised on the sector, and produce special reports aimed at offering guidance and also providing a data platform. Moreover, following the global financial crisis that kicked off in 2007, many of the main flaws of the banking regulatory framework from before the crisis became very apparent, resulting in the international banking community coming up with a series of reforms to fix the underlying issues. [450] One of the finest examples of these reforms is Basel III, which 'tightened banking regulation in a number of areas closely related to the traditional project finance funding scheme through commercial banks.'[451]

On the other hand, there are arbitral institutions which were established solely with the aim of resolving financial disputes, such as P.R.I.M.E. Finance. P.R.I.M.E. Finance offers specialist guidance and solutions for parties who wish to choose international commercial arbitration as a dispute resolution system for their financial transactions, and is the first institution to offer such specific expertise.[452]

Regulators have been pushing for the introduction of arbitration procedures specifically designed for the industry. Meanwhile, arbitration is increasingly witnessing the creation of initiatives for specific industries. For instance, the International Swaps and Derivatives Association introduced optional arbitration clauses under its Master Agreement. The Hong Kong-based Financial Dispute Resolution Centre (FDRC) caters to bank-customer disputes, while Spain's DIRIBAN focuses on disputes between members of the Spanish Banking Association. P.R.I.M.E. Finance acts as an administrator for international financial arbitration. These demonstrate that the use-case for arbitration is increasingly recognised in light

[450] Ma (n 118) 110 <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1056&context=mbelr> accessed 24 October 2021.
[451] Ibid.
[452] Jennifer Bryant and Maximilian Schulze. 'Banking and Finance Arbitration Revisited' [2017] Yearbook on International Arbitration, 5, 130 (Bryant and Schulze note that 'Unless the banks which are likely to be the contractual party with the greater bargaining power – if there is an imbalance – seek to exercise their powers by imposing unfair and extensive unilateral arbitration clauses on the weaker counterparty, there are many reasons supporting arbitration as a suitable dispute resolution mechanism in banking and finance disputes. P.R.I.M.E. Finance Arbitration Rules have entered into force to provide a tailor-made frame for these disputes and create a level playing field for all concerned users.').

of the banking crisis that followed the 2007 financial crash, as well as the rapid technological evolution of the financial sector. [453]

It is important to analyse the existing efforts and rules undertaken by international financial arbitration institutions to be able to demonstrate what this thesis is proposing to improve and develop. Such rules will provide the foundation of the proposed pooling system that will be introduced under Section 5.4 *Case Study*, but it is also important to compare and evaluate the initiatives, and how they can be used as a basis for the proposed system. This chapter will analyse the biggest and most influential institutions in the field of financial arbitration and their recent efforts to encourage the use of international commercial arbitration for financial disputes.

5.2. Work undertaken by institutions for globalisation and uniformity of using international arbitration for finance disputes

5.2.1. P.R.I.M.E Finance and P.R.I.M.E Finance Rules

P.R.I.M.E. Finance is an institution established in 2012, aiming to provide alternative dispute resolution mechanisms for complex financial disputes, including project financings. The idea of P.R.I.M.E. Finance emerged from the 'lack of expert arbitrators' for financial disputes.[454] P.R.I.M.E. Finance brings a fresh approach to the existing problems in an effort to mitigate the advantages of litigation as a dispute resolution mechanism. P.R.I.M.E. Finance emphasises that it is composed of many highly experienced financial market practitioners, coming from different backgrounds such as judges, bankers, regulators and buysiders.[455] The institution also takes pride in drafting arbitration rules that are specifically tailored for complex financial cross-border transactions and underlines the chance for the parties to choose 'any legal system to be applicable to their arbitration clause and dispute'.[456]

[453] Affaki '*Arbitration in banking and finance deconstructed*' (n 24) 3.
[454] Freeman (n 249) 89
[455] 'P.R.I.M.E. Finance: Why Choose Us' <https://primefinancedisputes.org/page/why-choose-us> accessed 3 February 2023.
[456] Ibid.

P.R.I.M.E. Finance has been able to accomplish this aspect very successfully, in terms of establishing different panels specialising in separate areas of finance and banking and finance law and resolving highly time sensitive matters in a very short amount of time. For example, in the case of Caesar Entertainment, an arbitral panel comprising three P.R.I.M.E. Finance-appointed arbitrators managed to decide within a week on a case concerning the time at which the company had become insolvent (which affected the payout on credit default swaps worth around USD 2.9 billion).[457] P.R.I.M.E. Finance provides a considerable variety of expertise, with more than 200 experts. In order to serve its purpose of offering a platform for an alternative dispute resolution regarding financial disputes, the institution has drafted the P.R.I.M.E. Finance Arbitration Rules, which are based on UNCITRAL arbitration rules and were reviewed in 2020. The latest revised version of the rules were launched to public for comments in January 2021.[458]

The P.R.I.M.E. Finance Arbitration Rules both set out the general framework and rules, and also provide model clauses to be inserted into a financial transaction in order to choose the institution as an alternative dispute resolution authority.[459] The draft rules were approved by the board in September 2021 and were expected to be re-launched at the end of 2021.[460] The revised set of rules became effective and came into force on 1 January 2022. The changes to the rules include a mandatory disclosure clause regarding the use of third-party funders and also a new approach in order to improve the transparency and predictability of arbitration, which is to publish the award unless there is a specific objection from the parties.[461] The non-public aspect of the arbitral awards has been a point raised many times in the past as a clear disadvantage to litigation.[462]

[457] Speller and Hornyold-Strickland (n 273).
[458] P.R.I.M.E. Finance Arbitration Rules (n 16).
[459] 'P.R.I.M.E. Finance Arbitration and Mediation Rules' <prime-arbitration-and-mediation-rules-v1801171c.pdf> accessed 14 February 2023.
[460] 'P.R.I.M.E Finance Arbitration Rules' <https://primefinancedisputes.org/page/p-r-i-m-e-finance-arbitration-rules> accessed 14 February 2023.
[461] Affaki, 'Revamping of P.R.I.M.E. Finance Arbitration Rules Underway' (n 12).
[462] Cesare Romano, 'Do We Really Need A World Financial Court?' [2009] American Society of International Law, Loyola School of Los Angeles <http://arbitrationblog.kluwerarbitration.com/2009/11/04/1221/> accessed 14 February 2023.

While arbitration procedures are known to be confidential – and therefore take place behind closed doors – in nature, the decisions rendered by international courts are public. This includes the judicial decisions given by international courts in economics and considered as 'global public goods'. There are two main criteria which make such courts and decisions public goods, which are firstly being 'non-rivalrous' and secondly, 'non-excludable'.[463]

These two criteria mean that 'consumption of the good by one individual does not reduce availability of the good for consumption by others; and that no one can be effectively excluded from using the good. Arbitration is a club good, as it is non-rivalrous but excludable'.[464]

One of the most important propositions is in relation to complex banking transactions, such as project finance transactions, that can involve a multitude of different parties. P.R.I.M.E. Finance redrafted its rules by adding 'detailed joinder and consolidation provisions'.[465] The proposed rules also aim to include measures for emergency arbitration and interim measures, since this can be a significant problem when it comes to financial disputes, as explained in Section 3.10 *Interim Measures/Summary Judgments.*

The rules also aim to cut the time spent on rendering an arbitral award.[466] For example, Article 16 and 17 of the rules state that an arbitral tribunal of three or more members shall render the final award within 90 days following the closing of the hearing, whereas the time limitation for a sole arbitrator to render an award is 60 days. Another very important change is that if the amount of the dispute is less than EUR 1 million, then the sole arbitrator is expected to render the award within 180 days after the constitution of the tribunal, according to Article 17.

P.R.I.M.E. Finance Rules are by far the most comprehensive and useful set of rules for the resolution of financial disputes on an international commercial arbitration platform, especially in terms of how quickly P.R.I.M.E. Finance is taking the latest

[463] Ibid.
[464] Ibid.
[465] Affaki, 'Revamping of P.R.I.M.E. Finance Arbitration Rules Underway' (n 12).
[466] Ibid.

changes into consideration and adapting to the changes. The main purpose of P.R.I.M.E. Finance as an institution is to specifically deal with financial disputes and the institution is closely connected it is to the field of international banking and finance.

5.2.2. ISDA Master Agreement and Arbitration Guide

ISDA currently has over 960 members from 78 countries, with a significant variety of market participants including government entities, international and local banks, law firms and financial institutions.[467] The ISDA Master Agreement is commonly being used by participants in the over the counter (OTC) derivative securities market, which is a more than USD 500 trillion market.[468]

For many years, ISDA did not get involved in the arbitration process, as it emerged from the sell-side and there was little need to provide any guidance on the issue.[469] However, in 2013, ISDA launched its Arbitration Guide, aiming to provide guidance for including model arbitration clauses to ISDA Master Agreements.[470] This was a major breakthrough in terms of providing a formal assistance for the parties to a financial transaction to choose arbitration as an alternative dispute resolution mechanism.

The guide is not aimed at deciding on the merits of any given dispute, but to guide the parties in terms of choosing an arbitral institution and a seat, alongside the procedural aspect of the arbitration and the administration of the proceedings.[471] The ISDA Arbitration Guide offers model arbitration clauses to be included in the master agreements, allowing the parties to select the rules of many international commercial arbitral institutions such as ICC, LCIA and AAA, along with a custom-made arbitration clause based on the choice of the arbitral seat.[472]

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[467] 'About ISDA' <https://www.isda.org/about-isda/> accessed 14 February 2023.
[468] M Konrad Borowicz, 'Contracts as regulation: the ISDA Master Agreement' [2021] *Capital Markets Law Journal*, Volume 16, Issue 1, 73.
[469] Ibid 84.
[470] Jamie Curle and others, 'PRIME Arbitration Clauses Gather Momentum' [2013] International Financial Law *Review*, 72.
[471] '2013 ISDA Arbitration Guide' (n 420).
[472] Ibid.

The ISDA Arbitration Guide also provides model clauses specifically for P.R.I.M.E. Finance, which is a very significant step for the institution, showing that it is fulfilling its aim to become 'established as a recognised international tribunal for the resolution of complex financial disputes'.[473]

In its original Master Agreements, ISDA proposes the courts of New York or England as the choice of jurisdiction, which is coherent with the traditional preference of parties in terms of bringing their financial disputes before either the New York or the London courts, which is explained in detail above.[474] However, as the years passed and the use of international commercial arbitration has become relatively more popular amongst the parties of a financial transaction, ISDA launched its consultation document in 2011, ahead of putting together its arbitration guide. The consultation document noted that when it comes to derivative transactions, the parties seem to have inadequate knowledge when it comes to international arbitration and therefore are failing to use well drafted arbitration clauses.[475]

The ISDA Arbitration Guide provides many different options for each and every step of an international commercial arbitration proceeding, starting with the choice of the arbitration institute, then how many arbitrators to be appointed, the seat of arbitration, and the guide also notes the changes to be made to the Master Agreement by changing the references made to a 'jurisdiction of any court' to an 'arbitral tribunal' and the references made to a 'judgment' to an 'arbitral award'.[476]

By taking action to include international commercial arbitration in its Master Agreement, ISDA has achieved something of a breakthrough in the move to adopt international commercial arbitration as an alternative dispute resolution mechanism for financial transactions. As such, the ISDA Arbitration Guide is a very important development in the field.

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[473] Ibid.
[474] 'ISDA Master Agreement' (n 15).
[475] Freeman (n 249) 84 (Freeman also notes that such situation is not very surprising, as several financial institutions and the parties they enter into an agreement might not have an extensive amount of knowledge, since arbitration has not been used widely for such contracts in the recent years. Hence, it is not surprising to see 'poorly drafted clauses', since 'an effective arbitration clause is harder to draft than an effective jurisdiction clause, especially for a complex transaction involving a number of parties and a number of contracts').
[476] '2013 ISDA Arbitration Guide' (n 420).

5.2.3. ICC Task Force on Financial Institutions and International Arbitration

The International Chamber of Commerce (ICC) formed a special Task Force on Financial Institutions and International Arbitration and produced a report in 2016. The ICC ADR Task Force conducted interviews with more than 50 financial institutions. It set out the main drawbacks and advantages to using international commercial arbitration for financial disputes, and analyses the current trends seen by these institutions with the aim of raising awareness.[477]

The report also provides substantial information regarding specific issues for banking and finance transactions based the type of transaction or jurisdictional (and geographical) differences such as Islamic finance disputes, project finance disputes or international financing.[478]

It is very important for an institution such as ICC to form a special task force devoted to financial arbitration. The report adds to the growing body of work that highlights the biggest hurdles faced by international commercial arbitration in a financial dispute context. The report is also beneficial in terms of coming up with solutions to the existing problems.

5.2.4. Hong Kong International Arbitration Centre (Panel of Arbitrators for Financial Services Disputes)

HKIAC launched its Panel of Arbitrators for Financial Services Disputes in 2018, which comprises 30 members from 17 different jurisdictions.[479] The financial dispute panel is the institution's second panel following their specialised panel for intellectual property disputes.

[477] 'ICC ADR Task Force Report' (n 24).
[478] Ibid.
[479] 'HKIAC launches Panel of Arbitrators for Financial Services' <https://www.hkiac.org/news/hkiac-launches-panel-arbitrators-financial-services-disputes> (2018) accessed 14 February 2023

The idea behind forming a panel of market veterans is to encourage the use of international commercial arbitration for financial disputes under the umbrella of HKIAC, by offering a wide selection of expert arbitrators.

5.2.5. The DIFC-LCIA Arbitration Centre and the Dubai International Arbitration Centre

In 2015, the DIFC Arbitration Institute partnered up with LCIA to form the DIFC-LCIA Arbitration Centre. As of mid-2021, it was handling approximately 180 active cases.[480] One of the most prominent qualities of the DIFC-LCIA Arbitration Centre was the fact that the arbitration rules adopted were quite similar to the LCIA arbitration rules, making it more attractive to parties who were seeking to choose international commercial arbitration as a dispute resolution mechanism, under an arbitration administered in the Middle East and North Africa (MENA) region.[481] However, in a surprising turn of events, the Emirate of Dubai decided to abolish the DIFC-LCIA Arbitration Centre in late 2021, in an effort to boost concentration and attraction to its institutional arbitration centre, the Dubai International Arbitration Centre (DIAC).[482] This decision surprised the arbitration community in the Middle East, as the DIFC-LCIA Arbitration Centre was gaining more and more popularity, with a 30% increase in its cases between 2020 and 2021.[483]

Although it is a now-abolished partnership, any effort in the Middle East for the recognition and improvement of international financial arbitration is crucial, which shows the efforts in the region to provide a more international and global platform. The Middle East, especially the United Arab Emirates and Saudi Arabia have a considerable amount of ongoing project financings, with many more in the pipeline, that include many different parties from different jurisdictions. Therefore, creating a

[480] 'Dubai Abolishes DIFC-LCIA Arbitration Centre and Moves to Revamp DIAC Arbitration' <https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2021/september/dubai-abolishes-difc-lcia> accessed 2 June 2022.
[481] Ibid (in addition, 'Many parties opting for the DIFC-LCIA Rules also have chosen the "offshore" Dubai International Financial Centre (DIFC) as the seat of arbitration, the DIFC courts being a common-law jurisdiction and the DIFC having an arbitration law based on the UNCITRAL Model Law').
[482] Ibid
[483] 'Closure Of DIFC-LCIA Arbitration Centre Causes Uncertainty' <https://www.shearman.com/Perspectives/2021/09/Closure-of-DIFC-LCIA-Arbitration-Centre-Causes-Uncertainty> accessed 2 June 2022.

modern, international platform is a very big step toward widening the use of international commercial arbitration for project finance disputes.

5.2.6. China International Economic and Trade Arbitration Commission Financial Disputes Arbitration Rules

China International Economic and Trade Arbitration Commission (CIETAC) was founded in April 1956 under the name Foreign Trade Arbitration Commission and is one of the biggest international arbitration institutions in the world, with a caseload of more than 2,000 cases per year on average in recent years.[484]

CIETAC initially published its arbitration rules in 2012, but shortly after, the institution launched its arbitration rules for financial disputes in 2015, aiming to regulate an 'impartial and prompt resolution of disputes arising from financial disputes between the parties'.[485] The main aim of the new rules is to modernise the existing legal framework while preserving the 'Chinese characteristics'.[486]

The revised rules introduced in 2015 has 20 amendments, including the introduction of two new articles regarding international commercial arbitration proceedings that deal with multiple agreements, and the concept of a joinder.[487] Under the new rules, the parties have the opportunity to initiate a single proceeding against multiple parties, alongside disputes arising out of more than one agreement, given the parties and agreements to be included have compatible arbitration clauses.[488] The rules also allow the consolidation of more than one ongoing arbitral proceedings under one main proceeding.[489]

5.2.7. FINRA Dispute Resolution Services

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[484] 'China International Economic and Trade Arbitration Commission: About Us' <http://www.cietac.org/index.php?m=Page&a=index&id=34&l=en> accessed 14 February 2023.
[485] Ibid.
[486] Thomas Manson and Jerry Zhang, 'International Commercial Arbitration in China: CIETAC' [2016] 74 Advocate (Vancouver) 551.
[487] Jingzhou Tao and Mariana Zhong, 'A quick read of the CIETAC arbitration rules 2015' [2015] Arbitration International, Vol 31. Issue 3, 455-463.
[488] Ibid.
[489] ibid.

FINRA is the biggest platform for securities dispute resolution in the United States, providing arbitration and mediation services as an alternative dispute resolution mechanism to litigation.[490] FINRA dispute resolution services focus on the potential disputes 'between and among investors, brokerage firms and individual brokers', seeking compensation for damages.[491] In 2015, a dispute resolution task force formed by FINRA launched a report which comprised 51 recommendations 'designed to improve FINRA's heavily-regulated dispute resolution program',[492] The recommendations aim to address certain issues such as the transparency of the arbitral tribunals, and advanced 'training of FINRA arbitrators'.[493]

In 2017, FINRA published a further status report regarding the recommendations made in 2015, stating that 35 of the 51 recommendations made were acted upon, which includes a 'proposal addressing the task force recommendation to develop an intermediate form of adjudication for small claims'.[494]

5.3. A new approach: creating a uniform package (framework) to improve the use of international arbitration for project finance disputes

It is commonly believed that the harmonisation and globalisation of secured transactions is not achievable in the short-term, although there has been a considerable amount of effort put into this specific area in recent years. The kind of reform necessary requires assessing the legal systems of both developed and developing countries and how they vary from each other, since a harmonised legal structure would require several countries to rebuild their legislation and legal approach.[495] Both the EBRD Model Law on Secured Transactions and the UNCITRAL Legislative Guide on Secured Transactions emphasise the fact that, in

[490] 'Finra Dispute Resolution Services: Overview' <https://www.finra.org/arbitration-mediation/overview> accessed 14 February 2023.
[491] Ibid.
[492] Jill I. Gross, 'FINRA Dispute Resolution Task Force Releases Its Final Report, with Support for Mediation and Live Hearings' [2016] Alternatives to the High Cost of Litigation, 34: 19-21. <https://doi-org.ezproxy.brunel.ac.uk/10.1002/alt.21622> accessed 1 April 2023.
[493] Ibid.
[494] Financial Industry Regulatory Authority (FINRA), 'Finra Dispute Resolution Issues Status Report on Arbitration Task Force Recommendations, (2017} Businesswire < https://search-ebscohost-com.ezproxy.brunel.ac.uk/login.aspx?direct=true&AuthType=ip,shib&db=bwh&AN=bizwire.c73608705&site=ehost-live&scope=site> accessed 13 March 2023.
[495] Raymond (n 217).

order to have an effective application of the global arrangements, it is important to take the domestic laws and legal systems into consideration and that it is not possible to implement these provisions to each country without any modifications.

At this point, it is clear to see that these approaches are beneficial for the improvement and development of a unified set of rules, however, there is a long way to establish such a legal system due to the differences between the national laws of different countries. Therefore, in the context of choosing arbitration as an alternative dispute resolution for secured transactions, the issues arising from the applicable law cannot be disregarded, since the implementation process still has its own matters in relation to the enforcement, court procedures, insolvency and bankruptcy arrangements of each jurisdiction.

P.R.I.M.E. Finance provides model clauses to be inserted into an arbitration agreement, which outlines the main procedural points for the parties to agree upon, including the number of arbitrators and the seat of arbitration.[496] The institution also provides separate model clauses for the main seats of arbitration, based on their specific characteristics. The proposed rules under the P.R.I.M.E. Finance umbrella also started incorporating different approaches and rules taking into account the specific problems occurring during the use of international arbitration for finance disputes, such as allowing the concept of a joinder, or publishing the full excerpts of the final awards.

Another arbitration institution, the ICC, also came up with a different solution that seeks to address some of the downsides of arbitration compared with litigation, by proposing a global or master arbitration agreement, for example, for joinders.

Although the efforts are undeniably beneficial, this only solves one part of the problem: technicality. Some of the general disadvantages of international commercial arbitration compared with litigation have an elevated impact on finance transactions. Witnessing the above-mentioned institutions taking action, and the substantial

[496] P.R.I.M.E. Finance Model Clause <https://primefinancedisputes.org/files/model-clauses/prime-finance-model-clause.pdf> accessed 14 February 2023.

improvements this engender, will surely escalate the number of parties choosing alternative dispute resolution over litigation.

However, there are certain problems evaluated in this research which arise particularly in the case of project finance transactions, as a result of their unique nature, which cannot be solved just by improving general rules. A considerable amount of effort has been expended moving the situation in the right direction, for example the introduction of a 'single dispute resolution scheme'[497]. However, this can be built upon further, in terms of the content and mechanism of the proposed consolidated agreement in order to make it more attractive to financial institutions.

A carefully drafted arbitration clause or arbitration agreement is, without a doubt, the initial significant step towards avoiding the potential issues that may arise in the future. However, it is also very important to acknowledge, unfortunately, that a lot of arbitration clauses included in project finance transactions are written without a proper 'understanding of the potential limits to arbitrability'.[498]

'Care needs to be taken to assure that the language describing the scope of the potential disputes to be submitted to arbitration is sufficiently broad to encompass claims that the transaction was fraudulently induced by corrupt means or otherwise entered into in violation of applicable law.'[499]

This research proposes a mechanism where the parties can choose the specifics of their transaction, in terms of the jurisdictions involved, the location where the project is built, the nature and number of parties involved. Subsequently, a system which suggests specific clauses to be inserted in the model clauses and making the parties aware of the 'red flags' that need to be paid attention to before drafting the clauses may significantly improve the use of arbitration.

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[497] 'The ICC Commission Report on Financial Institutions and International Arbitration' (n 124) (The report notes despite the fact that the loan agreements are executed separately between the borrower and the lender(s) and they are different than any other project document, choosing one dispute resolution mechanism might be advantageous from the lender point of view, to preserve the project unity and to avoid any delays in the legal proceedings. With a single dispute resolution forum, the lenders would have the chance to resolve multiparty disputes on the same platform. Meanwhile, 'it also allows them to retain the right to isolate reimbursement actions from issues relating to commercial contracts entered into by the project company'.).

[498] Mark Kantor, 'International Project Finance and Arbitration with Public Sector Entities: When is Arbitrability a Fiction' [2001] Fordham International Law Journal, vol. 24, no. 4, 1172.

[499] ibid.

5.4. Case Study

As evaluated in detail above, there are many reputable international commercial arbitration organisations and institutions that have developed their own rules, guides or model laws for commercial and financial disputes, but there is not a specific guidance for project finance disputes. For example, taking the ISDA Arbitration Guide as a prospective model, a framework guidance offering many different options for different scenarios for the parties to choose from would significantly encourage the parties to choose international commercial arbitration over litigation.

The proposed system, fundamentally, is a series of questions to be asked to parties, prior to choosing the dispute resolution mechanism they would like to choose for any potential future disputes. Furthermore, even after the parties agree upon whether to opt for international commercial arbitration and/or court litigation, an extensive series of questions would also guide them towards choosing the different layers of applicable law, including the contracts and, for instance, the procedural law to be applied.

One of the reasons for an arbitral clause being harder to draft than a litigation clause is 'that arbitration is always based on the parties' consent. Aspects of dispute resolution such as joinder of parties and consolidation of different proceedings, which in litigation can be regulated by a court exercising its procedural powers, have to be provided for an arbitration context in the arbitration agreement'.[500]

The proposed pooling system can be imagined as the application of a considerably more extensive, multi-jurisdictional and automated version of the due diligence checklist created by the Queen Mary Task Force, mentioned briefly in Section 3.6.1 *Third-Party Funding*. The main idea behind the proposed system is to ask the parties an extensive set of questions including the legal nature of the project, the agreements involved, location of the parties, the security structure, involvement of a third-party funder, and as a result, generating a report identifying the potential issues

[500] Freeman (n 249) 85.

that can arise, what to include in the arbitration agreement or the arbitration clause, what to avoid, mandatory court involvements to consider, and any other matters that can be considered as a 'red flag'.

It is important to highlight at this point that the system would work best if the parties use it not just before drafting their arbitration clauses or arbitration agreements. Instead, they could benefit from the pooling system before they even draft their facility, project and security agreements, as the red flags and all the collective information to be provided under the system might change the way the financing or the security would be structured. In other words, there might be certain issues that can be fixed prior to deciding, for example, the types of security to be established, if the parties look at the transaction from an international commercial law point of view.

This would be advantageous for two reasons. Firstly, a comprehensive report, answering all the questions that the parties might have, would eliminate the possibility of parties avoiding international commercial arbitration as their choice of dispute resolution mechanism just because of lack of familiarity. In other words, as mentioned above, certain respondents to the Queen Mary survey[501] said they would not consider international commercial arbitration for disputes arising from banking and finance transactions because it had many unknowns. By identifying and clarifying the factors to consider, the concept of international commercial arbitration would basically become more 'user friendly',

Secondly, even with respect to people who are familiar with the concept, it is very hard to gather information about each and every jurisdiction involved in the big picture of a project financing, and therefore to foresee the potential issues that need to be borne in mind. This sort of a system would make it considerably easier for the legal representatives of the parties to conduct a due diligence of the transaction.

However, it is important to note that this kind of mechanism would require an extensive regulatory, legislative and practical database collected from many different jurisdictions. In order to demonstrate the proposed 'pooling system', two case studies need to be established, one based in Turkey and one based in the United Kingdom,

[501] Queen Mary Survey (n 6).

with many different layers, including a multi-jurisdictional structure with multiple parties and the agreements involved. Prior to analysing the two examples, it is important to come up with a comprehensive list of questions to be asked to the parties as a first step.

5.4.1. List of questions to be asked under the 'pool system'

As explained above, in order to provide an analysis and answers to the parties who are considering international commercial arbitration, separately or collectively, for the agreements executed under a project finance transaction, a series of questions need to be asked to the parties to create the analysis.

The proposed system would not address general concerns when choosing international commercial arbitration as the parties' preferred dispute resolution mechanism, which is covered broadly under Chapter 3 of this thesis, evaluating the advantages and disadvantages of the conventional way to resolve disputes, which is litigation, over international commercial arbitration. As mentioned above, there are several advantages and disadvantages of choosing international commercial arbitration over litigation, and certain efforts are made by international institutions, such as P.R.I.M.E. Finance to improve the use of international commercial arbitration by tackling issues around confidentiality, time, cost and multiparty structure. However, as also mentioned above in this chapter, these efforts, as valuable as they are, only solve the problems on a general level, and a more local approach regarding matters relating to the enforcement, court procedures, insolvency and bankruptcy arrangements of each jurisdiction is necessary to be introduced. Therefore, the overall results will not provide recommendations to improve the use of international commercial arbitration based on general issues, but will raise the red flags based on specific jurisdictions.

5.4.1.1. Questions in relation to the main aspects of the project

The proposed list of questions, listed in ANNEX I of this research paper, can be categorised under five sections. The first section would comprise the questions in

relation to the main aspects of the project. By answering the questions under this section, the parties would be able to gain more insight about the specific requirements of the jurisdiction where the project is based and macro-level information would be provided about the country, including the potential political risk involved, the relevant legislation (including its private international law, procedural law and international arbitration law, bankruptcy law). Another aspect that would be covered under this section would be to highlight if the country where the project is located is party to the international conventions or agreements on the recognition and enforcement of the arbitral awards.

The first section relates to the general nature of the project finance transaction, which would be crucial in terms of laying out the main characteristics of the financing. Questions asked under this section would include queries regarding the location of the project, the type of the company formed (whether it is a consortium or a joint venture), the location of the companies that formed the project company and their shareholders, and the legal nature of the project (whether it is an infrastructure project, or an energy project etc.), as this would have very significant consequences regarding the licences to be obtained from the local authorities and the parties that would be involved in the project. Answers to the questions under this section would provide general information regarding the project.

5.4.1.2. Questions in relation to the financing arrangements

The following section of the questionnaire relates to the financing arrangements and their nature. The core of the financing agreements is the facility agreement, and it is very important to understand the type and the structure of the facility agreement. Therefore, the questions under this section would include the type of the facility agreement and the number of tranches that are being agreed upon, the number of banks involved – commercial banks, international financial institutions and export credit agencies – and their locations, governing law of the agreement, and the details regarding the facility agent and the security agent.

This section also aims to gather further details about the remaining financial agreements used under the project financing, such as an intercreditor agreement, its

governing law, and information regarding the parties involved. This section is very important, especially to map out the locations of the lenders and their status.

5.4.1.3. Questions in relation to the security arrangements

The third section's questions comprise queries in relation to the security agreements. Questions asked under this section might be the most important ones the complexity of the security agreements, alongside the differences between each and every jurisdiction's approach to the creation, perfection and enforcement of different types of security, is one of the biggest reasons why international commercial arbitration is not preferred as the dispute resolution for project finance transactions, as detailed earlier in this thesis.

Firstly, it is very important to understand the elements of the security package, and what kind of security will be provided. An important aspect here is to learn whether the parties are considering a blanket security or not, as several jurisdictions do not permit a blanket security to be established on the assets. It is also very important to obtain detailed information about each security agreement included in the security package and to include follow up questions to determine the locations of the accounts, mortgages etc. As mentioned before in Chapter 3, certain security documents need to be governed by the laws of the host country, under the regulations of some countries. Therefore, gathering this information is very important to point out the mandatory requirements of certain jurisdictions, and to avoid red flags. Alongside the security arrangements, this section also includes questions about any guarantees provided, either corporate or personal, and any other security arrangements in place.

5.4.1.4. Questions in relation to the project agreements

The following section is aimed at gathering information regarding the project agreements and documents. This part also has a crucial importance, as the agreements signed as project documents are executed with third parties, such as the EPC contract, offtake agreement and the operation and maintenance agreement. Identifying the parties involved under the project agreements would be important

when considering the problems associated with the multiparty/joinder aspect of an international commercial arbitration process, and it might be necessary to obtain consent from the relevant third parties in this respect (or coming up with alternative solutions with the third parties, and to structure the arbitration clause accordingly).

This section also aims to gather information about insurance arrangements, and whether the project is a build-operate-transfer project or more importantly, if the project is a public-private-partnership, meaning the government of the host country is involved in the project. If this is the case, then the red flags that the system would generate after the answers to the questionnaire would be very different, as the dynamic between the parties is very different and lots of the arrangements between the parties would be governed by the laws of the host country. Therefore, there would be many aspects to be considered while drafting the arbitration clause.

5.4.1.5. Questions in relation to the preferred method of dispute resolution

The last set of questions would be in relation to the preferred method of dispute resolution, and if there are any specific preferences that the parties would like to point out. If the preferred alternative dispute resolution of the parties is, indeed, international commercial arbitration, this section would provide specific information including the choice of law governing the arbitration proceedings and the arbitral seat. Most importantly, this section would provide information regarding the recognition and enforcement of the arbitral awards, based on the jurisdiction of where the project is located.

These set of questions aim to identify the main characteristics of a particular project finance transaction, in order to gather details so that the answers to be generated in the next section can be tailored to the specific situation.

5.4.2. ‘Project Turkey’

5.4.2.1. Project specifics

The first example is regarding a project based in Turkey. It is a project that includes the building and operation of a combined cycle geothermal power plant (CCGT) located in Turkey. The company established to undertake the development of the CCGT power plant is a special purpose vehicle established in Turkey, as a consortium. The shareholders of the consortium are two companies, one Turkey-based construction firm and one UK-based engineering company.

The first agreement is a facility agreement, which is signed between the special purpose vehicle, (the project company) and 20 different banks and financial institutions, domestic and international. The facility agreement is governed by English law. There are 10 Turkey-based lenders, two UK-based export credit agencies (ECAs), and eight international banks – two UK-based, three US-based and three Spain-based commercial banks. The leading bank with the most exposure, also known as the mandated lead arranger (MLA), enters into an intercreditor agreement with all the remaining lenders.

The project also includes security over the commercial enterprise of the project company, the shares and the accounts of the project company. There is an additional arrangement for the assignment of the project company's receivables. The equity contributors have also provided personal and corporate guarantees for the loan. For the purposes of this example, the Turkey-based shareholder company has provided a corporate guarantee, whereas the majority shareholder of the UK-based company residing in Germany has provided a personal guarantee. All of the security documents can be instantly accelerated in the event of default.

Lastly, in terms of project documents, the shareholders of the project company have executed a shareholders' agreement. In order to undertake the construction of certain parts of the CCGT power plant, the project company has agreed to work with a subcontractor, which is a subsidiary of the Turkey-based shareholder and signed an EPC contract. The project company has also executed insurance contracts for the power plant, alongside an operations and maintenance agreement with another Turkey-based company.

In order to identify the red flags and to be able to provide guidance as to how to draft the international commercial arbitration agreement or clause, it is crucial to identify the main elements of the project. From a more project finance specific point of view, the starting point when it comes to identifying the core factors would be to pinpoint where the project assets are located. Subsequently, it is also vital to identify where the cash proceeds that would be used to repay the creditors originate from, together with where the authorities that would grant the necessary licences and approvals are located.[502] Under the scenario set forth, the answer to all of these three considerations are Turkey; the project assets are located in Turkey, the cash flow originated from Turkey, and the licenses and authorisations to build, operate and maintain the project would be granted by the Turkish authorities.

5.4.2.2. General legislation information for project financings for 'Project Turkey'

First of all, it is important to identify the primary legislation which regulates project financings in any given country, in order to identify any potential warnings or red flags for the parties. In our example, Turkey does not have a specific legislation for project financings, but several laws and regulations would be applicable, including the Turkish Commercial Code[503], Turkish Code of Obligations[504] and the Turkish Civil Code.[505]

On a more specific level, apart from the issues that may potentially arise due to the financing documents, project documents or the legal nature of the project financing, the system would also flag the legislative arrangements in a country that have the potential to affect the decision of parties in terms of choosing their dispute resolution mechanism, or when it comes to drafting their arbitration clause. In our example, Turkish bankruptcy law has certain arrangements that would need to be taken into consideration.

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[502] 'Supplementary Materials to the ICC Commission: Financial Institutions and International Arbitration' (n 169).
[503] Turkish Commercial Code No. 6102
[504] Turkish Code of Obligations No. 6098
[505] Turkish Civil Code No. 4721

First of all, Turkey is not a party to neither the UNCITRAL Model Law on Cross-Border Insolvency nor the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments. Moreover, there is no legislation under Turkish law regulating cross-border insolvency proceedings and their complex nature.[506]

As a general fact (not specifically for Turkey), as mentioned before, firstly, bankruptcy proceedings require the mandatory involvement of the local courts. In other words, if the project company is unable to repay its debt, the proceedings to declare the company insolvent or bankrupt do not fall under the scope of an arbitral tribunal. Therefore, it is very important to be familiar with the host country's insolvency and bankruptcy regulations. Moreover, the bankruptcy scenario plays an important role within the structure of project finance, as the lenders cannot assume recourse to the owners of the company (unless there is a personal guarantee} if and when the project company defaults. In order to accelerate and enforce their security, which may be the only way for the lenders to recover their investments, they would be required to apply to the local courts and start the proceedings.

In Turkey, there are several issues that need to be considered in terms of Turkish primary and secondary legislation. One of the potential issues arise from the Turkish Bankruptcy Law[507], as the ranking of all the creditors of a company that is in the process of bankruptcy will be determined by such legislation.[508] In general, the secured creditors would have priority over unsecured creditors, after registering their status and ranking with the estate.[509] Recently, Turkey introduced an amendment to its relevant legislation, prioritising secured creditors over the amounts the company owes to the government.[510] Preferential creditors, which are the secured creditors and the government regarding the public receivables[511] would have the first ranking, and certain types of security, such as mortgages, would have a priority over the

[506] Gokben Erdem Dirican, Ali Gozutok and Irem Ercan, 'Insolvency 2022, Turkey: Trends and Developments' (2022) < https://practiceguides.chambers.com/practice-guides/insolvency-2022/turkey/trends-and-developments> Accessed 1 April 2023

[507] Execution and Bankruptcy Law of Turkey No. 2004

[508] Fatos Otcuoglu and Busa Tuncel, 'International Comparative Legal Guides, Project Finance 2021' [2021] 10th edition, Chapter 26 <https://www.pekin.com.tr/wp-content/uploads/2021/05/PF21_Chapter-26_Turkey.pdf> accessed 14 February 2023.

[509] Herguner Bilgen Ozeke Attorney Partnership, 'Chambers Global Practice Guides: Insolvency' (2020) <https://herguner.av.tr/wp-content/uploads/2021/01/Chambers-Insolvency-Guide-2020.pdf> accessed 1 April 2023. The contributors to the article are Tolga Danisman, Ece Basaran Kucuk, Nehir Dicle and Mustafa Mert Dicle.

[510] Ibid.

[511] These receivables would include taxes such as real estate taxes and custom duties.

public receivables.[512] Preferential creditors would be followed by the privileged creditors, non-privileged creditors, and unsecured creditors.[513]

Moreover, there is a concept of technical bankruptcy regulated under the Turkish Commercial Code, which means when the ratio of a company's share capital to the company's shareholders' equity falls below a certain level, the company would be in a position to be declared technically bankrupt, regardless of whether it has the capacity to pay its debt.[514] In such an event, the company is required to take necessary steps, including recapitalisation, in order to avoid being declared bankrupt. Also, under the same code, if more than half of a company's assets are seized by its creditors through attachment proceedings, and if the remaining assets of the company are inadequate to cover its short-term debt, the company itself is compelled to apply to the local courts seeking to be declared bankrupt.[515]

Moreover, in Turkey, 'it may not be possible to obtain specific performance before the execution offices, since it is neither recognised nor tested by law'.[516]

One of the important issues to highlight is that a local court may claim that it is the competent court, even if the parties have chosen a foreign jurisdiction, if the parties have initiated the legal proceedings before a Turkish court and the defendant does not raise any objections as to the competence of the court to decide on the matter.

Another red flag to be mentioned is on the issue of unilateral jurisdiction clauses and their validity, as covered in detail under *Section 4.5 Hybrid Approach*. As mentioned above, the enforceability of the unilateral arbitration clause has not been tested. Under the relevant Turkish legislation, the concept of a unilateral jurisdiction clause is considered to be void, and against the public policy rules. However, the judicial precedents have been inconsistent, as there are several judgments handed down by local courts deciding that a unilateral jurisdiction clause, which allows parties to choose a hybrid approach that includes both international commercial arbitration and litigation to resolve their disputes to be void and unenforceable. However, more

[512] Herguner Bilgen Ozeke Attorney Partnership (n 509).
[513] Ibid.
[514] Ibid.
[515] Ibid.
[516] Otcuoglu and Tuncel (n 508).

recent judgments handed down by the country's Court of Appeals were perceived as a potential green light regarding the recognition of unilateral jurisdiction clauses.

5.4.2.3. Specific analysis on the financing documents for 'Project Turkey'

When the parties enter this information, the system would firstly analyse the answers given in relation with the financing arrangements. Under Turkish law, if a project financing for a project company located in Turkey involves an international creditor, then the loan agreement is usually governed by English law.[517] This is not a legal requirement, but a practical rule-of-thumb that the parties would benefit from when thinking about how to structure their financing arrangements.

In terms of familiarity with financing documents, intercreditor agreements are commonly used for syndicated loans, and the majority of the project finance transactions have a bundle of loan arrangements, and comprise several loan agreements that are either executed as syndicated loan agreements, or involve multiple creditors under an intercreditor agreement.[518]

Although there are no requirements under the Turkish laws and regulations to register the project documents, Turkey's Banking Regulatory and Supervision Authority has set certain thresholds for finance documents, and some finance documents are required to be registered with the authority for the sake of transparency.[519]

On the other hand, although it is beneficial for the parties to be able to choose the governing law of the financing document, the second step would be to investigate any practical issues that might arise as a result of a conflict or an event of default, and to identify any red flags to the parties involved.

[517] Oba and Coskun (n 22).
[518] Jonathan W Blythe, Baris Polat and Nihan Uslu Yigit, 'Project finance in Turkey: overview' Senguler & Senguler <https://uk.practicallaw.thomsonreuters.com/8-637-0114?transitionType=Default&contextData=(sc.Default)#co_anchor_a441380> accessed 1 April 2023
[519] Ibid.

In this example, the biggest red flag that might arise based on the provisions of a facility agreement under Turkish law would be the issues around clawback risk, which is also closely related to the security agreements executed between the parties. Under the Turkish practice, the international lenders also face a risk of clawback, since the remaining creditors of a borrower which is deemed insolvent can, in certain conditions defined by law, make an application to the local courts to declare specific agreements as void.[520] This risk is very important and should be flagged to the lenders, as it is 'generally applicable to arrangements and contracts that were executed within a year prior to the insolvency application, and can include the security agreements and therefore can result in invalidating the security created as collateral for an existing debt'.[521]

On the other hand, it is also important to highlight the recent developments in a country that might have a positive impact for the creditors. For example, Turkey has recently introduced a new legislation[522] regulating an alternative financing to raise funds for project finance transactions via the project financing funds founded by 'investment corporations or portfolio management companies', which gives the borrower the possibility to raise the necessary funding as third-party investments.[523]

5.4.2.4. Specific analysis on the security documents for 'Project Turkey'

As mentioned several times in this thesis, the issues around security documents, creation, perfection and enforcement of security, the mandatory governing laws of the security documents are one of the most important aspects to take into consideration before drafting the arbitration clause or the arbitration agreement, even before deciding whether to choose international commercial arbitration over conventional methods of dispute resolution. Therefore, the system would inform the parties about these facts, to give the parties the chance to properly structure their security mechanism.

[520] Oba and Coskun (n 22).
[521] Ibid.
[522] The law was submitted to the Turkish Parliament on 6 February and had proposed changes to Turkey's Banking Law No: 5411 and the Capital Markets Law No. 6362.
[523] Oba and Coskun (n 22) (Oba and Coskun note that the third-party investments are provided as 'remuneration for project assets and project revenues backed by securities').

Generally speaking, the most common forms of security involved under a project finance transaction are; share pledge, pledge over movables and accounts, mortgage, transfer/assignment of receivables, guarantee and suretyship.[524]

As per the Turkish legislation, a blanket security over all the assets is not possible and the security needs to be created over the assets separately, based on the type of each asset. Furthermore, as per the relevant Turkish legislation, regarding a security to be created over moveable or immoveable assets located in Turkey, there is a mandatory requirement for the security agreements to be governed by Turkish law. If there is a foreign element with respect to remaining types of security, then the parties have the opportunity to choose a foreign law to govern their contracts.[525]

There are certain governmental bodies that the relevant security is required to be registered with. For a mortgage agreement to be valid, it is required to be registered with the relevant title registry office, whereas the share pledge agreements must be registered under the company's share ledger, and on the share certificates. Moreover, the assignment of receivables would not be considered as valid and binding unless the agreement is signed by both the assignor and the assignee in writing.[526]

Based on the type of security created, the lenders would need to take the issue before the local Turkish courts in order to enforce their security. For example, if the security the lenders are seeking to enforce is a personal guarantee, then it can be enforced without the involvement of the courts, but if it is a commercial enterprise pledge or a mortgage, enforcement of these types of security agreements would require the mandatory involvement of local courts.[527]

[524] Turkey's International Private and Procedural Law No 5718 Article 62 regulates the recognition and enforcement of an international arbitral award. There are several grounds for a court to reject the recognition and enforcement of a foreign arbitral award.
[525] Oba and Coskun (n 22) (Oba and Coskun also note that the foreign element can be one of the parties being foreign, or if the 'assigned receivables arise from a commercial relationship governed by foreign law')
[526] Blythe, Polat and Yigit (n 518).
[527] Ibid.

In terms of the enforcement of debt and security, the Turkish law allows the enforcement of both contractual and structural subordination[528] of debt.[529] However, it is important to note that the enforcement of structural subordination is subject to the relevant 'mandatory ranking and public order provisions' regulated under Turkey's Execution and Bankruptcy Law.[530] Regarding the contractual subordination, parties are free to regulate their own subordination arrangements under a contract, but the mandatory ranking regulated by law cannot be altered or shifted by an agreement between the parties. 'In short, security established over assets first will always have priority over assets secured later'.[531]

Another very important point to be highlighted is the fact that under Turkish law, the concept of trustee[532] is usually not recognised, and the creditors, who would like to enforce their security interests would be required to initiate the proceedings on behalf of themselves, rather than a trustee.[533] An alternative solution for this obstacle would be to sign a facility agreement that is governed by a law, such as English law, and appoint a security agent to act on behalf of all of the creditors.[534] The important outcome of this issue is that each lender, in the event there is not a security agent designated under the loan agreement, would usually be required to sign the loan document and the security documents based on their own share of risk.[535]

5.4.2.5. Specific analysis on the project documents for 'Project Turkey'

The third section's questions would shed light into the potential issues that may arise due to the project documents, parties of such documents and their drafting.

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[528] 'Structural Subordination' <https://uk.practicallaw.thomsonreuters.com/3-382-3847?transitionType=Default&contextData=(sc.Default)#:~:text=The%20concept%20that%20a%20lender,company%20as%20an%20equity%20holder.> Accessed 1 April 2023 (Structural subordination means that a creditor, who granted money to a parent company, would be subordinated to a creditor which granted a loan to the company's subsidiary operating company. In other words, the lender of a subsidiary operating company would be more senior than the lender of the parent company, and the lender of the parent company would only be repaid from the operating assets of the company after the subsidiary operating company lender is paid first.).
[529] Blythe, Polat and Yigit (n 518).
[530] Ibid.
[531] Ibid.
[532] A trustee is a third-party institution that holds various types of assets on behalf of the ultimate beneficiary owner and has the authority to act on behalf of the ultimate beneficiary owner.
[533] Blythe, Polat and Yigit (n 518).
[534] Ibid.
[535] Ibid.

Another important aspect is the nature and the structure of the project itself – whether it is a public-private-partnership, a concession, or a special type of arrangement such as a build-operate-transfer project. In our example, under the relevant Turkish legislation, 'PPP-related project contracts cannot be referred to the jurisdiction of foreign courts and/or governed by foreign law'.[536] Therefore, any disputes arising out of a public-private-partnership must be resolved before a Turkish court and the documentation between the project undertaker and the government must be governed by Turkish law.

Another important issue pertains to the licences and approvals to be obtained by the project company. It would not be possible to lay out each and every approval to be obtained from the local authorities in every jurisdiction because, as mentioned before, these projects are highly complex and require many different procedures on a case-by-case basis. However, it is possible to underline if there are any red flags to consider in terms of the main approvals, permits and licences to be granted. For financing to be granted for certain projects, specific licences and approvals are required under Turkish law in order to construct and operate the project.[537] In our example, there are certain licenses to be granted including one by the Energy Market Regulatory Authority and the zoning plan needs to be approved by the Turkish Ministry of Zoning.

In terms of insurance agreements, one issue to point out would be the fact that under Turkish insurance regulations, punitive damages are not recognised and the only type of damages parties can seek to recover would be the compensatory ones.[538]

5.4.2.6. Specific analysis on the preferred dispute resolution mechanism for 'Project Turkey'

The questions answered under the last section of the questionnaire would be important in terms of general international commercial arbitration issues. Firstly, the

[536] Oba and Coskun (n 22).
[537] Oba and Coskun (n 22).
[538] Blythe, Polat and Yigit (n 491).

system would flag if the country where the project is located is a party to the main international arbitration agreements and conventions. In terms of the effectiveness of international arbitration, there are certain circumstances which need attention, especially when it comes to the recognition and enforcement of arbitral awards[539]. In this example, Turkey is a party to the New York Convention and implemented the main principles of the convention into its local legislation. Turkey also is a party to the Geneva Convention on International Commercial Arbitration and ICSID.[540] Being a party to such conventions give the parties a certain level of relief in terms of the recognition and enforcement of an arbitral award, whether it is rendered by an international institution, or by an ad hoc arbitral tribunal. Following this, the system would identify if there are any legislative or practical issues that need to be flagged at the stage where one of the parties wants the award to be recognised and/or enforced.

Since Turkey is a contracting party to the New York Convention, the enforcement conditions and the grounds for refusing to recognise and enforce an arbitral award under the New York Convention are applicable.

In addition, as per Turkey's International Private and Procedural Law, the recognition and enforcement of the award may be objected to by one of the parties claiming the award has already been, either wholly or partially, executed – i.e. the compensation foreseen under the arbitral award has been paid.[541]

In Turkey, an important fact to point out to the parties is that the grounds for rejecting the recognition and enforcement of an arbitral award include the arbitration agreement not being written and it is also recommended to be in Turkish

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[539] Otcuoglu and Tuncel (n 508) (Otcuoglu and Tuncel state that the recognition and enforcement of an arbitral award might be refused in Turkey, if one of the parties to the dispute alleges that they have not been represented properly before an arbitral tribunal, or if the party has not been given proper notice regarding the arbitral proceedings. In addition, if one of the parties claim the invalidity of the arbitration clause, any procedural breach in terms of the appointment of the arbitral tribunal, a breach due to the scope of the arbitral agreement, finality and/or enforceability of the arbitral award, or claim that the arbitral award was annulled in a different jurisdiction.).

[540] 'Global Arbitration Review: Commercial Arbitration' (2023) <https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/turkey> accessed 2 April 2023

[541] 'Enforcement of Arbitral Awards in Turkey: Overview' <https://uk.practicallaw.thomsonreuters.com/w-034-6350?originationContext=knowHow&transitionType=KnowHowItem&contextData=(sc.Default)&firstPage=true#:~:text=In%20Turkish%20law%2C%20the%20only,the%20merits%20of%20arbitral%20awards.> Accessed 2 April 2023.

language.[542] The Turkish Court of Appeal handed down three judgments in 2012, 2014, and 2016 – while the court decided that an arbitration clause written in English was valid in its 2012 judgment, it refused to acknowledge the validity of two arbitration clauses written under agreements governed by Swiss law in its 2014 and 2016 decisions.[543] Although this is not something that is regulated with a legislation, these two recent judicial precedents show the risk of an arbitral agreement or an arbitral clause not being recognised if it is not drafted in Turkish.

After securing the enforcement decision, if the party that is obliged to pay a certain sum under the award fails to do so within seven days of receiving the enforcement order, the assets including movable and immovable assets alongside the receivables can be seized.[544]

Another important point to mention is that under the relevant Turkish legislation, a partial arbitral award may be enforceable whereas an interim arbitral award, which is not final and binding, cannot be enforced by the courts.[545]

Lastly, due to a recent amendment made to Article 40 of the Law on the Central Bank of the Republic of Turkey, assets held by the Turkish Central Bank, of a foreign central bank, are immune against any attachment, interim junction or provisional attachment.[546]

5.4.3. Overall results list to be provided based on 'Project Turkey' data

Based on the information provided above, the list provided after the parties enter the answers to the questions would be a very short, summarised table, with links provided under every section to read more about the case, and the parties would be able to read about the specific point in more detail by clicking on the link provided.

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[542] Otcuoglu and Tuncel (n 508).
[543] Ergin Mizrahi, 'Enforcing foreign arbitral awards in Turkey – not so easy and not so cheap' (2019) <https://www.inhouselawyer.co.uk/legal-briefing/enforcing-foreign-arbitral-awards-in-turkey-not-so-easy-and-not-so-cheap/> accessed 2 April 2023.
[544] 'Enforcement of Arbitral Awards in Turkey: Overview' (n 514).
[545] Asena Aytug Keser and Direnc Bada 'Challenging and Enforcing Arbitration Awards: Turkey' <https://globalarbitrationreview.com/insight/know-how/challenging-and-enforcing-arbitration-awards/report/turkey> Accessed 2 April 2023.
[546] ibid.

General Applicable Laws	**include** Turkish Commercial Code, Turkish Code of Obligation and the Turkish Civil Code.
Bankruptcy specific issues	● **Not a party to** UNCITRAL Model Law on Cross border Insolvency nor the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments. ● **No specific legislation** regulating the cross-border insolvency proceedings. ● **Creditor ranking** secured creditors over unsecured, preferential creditors to be followed by privileged creditors, then non-privileged creditors and lastly, unsecured creditors. ● **Technical bankruptcy** in the event of technical bankruptcy, company is compelled to apply to the local courts for a bankruptcy declaration. ● **Practical issues** include the possibility of not securing specific performance before execution offices.
Financing Documents	● **If international creditor is involved,** governing law of the loan agreement is usually English law. ● **Intercreditor agreements** commonly used for syndicated loans. ● **Registration under BRSA** some finance documents must be registered with the Banking Regulatory and Supervision Authority. ● **Clawback risk** under certain circumstances, other creditors can apply to courts to declare specific agreements as void.
Security documents	● **Most common security arrangements** are share pledge, account pledge, mortgage, transfer of receivables, guarantees. ● **Blanket security** not possible, separate security creation required. ● **Mandatory governing law:** Security created over moveable/immoveable located in Turkey must be governed by Turkish law. ● **Certain types of security** to be registered. ● **Enforcement of security** would involve local courts,

	apart from guarantees. ● **Contractual and structural subordination** allowed; structural subordination subject to mandatory ranking provisions under law. ● **Trustee** not recognised.
Project Agreements	● **PPP-related project agreements** cannot be brought before foreign courts and cannot be governed by foreign law. ● **Licenses and authorisations** must be obtained from authorities. ● **Insurance agreements** do not cover punitive damages. ● **Zoning plan** to be approved; license from Energy Market Regulatory Authority to be granted. ● **Risk factors** Additional measures might be needed to mitigate the political risk, with stricter covenants under the loan and security agreements, alongside an expanded insurance arrangement.
Arbitrability	● **Party to** New York Convention, Geneva Convention and ICSID ● **Arbitration agreement** preferred to be written in Turkish (recommended to be signed in a dual column format, one side in Turkish). ● **Multiparty** involvement together with mandatory choices of local law must be taken into consideration while drafting the arbitration clause/agreement, in terms of getting consent from all parties involved ● **Partial arbitral award** may be enforceable, **interim arbitral award** may not be enforceable. ● **Local courts** may claim competency, even parties have chosen a foreign jurisdiction, if parties have initiated proceedings before Turkish courts. ● **Unilateral arbitration clauses** and their validity remain untested.

5.4.4. ‘**Project UK’**

5.4.4.1. Project specifics

In addition to sampling a developing country that hosts many high profile project financings such as Turkey, it is also important to evaluate a developed country with a significant volume of ongoing project finance transactions such as the UK. In order to see the differences between two jurisdictions, the essentials of the case study will stay the same, where the references to Turkey will be replaced with the UK.

Hence, the second example is regarding a project based in the UK. It is a project that includes the building and operation of a wind turbine located in the UK. The company established to undertake the construction of the wind power plant is a special purpose vehicle established in the UK, as a consortium. The shareholders of the consortium are two companies, one Turkey-based construction firm and one UK-based engineering company.

The first agreement is a facility agreement, which is signed between the special purpose vehicle, (the project company) and 20 different banks and financial institutions, domestic and international. The facility agreement is governed by English law. There are 10 UK-based lenders, two UK-based export credit agencies (ECAs), and eight international banks – two UK-based, three US-based and three Spain-based commercial banks. The leading bank with the most exposure, also known as the mandated lead arranger (MLA), enters into an intercreditor agreement with all the remaining lenders.

The project also includes security over the commercial enterprise of the project company, the shares and the accounts of the project company. There is an additional arrangement for the assignment of the project company’s receivables. The equity contributors have also provided personal and corporate guarantees for the loan. For the purposes of this example, the Turkey-based shareholder company has provided a corporate guarantee, whereas the majority shareholder of the UK-based company has provided a personal guarantee. All of the security documents can be instantly accelerated in the event of default.

Lastly, in terms of project documents, the shareholders of the project company have executed a shareholders' agreement. In order to undertake the construction of certain parts of the wind power plant, the project company has agreed to work with a subcontractor, which is a subsidiary of the UK-based shareholder and signed an EPC contract. The project company has also executed insurance contracts for the power plant, alongside an operations and maintenance agreement with another Turkey-based company.

Therefore, the project assets are located in the UK, the cash flow originated from the UK, and the licenses and authorisations to build, operate and maintain the project would be granted by the UK authorities.

5.4.4.2. General legislation information for project financings for 'Project UK'

The UK is a very developed, sophisticated and mature market in terms of project finance and the country's familiarity with such transactions.[547] Moreover, as mentioned before, English law is one of the most common choices of law to govern the financing agreements, and in terms of jurisdictional preference due to the expertise of the courts and substantive case law. In this sense, it is also one of the jurisdictions which would be less prone to shifting away from the traditional litigation route towards international commercial arbitration. However, there are certain aspects of international commercial arbitration, which could be viewed as more advantageous by market participants, which will be evaluated below.

Just like Turkey, the UK also does not have a specific legislation for project finance transactions. The general applicable laws to a project finance transaction would be

[547] Conrad Purcell, Bird & Bird LLP, 'UK: Project Finance Comparative Guide' (2022) < https://www.mondaq.com/uk/finance-and-banking/1109178/project-finance-comparative-guide> accessed 10 April 2023.

the common law of the UK, and various different legislations related to project financings, such as the Insolvency Act 1986, and the Property Act 1925.[548]

In the UK, project finance is a very popular tool used for projects in sectors that are regulated, which includes energy generation. If the project involves energy production, then the project would be regulated by a specific governmental institution, which is the Gas and Electricity Markets Authority through the Office of Gas and Electricity Markets (Ofgem).[549] Ofgem has a wide scope of authority, as it is the institution that grants the necessary licences and permits for each project, but it also has the authority to 'impose financial penalties and prosecute the companies that commit certain offences'.[550]

In terms of the validity of unilateral jurisdiction clauses, as explained in detail under Section 4.5 *Hybrid Approach*, the UK is one of the jurisdictions that recognises and validates a unilateral jurisdiction clause.

On a separate note, PPPs were widely popular in the UK for project financings, especially for the construction of infrastructure projects such as hospitals, motorways and schools. However, there has been a shift away from using the PPP structure for public service-type projects, and project finance transactions in the country are now more focused on consumer-funded industries such as green energy and digital infrastructure.[551]

5.4.4.3. Specific analysis on the financing documents for 'Project UK'

The funding for project finance transactions in the UK is usually provided as loans by commercial and development banks and as equity from the project sponsors.[552] Alongside the bank creditors and equity investors, pension funds and institutional

[548] John-Patrick Sweny and Louise Crawford, Latham and Watkins LLP 'Project finance in the UK (England and Wales): overview' (2018) <https://uk.practicallaw.thomsonreuters.com/w-015-4806?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 7 April 2023.
[549] 'UK: Project Finance Comparative Guide' (n 547).
[550] Ibid.
[551] Ibid.
[552] Sweny and Crawford (n 548).

investors also participate in the funding.[553] Project bonds are also used for funding, although it is not very common.[554]

One practice that has been widely used by UK-based companies in the event of financial distress in the scheme of arrangement. The scheme of arrangement is a very useful tool especially when a company is struggling to meet its repayment obligations, and there are multiple creditors involved. For example, it may be used if there is a credit facility provided by many different creditors based in different countries, and the governing law of the facility agreement is English. If the company wishes to negotiate the existing repayment terms with its lenders but fails to convince the adequate amount of the creditors defined under the agreement, then the company would have the chance to initiate a scheme of arrangement proceeding and seek to obtain an approval from the relevant majority of its creditors, to amend the terms which was initially rejected by the minority of its lenders.[555] If the company succeeds in getting the amendment approved by the majority of its creditors, then the scheme would be brought before a competent UK court for approval. As a post-Brexit development, the UK has introduced the concept of a restructuring plan, colloquially known as the super scheme, and also improved its moratorium arrangements.

5.4.4.4. Specific analysis on the security documents for 'Project UK'

The most common security agreements used in a project finance transaction located in the UK are share pledge, mortgage, assignment of key project contracts and insurances and account pledge.[556]

Based on the type of security, it needs to be registered with the relevant UK government authority. For all the security arrangements that are registrable, an application to the Companies House is required within 21 days after the security is

[553] Ibid.
[554] Ibid.
[555] Nicole Stolowy, 'Insolvency and Brexit: an example of forum shopping in business law', [2023] J.B.L. 2023, 2, 99-119 (Also see 'UK: Project Finance Comparative Guide' (n 547) which states that normally, lenders to a project company will receive a security package that combines fixed and floating charges over all the company's assets. This will ordinarily include the company's bank accounts, assignments of the company's contractual rights, as well as a mortgage over its land (per the Law of Property Act 1925: a charge by deed expressed to be by way of legal mortgage)
[556] Sweny and Crawford (n 548).

created, whereas for security over a land needs to be registered with the Land Registry. Share pledge agreements must be registered under the company's share ledger, and on the share certificates.[557]

Regarding the enforcement of a security interest and their rankings, fixed charges and mortgages would rank first, followed by the floating charges. However, certain unsecured creditors holding a specific type of floating charge such as employees and their wages, are given a preferential status.[558]

Unlike Turkey, the concept of trustee is a well-used and recognised institution. The security trustee, which holds the security interests of the creditors, is usually the one to manage the process of enforcing the security, based on the instructions of the majority of creditors.[559]

In an event of default, the creditors would need to apply to courts to appoint an administrator, to take over possession or to sell an asset of the borrower, and to exercise their set-off rights.[560] However, under the UK law, security beneficiaries can enforce their security interest by appointing an administrator out-of-court, if the security is with regards to cash and financial instruments, including shares. This type of appointment would also trigger an enforcement freeze applicable to all remaining creditors.[561]

Enforcement of a guarantee, just like Turkey, would be enforceable as a contractual claim.[562]

5.4.4.5. Specific analysis on the project documents for 'Project UK'

In general terms, in order for a project finance transaction to materialise, relevant government approvals must be obtained from the UK authorities. If the transaction is an infrastructure project, then the Planning Act 2008 and the Localism Act 2011 set

[557] Sweny and Crawford (n 548).
[558] Ibid
[559] Ibid
[560] 'UK: Project Finance Comparative Guide' (n 547).
[561] ibid
[562] 'UK: Project Finance Comparative Guide' (n 547).

forth the necessary planning permissions to be obtained for the approval of a major project finance transaction.[563] If the project is deemed as 'nationally significant', then the application goes before a planning inspectorate, who would make a recommendation to the Secretary of State to make a decision on whether to grant a planning permission for the project.[564]

Although the UK legislation does not require the registration of the project with any authorities, there are certain specific licences, permits and approvals which might be granted depending on whether further documentation for the authorisation is submitted to the relevant authorities or not.[565]

5.4.4.6. Specific analysis on the preferred dispute resolution mechanism for 'Project UK'

Under UK law, the arbitrability of issues arising out of bankruptcy-related issues are regulated under the Arbitration Act 1996 which states that the appointed trustee can choose to allow or reject arbitration as an alternative to litigation to resolve the dispute between the parties, unlike the majority of other jurisdictions.[566]

The Arbitration Act 1996 also regulates the arbitrability on a general level, as it recognises the non-arbitrability doctrine. However, there are no limitations provided under the Arbitration Act 1996 regarding which specific kind of disputes are non-arbitrable. Therefore, the issue of whether a dispute is arbitrable, or contrary to the public policy is mostly decided by the courts, and the existing case law.[567]

Unlike certain other jurisdictions where the necessary equipment and raw materials can be purchased from local producers, regarding the project finance transactions for project located in the UK, these materials are usually imported.[568] Hence, this aspect brings an additional risk into the equation, and in order to manage such a risk, the

[563] Sweny and Crawford (n 548).
[564] Ibid.
[565] Ibid.
[566] Dr David Ndolo, 'Role of public policy in the arbitrability of disputes under US and English law' [2023] Int. A.L.R. 2023, 26(1), 72-87
[567] ibid.
[568] 'UK: Project Finance Comparative Guide' (n 547).

lenders would seek assurance from the company, in terms of its ability to enforce its rights arising out of the contract against the supplier located in a different country as fast as possible and in a cost effective way.[569] One way to tackle this issue would be to insert an arbitration clause to the supply contract, and therefore the project company would be able to enforce the arbitral award against the third party supplier, especially if the headquarters of the supplier is located in a country that is a party to the New York Convention.[570] If the supplier is located in a jurisdiction that is not a signatory to the New York Convention, then certain additional layers of protection might be necessary.[571]

As explained in detail under Section 3.6.1 *Effects of Brexit on the enforcement of court judgments,* Brexit had a significant impact on the enforcement of foreign court judgments in the UK, as several applicable laws under the EU legal framework are no longer applicable. The judgments rendered from EU member jurisdictions that do not fall under the scope of Hague Convention are not directly enforceable. Hague Convention has a wide range of signatories, namely the European Union, European Free Trade Association states, Mexico, Singapore and Montenegro, and the judgments secured in these countries will be governed by the Hague Convention, and the remaining judgments would be enforceable under the UK's Administration of Justice Act 1920, the Foreign Judgments (Reciprocal Enforcement) Act 1933 and the common law.[572] In any case, the 'the judgment debtor may be required to commence fresh proceedings before an English court to enforce the foreign judgment as a debt'.[573]

On the other hand, in terms of enforcement of arbitral awards, the UK is party to the New York Convention, and therefore the enforcement of foreign arbitral awards in the UK has and the procedures have not been adversely affected. As explained in Chapter 3, the effects of post-Brexit and whether the UK will be a signatory to certain conventions regarding the enforcement of foreign court judgments is still uncertain, and there are significant advantages of using international commercial arbitration as

[569] 'UK: Project Finance Comparative Guide' (n 547)..
[570] Ibid.
[571] Ibid.
[572] Ibid.
[573] ibid.

an alternative dispute resolution mechanism for cross-border commercial agreements.[574]

5.4.5. Overall results list to be provided based on 'Project UK' data

General Applicable Laws	• **Include** Insolvency Act 1986, Property Act 1925, Planning Act 2008, Administration of Justice Act 1920, Arbitration Act 1996.
Bankruptcy specific issues	• **Party to** UNCITRAL Model Law on Cross border Insolvency nor the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments. • **Legislation** regulating the cross-border insolvency proceedings is Cross Border Insolvency Regulations 2006 • **Trustee** can decide arbitration vs litigation for the insolvency dispute.
Financing Documents	• **Loans** provided by commercial and development banks, with participation from pension funds and international investors. • **Post-Brexit regulatory changes** include **scheme of arrangement** and **restructuring plan**, for loan arrangements with multiple creditors from different jurisdictions.
Security documents	• **Most common security arrangements** are share pledge, mortgage, assignment of key project contracts and insurances and account pledge. • **Registration with government** authorities necessary for certain types of security. • **Guarantees** enforceable as contractual claim. • **Ranking for security enforcement** fixed charges and mortgages would rank first, followed by floating charges. Certain unsecured creditors holding a specific type of floating charge such as employees and their wages, these creditors would be given a preferential status.

[574] ibid

	● **Trustee** is commonly used, would act upon the approval of the majority of creditors.
Project Agreements	● **PPP** structure is being abandoned, a shift towards consumer-funded projects are more common ● **Licenses and authorisations** must be obtained from authorities. Projects need to be registered with the Secretary of State to obtain a planning permission.
Arbitrability	● **Party to** New York Convention, Geneva Convention and ICSID. ● **Non-arbitrability** doctrine accepted, public policy as grounds for non-enforcement to be decided by courts and case law. ● **High dependency** on exports of materials as a risk would be mitigated by choosing arbitration for speedy dispute resolutions. ● **Enforcement of court judgments** is uncertain after Brexit ● **Unilateral jurisdiction clauses** allowed.

5.5. Conclusion

Chapter 5 introduced the proposed system in an effort to improve the use of international commercial arbitration for financial disputes. As a last step toward grasping what the proposed system entails, this chapter noted the efforts on a global level to encourage the use of international commercial arbitration for commercial disputes, and how the new developments are trying to tackle the disadvantages of international commercial arbitration analysed in the previous chapters. In a world where cross-border transactions have been consistently on the rise, cross-border disputes started to increase, which paved the way for international institutions to be established for the purpose of resolving such disputes. Therefore, this chapter discussed certain international bodies, such as P.R.I.M.E. Finance, that were formed for globalisation and uniformity in the use of international commercial arbitration, specifically for financial disputes. P.R.I.M.E. Finance provides many tools to parties, including establishing separate panels based on expertise. P.R.I.M.E. Finance Rules, which were revised and came into effect at the beginning of 2022, include provisions

regarding transparency about third-party funders, confidentiality, predictability, joinder and shortening the time for rendering an award.

This chapter also discussed other international instruments to encourage the use of international commercial arbitration, including the ISDA Master Agreement and Arbitration Guide, the ICC Task Force on Financial Institutions and International Arbitration, Financial Sector Branch of the London Arbitration Club, the Hong Kong International Arbitration Centre (Panel of Arbitrators for Financial Services Disputes), The DIFC-LCIA Arbitration Centre and the Dubai International Arbitration Centre, China International Economic and Trade Arbitration Commission Financial Disputes Arbitration Rules and FINRA Dispute Resolution Services.

All these efforts by various different institutions located in different parts of the world are significant and noteworthy, and undeniably beneficial for the improvement and development of a unified set of rules. One example is the P.R.I.M.E. Finance Rules, and another one is the ICC's proposal to have a global or master arbitration agreements for joinders. However, as explained in the previous chapters, creating a unified legal system has its own hurdles, and regarding secured transactions, such as project financings, the local laws and regulations for each jurisdiction is an additional layer for concern for the parties. Reasons for this include not being familiar with the local jurisdictions and their enforcement proceedings and arbitrability. Moreover, such efforts currently only solves the technical side of the issue on a more general level, whereas there are certain issues that arise specifically in the case of a project finance transaction. This chapter also noted that there are other efforts in the project finance area, such as the 'single dispute resolution scheme' which is choosing one single dispute resolution forum for all the different project finance documents, but a system which would be specifically designed for the use of international commercial arbitration for project finance disputes would provide a significant improvement.

Therefore, this chapter introduced the proposed system, aimed to point out the 'red flags' that the parties take into consideration prior to drafting their arbitration agreement, or even before deciding between arbitration and litigation. The proposed system contains a series of questions to be asked to the parties before deciding on

the method of dispute resolution, which then would ultimately guide the parties to draft a highly functional arbitration clause, alongside providing facts and guidance based on each main and ancillary document to be executed for their project financing. The questions were divided into four sections containing questions in relation to the main aspects of the project, financing arrangements, security arrangements and the preferred method of dispute resolution. This chapter identified that the issues flagged would be beneficial for the parties even before agreeing upon a security structure or finalising their facility agreement.

It is important to note at this point that the proposed system would entail a very extensive database to be formed, which includes information from various different jurisdictions. In order to demonstrate the aim of the proposed system, this chapter introduced two case studies, one being a project based in Turkey and the second in the UK and analysed their relevant legislation, regulations and their practice. This chapter noted that a comprehensive guidance report would be generated based on the answers provided, which would eliminate the reluctancy just because there are too many unknowns, documents, parties and jurisdictions involved.

The overall lists provided under this chapter are, by no means, exhaustive and therefore can be developed further on a jurisdictional basis. It is also important to once again mention that the ‘red flags’ or points listed following the analysis of both jurisdictions would be supplementary to the existing efforts of international institutions guiding the parties as to how to draft their arbitration agreements. For example, the new rules introduced by P.R.I.M.E. Finance with an improved approach to confidentiality, or the discussions revolving around creating project unity and therefore reducing the risk of parallel proceedings, should be considered as the main factors to take into consideration. This list is a more project finance- and international commercial arbitration-focused supplement, aiming to create a database to improve the use of international commercial arbitration specifically for project finance disputes.

6. Chapter Six – Conclusion and Recommendations

Given some of the established advantages to the use of international commercial arbitration, whether the practice has the potential to become more commonplace in project finance transactions specifically is an important, albeit complex, question. Arbitration is often deemed unattractive by project finance practitioners for reasons that are specific to project finance – for example the multi-party nature of project finance agreements, the complex security packages involved and the obstacles to enforcement in many emerging market jurisdictions. But there are also more general challenges in using arbitration which are, to some degree, heightened in a finance context and more specifically in a project finance context. For this reason, the use of litigation has continued to be more prevalent by parties to a project finance transaction to date.

Beyond the confines of project finance, the concept of international arbitration has gained traction globally. As arbitration has become more widespread, academics and practitioners have increasingly sought to weigh the pros and cons of the practice for specific sectors – with a significant volume of research published specifically addressing arbitration's use in finance transactions. Yet, while much of these publications set out the obstacles faced when including arbitration clauses in finance transactions, as opposed to relying on litigation, little has been written on what potential solutions might look like.

Therefore, the mechanism proposed in this thesis would assist parties to a project finance transaction and their counsel in constructing the most beneficial and effective arbitration clauses in their contracts by synthesising the (often bewildering) array of variables inherent in a project finance deal – including multiple jurisdictions, sub-contracts, and parties. By simplifying the process, the hope is to encourage adoption of international commercial arbitration as a preferred dispute resolution mechanism.

In seeking to develop a solution to the research question posed in this thesis, it was necessary to describe and analyse, in detail, the main characteristics and the legal

nature of a project finance transaction. This included a brief summary of the historical development of project finance, a summary of the parties involved in a project finance transaction, a summary of both the main and ancillary documentation involved in a project finance transaction. Of particular importance is the description of the security documentation involved, given the wide variety of types of security granted to lenders in a project finance deal, as well as the often highly divergent local approaches to perfecting or enforcing security in different emerging market jurisdictions. As one of the core agreements in a project finance transaction, the security documents can shine a light on some of the broader issues faced when applying arbitration to the sector. On that front, this thesis has noted that there has been significant efforts to globalise and unify the creation, perfection and enforcement of security, such as the EBRD Model Law on Secured Transactions, the UNCITRAL Legislative Guide on Secured Transactions, the United Nations Convention on the Assignment of Receivables and most importantly, Article 9 of the UCC. However, there is still a reluctance for many jurisdictions to adopt a unified approach to security, mainly because of the perception that a system adopted by a common law jurisdiction, such as Article 9 of the UCC which is adopted by the US, would not be compatible with civil law jurisdiction. Although the world is not close to adopting a harmonised approach as to how the security is created, perfected or enforced, such efforts are very important milestones.

The development of a project finance transaction and the accompanying documentation can require a vast array of specialisms including, but not limited to, energy, infrastructure, and banking and finance. However, these specialisms cannot stand in isolation, but must be synergised by project finance practitioners, adding a further layer of complexity. These various specialisms were detailed in the thesis, forming the groundwork for the proposed pooling mechanism. The types of risk factors that can come to bear on a project finance development, include political risk, resource risk, completion risk and insolvency risk, were also considered. Efforts already underway to unify security arrangements and the relevant local legislations were also discussed.

In assessing the reasons for why international commercial arbitration remains a relatively unpopular choice of dispute resolution mechanism for project finance

transactions, and by extension what can be done to address this, it was also necessary to identify the main advantages and disadvantages of arbitration in comparison to litigation. Any solution or proposal to increase uptake of arbitration necessarily derives from identifying the reasons why parties to a project finance deal currently prefer one option over the other. This includes some factors that are general to arbitration, such as neutrality of the arbitral forum, the finality of the arbitral award and enforceability, which were analysed from a project finance perspective. Some of the concepts that work in theory, such as party autonomy, has its own limits in practice, based on national legislations and judicial precedents. Another project finance transaction-specific issue to consider is the usual imbalance of power between the main parties, being the borrower and the creditor, resulting in the creditor side deciding on a more favourable forum for dispute resolution. There are also factors that are particularly relevant to project finance, such as bankruptcy and the mandatory involvement of local courts in certain security arrangements.

Regarding the issue of bankruptcy, the thesis further discussed that the absence of an international bankruptcy regime means bankruptcy proceedings are generally initiated and implemented through the local courts located in the jurisdiction where the borrower is located. This is of supreme importance to lenders to a project finance transaction, who will be particularly concerned by the mechanics of the local bankruptcy or insolvency regime – not least because the location of the assets and, if necessary, enforcement against those assets, means it may not be possible for lenders to avoid becoming entangled with the local court system. Given that the repayment of, or recovery against, their debt claim may be at stake, lenders will want to ensure they are best positioned within any such local insolvency process, for example regarding the waterfall of repayments. Given that bankruptcy remains the exclusive preserve of local judiciaries, these are issues that cannot currently be easily resolved through international commercial arbitration.

The enforceability, or otherwise, of arbitral awards is another key issue for project finance parties when choosing their dispute resolution mechanism, in particular given the importance of the enforceability of security to the nature of the project finance structure. In theory, the New York Convention should make enforcement of an award relatively straightforward in the domestic courts of a signatory country – in some

cases possibly easier than securing recognition of a foreign court judgment. The grounds for appealing against a final and binding arbitral award are very limited, and largely relate to procedural defects or that enforcement of the award would run counter to public policy. However, as detailed in this thesis, in practice matters are not so simple. Parties left unsatisfied by the outcome of the arbitral proceedings have a tendency to bring the award before the courts in an effort to have the award annulled, despite the narrow grounds for appeal. More broadly, the enforceability of security is of particular importance in a project finance transaction, where lenders' primary recourse is against the asset itself. This brings into play issues around the differences in enforcement in countries with developed legal systems as compared to countries with underdeveloped legal systems.

Another area of comparison between international commercial arbitration and traditional litigation is in regard to confidentiality, which – again – can be both a blessing and a curse for practitioners depending on the circumstances. On the one hand, international commercial arbitration, which is generally confidential, offers parties the advantage of keeping the resolution behind closed doors, which can help in reputation management and maintaining commercial secrets. However, the end result of a system built upon confidentiality is that there is no readily available archive of precedents on which arbitrators or the parties to a dispute can refer. In turn, this raises questions as to the predictability of decisions made by arbitrators. Arbitral institutions have been making some recent efforts to address this issue by making some decisions available. Therefore, it is important for the parties to draft their arbitration agreements accordingly, and either add an explicit clause about the level of confidentiality they desire, or to choose the rules of international arbitration institutions as their applicable law, which provide an automatic confidentiality principle, such as the LCIA arbitration rules.

Other issues this thesis has explored in terms of the relative advantages and disadvantages of international commercial arbitration, include the ability to choose an arbitrator or an arbitral tribunal with extensive expert knowledge on the merits of the specific dispute in arbitration, an analysis of the expense and speed of arbitration versus litigation, and the involvement of third-party funders in the industries. Lastly, the relative difficulty of joinder and summary judgment within arbitration is discussed,

given the importance of these concepts to project finance transactions (in no small part simply due to the large number of parties involved in a project finance deal).

Having outlined the core components of a project finance transaction and of international commercial arbitration, the key step in demonstrating a potential mechanism to improve the attractiveness of the latter in the context of the former is to connect the two concepts and provide a bridge between the theory and practice. The use of international commercial arbitration in financial disputes is shown with the assistance of judicial precedents and case law. This thesis selected cases which were chosen from a limited number of cases related to international commercial arbitration for financial disputes, which are all rendered after 2010 to 2023. The cases selected show different outcomes, including a successful enforcement, annulment of an award by the courts, refusal of efforts to set an arbitral award aside, and refusal of the recognition and enforcement of an award.

Another significant concept is the unilateral jurisdiction clause, which offers one party the exclusive right to either take a dispute before an arbitral tribunal or a court. The thesis argues that enforceability of unilateral jurisdiction clauses is not a straightforward issue, with varying precedents in different jurisdictions. Given that lenders in financial transactions tend to push for the inclusion of a unilateral jurisdiction clause in their favour, the different approaches taken by the judiciaries in different countries is clearly a matter of concern for those lenders. While some jurisdictions, such as the UK, recognise and validate the unilateral clauses, some jurisdictions simply do not recognise such an arrangement, something which is crucial to consider prior to the drafting of an arbitration clause.

Meanwhile, as much as there have been efforts to improve the applicability of international commercial arbitration to finance disputes, it is also important to also recognise the efforts undertaken to improve the use and practice of litigation for such matters. Examples detailed in the thesis include the introduction of the Financial List in the English Courts, the establishment of Dubai's offshore DIFC and Qatar's onshore Financial Centre, as well as the expansion of the Hague Convention, under which signatories agree to recognise foreign court judgments from fellow signatory states.

As these issues have come increasingly under the spotlight over the last decade, financial dispute resolution centres and commercial arbitration institutions that encompass financial disputes under their remit have already started addressing some of the main issues. This has included attempts to shape their rules and approaches, with the aim of improving the use of arbitration for financial disputes. Several international arbitral institutions offer their expertise, model laws and tribunals for general commercial purposes but have a special interest in financial disputes, with dedicated specialist departments, such as the ICC. Others, such as P.R.I.M.E. Finance, were established solely with a view to resolving financial disputes.

As a final step toward understanding the system proposed in this thesis, the global efforts already undertaken by various bodies to address some of the identified challenges to using international commercial arbitration for the resolution of financial disputes are presented. For example, the work toward globalisation and uniformity in the use of arbitration conducted by P.R.I.M.E. Finance is examined, including the tools and resources it provides. These include the establishment of separate arbitral panels based on expertise and the P.R.I.M.E. Finance rules, which were revised and came into effect at the start of 2022. The revised rules include provisions relating to transparency over third-party funders, confidentiality, predictability, joinder and rules aimed at speeding up the arbitration process.

Other such steps to encourage the use of international commercial arbitration include the ISDA Master Agreement and Arbitration Guide, the ICC Task Force on Financial Institutions and International Arbitration, the Financial Sector Branch of the London Arbitration Club, the Hong Kong International Arbitration Centre (Panel of Arbitrators for Financial Services Disputes), the DIFC-LCIA Arbitration Centre and the Dubai International Arbitration Centre, China International Economic and Trade Arbitration Commission Financial Disputes Arbitration Rules, and FINRA Dispute Resolution Services.

These efforts, from entities all across the globe, have certainly had a positive impact in the incremental effort to develop a unified set of rules. But the creation of a unified

legal system is not without its hurdles. Additionally, as described, for secured transactions – which project finance loans invariably are – there are added concerns for project participants stemming from the local laws and regulations in the relevant jurisdictions. As such, this thesis posited an approach whereby the parties to a transaction are asked a series of questions prior to deciding a method of dispute resolution. Depending on the answers to those questions, the parties would be guided on their situational specifics in such a way they are best placed to draft a highly functioning arbitration clause, alongside receiving facts and guidance based on each main and ancillary document to be executed for their project financing.

To demonstrate the purpose of the system and how it might operate, two case studies were presented, one being a project based in Turkey and the other a project based in the UK, which also include analysis of relevant legislation and regulations. Although these two jurisdictions were chosen specifically to demonstrate the proposed system, this research aimed to demonstrate how the proposed system might work by pointing out the main jurisdictional challenges in the current environment through an analysis of two different countries.

Finally, a list of issues that may be beneficial for the parties to consider when structuring their transaction and implementing a functioning arbitral clause to their agreements is included. The aforementioned list is not exhaustive and can be developed further on a jurisdiction-by-jurisdiction basis, and highly focused on creating a database aimed at improving the use of international commercial arbitration for project finance disputes specifically.

If a future model is created by collecting legislative information, judicial precedent, and insight on the issues that arise in practice, this proposed system could be an international solution which would essentially improve the use of international commercial arbitration for project finance disputes. This system, in its core, is aimed to shed light on the ‘unknown’, which is one of the biggest reasons why parties of a project finance transaction would be reluctant to prefer international commercial arbitration for their disputes. A detailed guidance report, based on the jurisdictional data and information, flagging the issues to take into consideration prior to drafting the arbitration clause or the agreement for each and every document under the

umbrella of a project finance transaction, would make it easier for the parties to structure their dispute resolution mechanism, and make international commercial arbitration a significantly more popular alternative.

ANNEX I – Proposed Questionnaire

Questions regarding the nature of the project:

Where is the project based?
What type of a company is formed to undertake the project?
Where are the shareholders of the special purpose vehicle based in?
Where are the companies that form the project company are located?
What is the nature of the project? If it is an infrastructure project, specifics should be listed – for example, is it a motorway project, or a hospital project? If it is an energy project, is it a renewable power plant project, or a thermal, CCGT power plant?
Is there a shareholders' agreement in place? If so, please identify the parties.

Questions in relation to the financing arrangements:

What is the nature of the facility agreement? For example, is it a revolving credit facility agreement, or a fixed rate facility agreement? How many different tranches are included in the facility agreement?
How many banks are involved?
How many commercial banks are involved? Where are they based?
How many export credit agencies are involved? Where are they based?
How many international financial institutions (such as the International Financial Corporation or the European Bank for Reconstruction and Development) are involved? Where are they based?
What is the governing law of the facility agreement?
Where is the facility agent/security agent/mandated lead arranger (if applicable) based?
Is there an intercreditor agreement in place? Who are the parties, where are they based, what is the governing law of the intercreditor agreement?

Questions in relation to the security agreements

What is the security package? Are the parties considering a blanket security?

Is there a share pledge agreement in place?
Is there an account pledge agreement in place? Which countries are the accounts are located in?
Is there a commercial enterprise pledge in place?
Is there an assignment of receivables agreement in place?
Is there a mortgage agreement in place? Where is the property located in?
Are there any corporate guarantees in place? What is the relationship of the corporate providing the guarantee with the project company? Where is the corporate providing the guarantee located in?
Are there any personal guarantees in place? What is the relationship of the person providing the guarantee with the project company? Where does the person providing the guarantee reside?
Are there any other security arrangements in place?

Questions in relation to the project agreements

Who are the parties of the EPC contract?
Is the project a build-operate-transfer agreement? Is there a concession agreement in place? Is the project a Public-Private-Partnership?
What are the necessary licenses required to be obtained under the project?
Is there an offtake agreement in place? If so, where are the parties based?
Where are the parties of the supply agreement based in?
Where are the parties of the purchase agreement based in?
Where are the parties of the operation and maintenance agreement based in? Is the company undertaking the operation and maintenance works connected to any of the shareholders of the project company?
Are there any insurances in place?

Questions in relation to the preferred method of dispute resolution

What is the preferred method of dispute resolution for each agreement? Do the parties wish to proceed with project unity and chose one specific dispute resolution mechanism for all the agreements?

Do the parties wish to implement a unilateral jurisdiction clause to their arbitration clause?

(Based on where the assets are located) Where are the likely jurisdictions where the parties would seek enforcement of their arbitral award?

What is the applicable law to the arbitration agreement?

Where would the parties choose as their arbitral seat?

Which institution would the parties choose to resolve their disputes? Would the arbitration be ad hoc or institutional?

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