



International Commercial Arbitration and Over-the-Counter Derivatives

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Abstract: Derivatives are complex financial contracts widely used in today's securities and commodities markets. Alongside promising speculative gains, they allow exporters, importers, lenders, borrowers and other commercial actors to hedge a range of risks they face in the course of their day-to-day operations. Equally, international commercial arbitration has become a preferred method of dispute resolution among legal entities and businessmen involved in international trade and commerce. Although being present in on-exchange rules of derivatives trading, arbitration clauses have been in fact neglected by derivative traders for decades. The article argues that this tendency has changed. Derivative traders embraced arbitration to resolve the disputes taking place in the interbank market as well as those occurring between traders and their clients. To justify that claim, the article considers recommendations published by International Swaps and Derivatives Association (ISDA), a private industry organization and a driving force in derivative markets. In addition to harmonization instruments published by ISDA, we also pay attention to standard master agreements proposed by European Banking Federation (EBF). The paper dwells upon a variety of arbitration clauses promoted by ISDA and EBF to maintain that arbitration currently has matched the status that litigation had over the years. The paper also considers the sanctions-related aspects of dispute resolution domain. It argues that arbitration will remain preferred method of dispute resolution despite the introduction of massive sanctions against the Russian Federation.

Keywords: Arbitration; Derivatives; ISDA; New York Convention; Dispute Resolution; Financial Contracts; Arbitration Clauses

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I. Introduction

According to the data published by the Bank of International Settlements, the volume of trading in derivatives¹ currently is comparable to the aggregate economic product of all nations.² The popularity of these complex financial products is quite easy to explain as they pro-

¹ Within this article we will use the terms “derivative,” “derivative financial product,” “derivative financial instrument,” “derivative trade” and “derivative contract” interchangeably.

² BIS OTC Derivatives Statistics. Available at: https://data.bis.org/topics/OTC_DER/tables-and-dashboards/BIS,DER_D7,1.0 [Accessed 20.07.2025].

vide an exceptionally wide range of opportunities for managing various kinds of business risk. Therefore, derivatives are used financial institutions, governments, commercial companies and international organizations alike. On many occasions these instruments are traded between entities from different countries thus adding a cross-border element to a business relationship between the parties. In contrast to exchange-traded derivatives privately negotiated (over-the-counter, OTC) derivative contracts offer tailored-made solutions to the needs of the parties to those contracts. OTC derivatives gained a lot of attention following a major financial crisis that devastated world economy in 2007–2008. The main emphasis of the post-crisis debate surrounding derivatives was made on poor regulation of OTC markets in preceding years. International community focused on possible regulatory responses to the challenges posed by these complex financial instruments.

ISDA Master Agreement, a standard contractual instrument governing the majority of derivatives globally, came under scrutiny. It appeared that the said framework agreement contained forum selection clauses submitting all future disputes to state courts in England and New York depending the governing law of the contract. Not surprisingly, international lawyers raised eyebrows over the lack of alternative method of dispute resolution associated with OTC derivative contracts. Subsequent doctrinal analysis revealed that many financial institutions generally preferred state courts over arbitration. Witnessing the growing European Master Agreement for international commercial arbitration in OTC derivatives sector, International Swaps and Derivatives Association (ISDA) responded with several soft law instruments in 2013 and 2018. According to some observers, these developments were expected to put international commercial arbitration in the forefront of dispute settlement in the financial industry.

In the present article we are trying to find out whether this is really the case in contemporary OTC derivatives markets. Confidentiality, known as one of the main advantages of international commercial arbitration, prevents us from referring to substantial number of arbitral awards issued by arbitration tribunals. Hence, we will address standard master agreements published by professional associations to evaluate the success of the pro-arbitration movement in international financial

markets. In particular, we will refer to model contracts developed by European and Chinese industry associations and published in a post-crisis era as they contain relevant arbitration clauses. To the same extent, ISDA guidance on the use of arbitration agreements will make an invaluable contribution to our research. In addition to these sources, we will quote trading rules of leading derivatives exchanges in both in Russia and abroad. The latter will allow us to illustrate historically existing prevalence of arbitration in organized derivatives trading in contrast to OTC markets. The article will also provide a practical-oriented guidance on arbitration in the derivatives market amidst Western sanctions introduced in respect of Russian corporations, individuals and financial institutions.

II. International Commercial Arbitration and the Arbitrability of Financial Contracts

II.1. Arbitration: a Brief Landscape

It is a matter of common knowledge that commercial relations have long become global. Venturing into foreign markets, entrepreneurs and legal entities may face conflicts and disagreements with their overseas business partners. Disputes may stem from cultural differences, discrepancies in applicable law, insolvency, general inability to perform obligations, political and sovereign risk events as well as from many other reasons. Irrespectively of the grounds for a particular dispute, continuing globalization requires commercial entities and entrepreneurs to seek dispute resolution opportunities addressing their needs. Proper mechanisms of cross-border dispute resolution should be able to mitigate the risks associated with international trade and investment. Due to various reasons, national courts do not always meet these expectations. Whenever an international counterparty proceeds to trial in state courts, it faces lengthy and costly court proceedings that often give its opponent a so-called home advantage. As domestic and foreign litigation has many disadvantages in the eyes of international business community, alternative methods of dispute resolutions arise.

Businessmen, legislators, regulators and legal scholars see international commercial arbitration as a decent alternative to state courts. The pre-requisite and the cornerstone of international commercial arbitration is a mutual written agreement of the parties. Existing in a form of a submission agreement or an arbitration clause in an international commercial contract, the arbitration agreement is commonly regarded as an instrument submitting an existing or a future dispute to arbitration. Submission agreement is made on a stand-alone basis and addresses a current dispute. However, more often an arbitration clause is incorporated into a contract at the outset of a commercial relationship of the parties. Irrespective of the drafting approach, in contrast to litigation arbitration is always consensual.³ Thus, mutual consent serves as a cornerstone of international arbitration. Therefore, it is crucial to have a valid and enforceable arbitration agreement in place.

Generally, international commercial arbitration operates as a “private dispute resolution system outside of national courts” (Moses, 2008, p. 39). The term “international commercial arbitration” has multiple meanings. It may relate to a field of law, a legal science studying international dispute resolution, a method of dispute settlement or an arbitral tribunal. The latter consists of a sole arbitrator or a panel of arbitrators, normally three. Although disputes may be resolved through ad hoc arbitration, international commercial arbitration is currently dominated by permanent arbitration institutions. These entities do not resolve a dispute *per se*. Rather arbitration institutions administer them by applying their own arbitration rules that are incorporated into international commercial contracts by reference.

London Court of International Arbitration Court (LCIA) and the International Chamber of Commerce (ICC) International Court of Arbitration headquartered in Paris are the most well-known arbitration institutions in Europe while Singapore International Arbitration Centre

³ However, international investment arbitration is based on an international convention or bilateral investment treaty. Therefore, foreign investors may seek compensation for their investments in absence of an arbitration clause present in a commercial contract concluded with a foreign State. Sometimes investment disputes are related to derivatives trading. See, e.g., ICSID. *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*. Case No. ARB/09/2. Available at: <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/09/2> [Accessed 20.07.2025].

(SIAC) and Hong Kong International Arbitration Center (HKIAC) play a major role in Asia. As a result of a large-scale arbitration reform implemented in the Russian Federation, international commercial disputes in Russia may be administered by several licensed permanent arbitration institutions including, *inter alia*, International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC) and Arbitration Centre at the Russian Union of Industrialists and Entrepreneurs (the RSPP Arbitration Centre).⁴

Nowadays, international commercial arbitration is regulated by a complex set of rules embedded in a handful of international treaties, statutes, and to a certain extent, soft law instruments. The 1923 Geneva Protocol⁵ and the 1927 Geneva Convention⁶ became the first international instruments pertaining to international commercial arbitration. Their adoption was an important step towards developing a robust legal framework regarding alternative dispute resolution. However, legal landscape of international commercial arbitration began to take shape after the World War II. The adoption of the famous New York Convention⁷ in 1958 became a real game changer in this field. This treaty enjoyed a major international success and massively contributed to spreading international commercial arbitration across the globe. Thanks to the New York Convention, an arbitral award made by an arbitral tribunal is enforceable in 172 countries, subject to limited exceptions.⁸ Apart from the New York Convention, international arbi-

⁴ Russian arbitration law reform. Alrud Newsletter dated 5 February 2019. Available at: <https://alrud.com/publications/5d4179155413e153ca2e870a> [Accessed 20.07.2025].

⁵ Protocol on Arbitration Clauses done at Geneva, 24 September 1923. Available at: https://treaties.un.org/pages/LONViewDetails.aspx?src=LON&id=555&chapter=30&clang=_en [Accessed 20.07.2025].

⁶ Convention on the Execution of Foreign Arbitral Awards Signed at Geneva, 26 September 1927. Available at: https://www.trans-lex.org/511400/_/convention-on-the-execution-of-foreign-arbitral-awards-signed-at-geneva-on-the-twenty-sixth-day-of-september-nineteen-hundred-and-twenty-seven/ [Accessed 20.07.2025].

⁷ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958). Available at: <https://www.newyorkconvention.org/english> [Accessed 20.07.2025].

⁸ Contracting States to the New York Convention. Available at: <https://www.newyorkconvention.org/contracting-states> [Accessed 20.07.2025].

tration relies on several other treaties of regional nature such as the European Convention on International Commercial Arbitration⁹ and Inter-American Convention on International Commercial Arbitration.¹⁰

In addition to international treaties, most countries have implemented their domestic laws on international commercial arbitration. Such laws operate either on a stand-alone basis or as a set of rules embedded into a larger statute generally governing commercial dispute resolution. Those legal rules are frequently based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the UNCITRAL Model Law).¹¹ Adopted in 1985 and subsequently updated in 2006, this model act was designed to assist legislators in modernizing their local laws and regulations to meet the growing need for arbitration of cross-border disputes. Promoting pro-arbitration approach among national states, it covers all facets of arbitration process including the conclusion of arbitration agreement, composition of the tribunal and the degree of state intervention into the arbitral proceedings.

Although UNCITRAL Model Law is in high demand with lawmakers, some countries opt for developing their domestic laws on arbitration on an independent basis. England and Wales, a popular jurisdiction for international dispute resolution, provide such an example. The Arbitration Act governing domestic and international arbitration in several parts of the United Kingdom with the exception of Scotland was introduced in 1996 and amended in 2025.¹² In contrast to England and Wales, Russia as well as other former Soviet republics enacted their

⁹ European Convention on International Commercial Arbitration. Geneva, 21 April 1961. Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&clang=_en [Accessed 20.07.2025].

¹⁰ Inter-American Convention on International Commercial Arbitration. Concluded at Panama City on 30 January 1975. Available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201438/volume-1438-I-24384-English.pdf> [Accessed 20.07.2025].

¹¹ UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. Available at: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration [Accessed 20.07.2025].

¹² Arbitration Act 1996. Available at: <https://www.legislation.gov.uk/ukpga/1996/23/contents> [Accessed 20.07.2025].

statutes largely following UNCITRAL Model Law soon after the dissolution of the Soviet Union.¹³ On top of statutory laws and international treaties, international commercial arbitration is supported by a wide range of soft law instruments. For instance, the International Bar Association (IBA) has published guidelines on taking evidence¹⁴ and conflicts of interest¹⁵ while the Chartered Institute of Arbitrators (CIArb) managed to address legal issues related to artificial intelligence and arbitration.¹⁶

II.2. Arbitrability of Derivative Contracts

As we have seen, international commercial arbitration operates in a coherent legal environment and relies on a number of international treaties, more than a hundred of domestic laws and soft law instruments drafted by various professional organizations. To take advantage of those legal instruments and have access to arbitration, disputes associated with derivatives have to be arbitrable. Arbitrability is a concept used to distinguish between disputes capable of being resolved through arbitration from other disputes and disagreements that are non-arbitrable. Legal scholars usually argue that there is a certain difference between objective and subjective arbitrability.¹⁷ Arbitrability *ratione personae* focuses on the parties to potential international disputes while arbitrability *ratione materiae* concerns the subject matter of the dispute.

¹³ See: Russian Federation Law on International Commercial Arbitration. An unofficial translation. Available at: [international-arbitration-act-russia-in-english.pdf](#) [Accessed 20.07.2025].

¹⁴ IBA Rules on the Taking of Evidence in International Arbitration. Available at: <https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b> [Accessed 20.07.2025].

¹⁵ IBA Guidelines on Conflicts of Interest in International Arbitration Approved by the IBA Council, 25 May 2024. Available at: <https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024> [Accessed 20.07.2025].

¹⁶ The Chartered Institute of Arbitrators Guideline on the Use of AI in Arbitration (2025). Available at: [guideline-on-the-use-of-ai-in-arbitration_updated-sept-2025.pdf](#) [Accessed 20.07.2025].

¹⁷ See, e.g., Arbitrability. Updated on: 23 December 2025. Available at: <https://jursmundi.com/en/document/publication/en-arbitrability> [Accessed 20.07.2025].

“Derivative” or “derivative financial instrument” is a generic term for a variety of commercial contracts in international financial markets. According to Practical Law Glossary, derivatives are bilateral contracts having two distinctive features.¹⁸ Firstly, their value depends on something else and secondly, they have a delayed performance date. These two essential traits of derivatives are widely shared among scholars and practitioners alike. J. Braithwaite noted that the value of a derivative is dependent on the price of a reference asset such as an underlying rate, commodity or index (Braithwaite, 2021, p. 14). J. Benjamin argues that in most cases, performance of a derivative contract takes place significantly after the date of the contract (Benjamin, 2007, p. 65). The list of derivatives contracts features futures, options, forwards, swaps as well as other analogous instruments (Wood, 1995, p. 207).

The main reason prompting commercial entities and financial institutions to enter into derivatives is market volatility. The fluctuations of exchange and currency rates, the prices of shares and commodities are omnipresent in the world economy (Golden and Lamm, 2016, p. 82). Speculators take advantage of price and rate movements gaining profits whenever the volatility in an underlying asset matches speculator’s expectations. In other words, they make a bet over the behavior of the underlying asset (Ramos-Muñoz, 2025). However, derivatives are most often used to hedge existing risks rather than to venture into risky speculative business. M.F. Rodríguez, a Spanish scholar, provides an example of such a trade (Rodríguez, 2015, p. 132). A citrus producer from Spain is exporting his products to USA which leads to currency rate exposure. The exporter may hedge against currency exchange risk through a foreign currency forward contract, the most basic type of a derivative. To conclude such a forward contract, Spanish farmer may approach a foreign or domestic derivatives trader and make a hedging derivative transaction thus transferring the currency risk to its counterparty.

¹⁸ Thompson Reuters Practical Law Glossary. Available at: [https://ca.practicallaw.thomsonreuters.com/9-107-6730?originationContext=document&transitionType=DocumentItem&contextData=\(sc.Default\)&ppcid=ec2d6b0a1e0542f3aae2b87d27bbafac&firstPage=true](https://ca.practicallaw.thomsonreuters.com/9-107-6730?originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&ppcid=ec2d6b0a1e0542f3aae2b87d27bbafac&firstPage=true) [Accessed 20.07.2025].

Thus, derivative financial instruments often underpin international commercial operations as parties to many business contracts reach out to derivative traders with a view to reduce the risks associated with their export and import contracts as well as foreign investments they make. Commercial character of hedging instruments arises from the corresponding commercial nature of the underlying business transactions. In absence of hedging, commercial purpose of derivatives is determined by speculative motivation of risk-takers using financial instruments for generating profits. Therefore, we may describe derivatives as long-term commercial contracts with a value determined by an underlying asset such as an index, a currency exchange rate or an interest rate. These contracts are entered into with a view to transfer existing risks or to make a bet on the movement of the underlying asset.

In contrast to domestic arbitration, international commercial arbitration is focused on resolving cross-border disputes. Therefore, in addition to proving the arbitrability of derivatives, we must be able to provide examples of their cross-border nature. To address the international element of a derivative contract, Golden and Lamm refer to a hypothetical negotiation of a derivative trade between a trader residing in Hong Kong while being hired by a Swiss bank. The negotiations take place to hedge a commodity or weather risk of a Chinese investment made in Africa (Golden and Lamm, 2015, p. 11). Although purely imaginable, this case illustrates the transnational and globalized nature of many derivative transactions.

Cross-border character of derivatives is supported by the international reach of ISDA, the leading market association and the developer of model contracts for the industry. Its impressive members list features hundreds of institutions from multiple jurisdictions.¹⁹ ISDA had an international focus from the outset. When this association was set up in 1985, it simultaneously retained law firms from London and New York to understand how to proceed (Borowicz, 2015, p. 50). Subsequently, it published a standard contract covering transnational derivative trans-

¹⁹ ISDA Members. Available at: <https://www.isda.org/membership/isda-members/> [Accessed 20.07.2025].

actions in 1992.²⁰ It may alternatively be governed by English or the state of New York law as its users may see fit. This model agreement and other contractual instruments drafted by ISDA currently govern the majority of privately negotiated derivatives worldwide.

On top of that, cross-border nature of many financial transactions is evidenced by case law.²¹ The most famous derivative dispute under English law arose in the beginning of the 1990s over capacity issues when a London borough entered into a number of swap transactions with a domestic investment bank.²² Nowadays, the litigants in derivative court cases often come from different jurisdictions. To support this statement, we may refer to a dispute between (i) a German bank and English municipal body over swap transactions,²³ (ii) Italian company and a German branch of an English bank,²⁴ (iii) a Polish company and a French bank,²⁵ (iv) a company from Sri Lanka and a major international bank incorporated in England,²⁶ (v) a German bank and an English company.²⁷

²⁰ Master Agreement (Multicurrency — Cross Border). Available at: <https://www.sc.com/en/uploads/sites/66/content/docs/1992-ISDA-Master-Agreement.pdf> [Accessed 20.07.2025].

²¹ LexisNexis summarized the key topics in derivatives litigation. The list includes capacity, legal nature of swaps, wagering and gaming, constructing standard agreements, payments and close-out amounts, disputes on jurisdiction, mis-selling and interest rates manipulation as well taxation and regulatory issues. Numerous disputes out of derivative contracts are of international nature as the parties to disputed transactions are domiciled in different jurisdictions. Derivatives — key cases. Published by a LexisNexis Banking & Finance expert. Available at: <https://www.lexisnexis.co.uk/legal/guidance/resolving-derivatives-disputes-key-cases> [Accessed 20.07.2025].

²² United Kingdom House of Lords. *Hazell v. Hammersmith and Fulham LBC* [1992] 2 AC 1.

²³ United Kingdom House of Lords. *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] UKHL 12.

²⁴ England and Wales High Court (Commercial Court). *Deutsche Bank AG London v. Comune di Busto Arsizio* [2021] EWHC 2706 (Comm).

²⁵ England and Wales High Court (Commercial Court). *Calyon v. Wytownia Sprzetu Komunikacyjnego PZL Swidnik SA* [2009] EWHC 1914 (Comm).

²⁶ England and Wales High Court (Commercial Court). *Standard Chartered Bank v. Ceylon Petroleum Corporation* [2011] EWHC 1785 (Comm) (11 July 2011).

²⁷ England and Wales High Court (Commercial Court). *MHB-Bank AG v. Shanpark Ltd* [2015] EWHC 408 (Comm).

III. Arbitration in Derivatives Disputes. On-Exchange and Over-the-Counter Transactions

III.1. Arbitration in On-Exchange Contracts

Thus, many derivative contracts feature a foreign element represented by the countries where the parties to them are incorporated. Arbitrability of disputes over derivatives and cross-border nature of those contracts provide a valid case for international commercial arbitration as a means of dispute resolution in derivative markets. To ascertain whether arbitration is a traditional method of settling disputes and other differences existing in derivatives trading, we shall divide the overall market of derivatives in two separate markets depending on the trading venue. First, we shall take a look organized trading in derivatives. Among professionals these are known as exchange traded derivatives. These financial instruments are mainly represented by futures and options. Their volumes, underlying assets and maturities are imposed by the exchange where they are traded. Moreover, the manner in which these contracts are settled is based on the clearing rules set out by a clearing house servicing the exchange.

On-exchange derivatives have quite a long history. Dojima Rice Exchange was founded in Osaka, Japan, as early as in 1697.²⁸ Given the enormous role that rice played in the Japanese economy, this exchange allowed the buyers to purchase rice at a fixed price ahead of time, thus facilitating futures trading. Another example of early derivative's trading is the 17th century Holland where tulip futures were traded during the notorious Tulip Mania (James, 1999, p. 1). In contrast to futures, options are more complicated financial instruments with an asymmetrical risk structure. The first options exchange, Chicago Board of Exchange (CBOE),²⁹ was set up in the United States in the 20th century. Tradi-

²⁸ Dojima Rice Exchange: What It is, How it Works, Example. Available at: <https://www.investopedia.com/terms/d/dojima-rice-exchange.asp> [Accessed 20.07.2025].

²⁹ The Creation of Listed Options at Cboe. 1 March 2024. Available at: https://www.cboe.com/insights/posts/the-creation-of-listed-options-at-cboe/?_gl=1*_jolid5*_up*_MQ..*_ga*MTY4OTYzNTUyMy4xNzQzNzQwNzA5*_ga_5Q99WB9X71*MTcoMzcoMDcwNy4xLjAuMTcoMzcoMDcwNy4wLjAuMA [Accessed 20.07.2025].

tionally, derivatives trading on the leading exchanges throughout the world involved commodities and securities such as bonds and shares. However, today's on-exchange derivatives trading proves to be highly innovative, especially in terms of its underlying assets. For instance, EUREX exchange launched trading in crypto derivatives to meet the growing need for hedging the risks existing in crypto markets.³⁰

Irrespectively of the underlying assets available, each exchange adopts its own set of trading rules applicable to all transactions of its participants. To resolve potential disputes between traders, exchange rules contain dispute resolution provisions. That said, members of securities and commodities exchanges have always been capable of resolving disputes on their own without any involvement of third parties and the State. In most cases on-exchange disputes were settled through arbitration. K.P. Berger maintains that alternative dispute resolution in stock exchanges is one of the oldest forms of arbitration (Berger, 2009, p. 54). For instance, London Securities Exchange (LSE) in England has always used arbitration clauses instead of litigation.³¹ Moreover, these opportunities for alternative dispute resolution greatly contributed to the popularity of LSE among traders and other businessmen (Weidemaier, 2019, p. 195). CBOE rules set out detailed provisions regarding arbitration for dispute resolution. To the contrary, the rules of Euronext, a highly innovative trading organizer, contain forum selection clauses. Therefore, disputes pertaining to this exchange will be resolved through litigation. However, these provisions shall not prejudice the arbitration agreements between the parties.³² Therefore, in some cases trading organizers may set default litigation provisions, but the traders may still opt them out by agreeing a bilateral arbitration clause.

³⁰ Eurex adds Ether to its crypto derivatives suite. 18 July 2024. Available at: <https://www.eurex.com/ex-en/find/news-center/news/Eurex-adds-Ether-to-its-crypto-derivatives-suite-4033676> [Accessed 20.07.2025].

³¹ Law, Lawyers, and Self Governance During the Heyday of the London Stock Exchange. Available at: <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4932&context=lcp> [Accessed 20.07.2025].

³² Euronext Rule Book. Book I: Harmonised Rules. Available at: https://www.euronext.com/sites/default/files/2020-11/Harmonised%20rulebook_EN.pdf [Accessed 20.07.2025].

The Moscow Exchange, the leading exchange for derivatives in Russia, offers a wide variety of derivative instruments as well. According to its trading rules, derivative products supported by the Moscow Exchange include options, futures and swaps with various underlying assets such as securities and foreign currencies. As opposed to privately negotiated derivatives traded within Russia, these instruments are standardized through the introduction of contractual specifications for each type of derivative product admitted to trading. Trading and clearing rules pertaining to these instruments contain arbitration clauses. For instance, Derivative Rules of the Moscow Exchange require that all disputes are referred to RSPP Arbitration Centre:

“2.12. Any dispute related to entering into, execution, and termination of Derivatives Contracts, use of SES³³ and access to Trading shall only be referred to the Arbitration Panel after every effort to resolve such dispute in an amicable way has been made. In case of full or partial refusal to satisfy a claim, or if no reply is received within seven (7) days after the claim was served, the claimant shall have the right to bring suit into the Arbitration Panel.

2.13. All civil legal disputes and disagreements arising from operations on the Moscow Exchange Derivatives Market, including those relating to executing, exercising, and terminating Derivative Contracts, and to the use of SES in accordance with these Rules, are to be considered and settled by the Arbitration Panel subject to Arbitration Procedures then in effect.

2.14. Any decision of the Arbitration Panel shall be final and binding. A decision of the Arbitration Panel that any party has failed to comply in a good faith manner, shall be enforced in accordance with the laws of the Russian Federation, or the laws of the jurisdiction where the enforcement takes place, or international treaties.”³⁴

RSPP Arbitration Centre is a legal successor of another arbitration institution, the Arbitration Commission of the National Association of Securities Market Participants (NAUFOR). In line with the Russian legislation on arbitration, RSPP Arbitration Centre is functioning under

³³ Simple Electronic Signature.

³⁴ Derivatives rules. Available at: <https://fs.moex.com/files/4989> [Accessed 20.07.2025].

the auspices of the Russian Union of Industrialists and Entrepreneurs (RSPP), a non-political non-governmental organization established in 1990 to promote the interests of Russian businessmen.³⁵ ICAC, the oldest international arbitration institution in Russia, is also capable of resolving disputes over derivatives. In 2001 it issued an arbitral award in relation to a dispute over an index forward transaction, a derivative contract that did not involve the actual delivery of an underlying asset.³⁶ As a result, ICAC treated the said contractual arrangement as an unenforceable betting transaction in accordance with applicable Russian rules and the practice of state courts that developed following the 1998 domestic financial crisis.

III.2. Privately Negotiated Transactions: Litigation Instead of Arbitration

The rise of OTC derivative trading is closely associated with ISDA whose contracts govern 90 per cent of OTC derivatives trading globally.³⁷ Before entering into derivative trades on a bilateral basis, parties to derivative contracts usually conclude a master agreement published by ISDA. Although 1992 ISDA Master Agreement still was in European Master Agreement with market participants in the 2000s (Muscat, 2009, p. 36), currently derivative traders and their clients will likely prefer the 2002 ISDA Master Agreement,³⁸ the most recent framework contract produced by ISDA. This powerful industry association has granted membership to the leading traders in swaps and other derivatives. In contrast to options, forwards and futures, swaps are relatively

³⁵ RSPP Arbitration Centre. Key Facts and Figures. Available at: https://arbitration-rspp.ru/files/other/Arbitration_centre_at_RSPP-Key_Facts_and_Figures_2024.pdf [Accessed 20.07.2025].

³⁶ ICAC Decision dated 21.02.2001, case No. 37/2000 Available at: <https://www.consultant.ru/cons/cgi/online.cgi?req=doc&cacheid=06E317BC6DCEF7E4061782BC64AF7724&mode=searchcard&base=ARB&n=19841&BASENODE=IiIiMSwoLEFSQjAwMiIiLCiMiwyMDMsQVJCQSiIiLCiMiwyLEFSQiIlg&rnd=aS2GA#Pj8B1rUug704UaRp2> [Accessed 20.07.2025].

³⁷ England and Wales Court of Appeal (Civil Division). *Lomas v. JFB Firth Rixson* [2010] EWHC 3372.

³⁸ Available at: <https://www.isda.org/book/2002-isda-master-agreement-myli-brary> [Accessed 20.07.2025].

new development in international financial markets. The first privately negotiated swap transaction took place between the World Bank and IBM (Fradique-Méndez, 2008, p. 6) in 1981. Since then, the markets for swaps and other OTC derivatives have demonstrated an exponential growth. As a result, OTC markets have “dwarfed” exchange trading in derivatives in terms of volume (Braithwaite, 2021, p. 15).

However, self-regulation model proposed by ISDA raised serious concerns following the 2006–2008 global financial crises. Its master agreements and other contractual instruments served as a legal basis for credit-default swaps. A credit-default swap or CDS is a complex financial instrument used for credit risk hedging purposes. These financial instruments played a major role in the development of the crisis. Troubled financial institutions, such as Lehman Brothers investment bank, AIG and Bear Sterns were massively exposed to CDS trading that became toxic at a certain point. Apart from the regulatory narrative in OTC derivatives market, the fall of Lehman Brothers and bail-out of other financial institutions revealed some discrepancies in dispute resolution techniques and prevailing market practice in other industries.

Following the discussion of the aftermath of 2008 financial crisis, K.P. Berger, a well-known legal scholar and international arbitrator, noted that arbitration had been ignored by financial institutions involved in derivatives trading (Berger, 2009, p. 54). He considered this kind of neglect astonishing for two reasons. Firstly, there was a stark contrast to other business industries that viewed arbitration as the preferred means of dispute resolution. Secondly, arbitration clauses were widely spread in on-exchange trading in derivatives, however, OTC markets refused to follow the same pattern. Indeed, we have earlier argued that arbitration is popular with exchanges and their clients until present day. However, it appeared that traders in OTC financial markets showed a strong commitment to national courts. The resolution of derivatives disputes was concentrated in leading Western financial centers such as London and New York.

In line with a dispute resolution clause embedded into 1992 and 2002 ISDA Master Agreements, the parties to derivative transactions should resolve their disputes in the following manner:

“(b) Jurisdiction. With respect to any suit, action or proceedings relating to any dispute arising out of or in connection with this Agreement (‘Proceedings’), each party irrevocably:

(i) submits:

(1) if this Agreement is expressed to be governed by English law, to (A) the non-exclusive jurisdiction of the English courts if the Proceedings do not involve a Convention Court and (B) the exclusive jurisdiction of the English courts if the Proceedings do involve a Convention Court; or

(2) if this Agreement is expressed to be governed by the laws of the State of New York, to the non-exclusive jurisdiction of the courts of the State of New York and the United States District Court located in the Borough of Manhattan in New York City;

(ii) waives any objection which it may have at any time to the laying of venue of any Proceedings brought in any such court, waives any claim that such Proceedings have been brought in an inconvenient forum and further waives the right to object, with respect to such Proceedings, that such court does not have any jurisdiction over such party; and

(iii) agrees, to the extent permitted by applicable law, that the bringing of Proceedings in any one or more jurisdictions will not preclude the bringing of Proceedings in any other jurisdiction.”

The said approach was not limited to ISDA as the Foreign Exchange Committee (FXC) adopted the same approach to dispute resolution. FXC is functioning under the auspices of the Federal Reserve Bank of New York.³⁹ Since the beginning of the 90s FXC has been publishing a set of standard documentation to unify contractual practice pertaining to foreign currency derivatives, mainly forwards and options. The latest FXC model contract, International Foreign Exchange and Currency Option Master Agreement (IFXCO),⁴⁰ was published in 2009. IFXCO contains the following dispute resolution clause:

³⁹ Foreign Exchange Committee. Available at: <https://www.newyorkfed.org/fxc> [Accessed 20.07.2025].

⁴⁰ Available at: https://www.newyorkfed.org/medialibrary/microsites/fxc/files/ifxco_terms.pdf [Accessed 20.07.2025].

“Consent to Jurisdiction. (a) (b) *With respect to any Proceedings, each Party irrevocably (i) submits to the nonexclusive jurisdiction of the courts of the jurisdiction set forth in Part XIII of the Adherence Agreement, and (ii) waives any objection that it may have at any time to the laying of venue of any Proceedings brought in any such court, waives any claim that such Proceedings have been brought in an inconvenient forum, and further waives the right to object, with respect to such Proceedings, that such court does not have jurisdiction over such Party. Nothing in the Agreement precludes either Party from bringing Proceedings in any other jurisdiction; nor shall the bringing of Proceedings in any one or more jurisdictions preclude the bringing of Proceedings in any other jurisdiction. Each Party irrevocably appoints the agent for service of process (if any) specified with respect to it in Part XIV of the Adherence Agreement. If for any reason any Party’s process agent is unable to act as such, such Party shall promptly notify the other Party and within thirty (30) days shall appoint a substitute process agent acceptable to the other Party.”*

Thus, disputes shall be submitted to national courts as set out in the Adherence Agreement. In turn, Part XIV of the Adherence Agreement allows the parties to make a choice between (i) the State of New York and the United States District Court located in the Borough of Manhattan in New York City, (ii) the courts of England and (iii) the Tokyo District Court. As in ISDA Master Agreements, the choice of a dispute resolution venue is linked to applicable law. IFXCO as well as several other standard agreements published by FXC may be governed by the laws of New York, the laws of Japan or England and Wales. The same provisions on jurisdiction are present in other model contracts published by FXC. In fact, this organization managed to develop a series of master agreements (DeRosa, 2014, p. 215) that rely on national courts for resolving disputes.

Obviously, courts in New York, Tokyo and London are well-positioned to resolve complex financial disputes as major financial centers are located in those cities. However, submitting disputes over derivatives to state courts in general has many disadvantages. On many occasions, court rulings are not enforceable abroad due to absence of international treaties on mutual recognition and enforcement of court decisions. Besides, as a general rule the parties to ISDA Master Agree-

ments, IFXCO and other model contracts published by FXC are not able to keep their dispute private. Furthermore, the parties are unable to appoint adjudicators. The ability to select the members of the tribunal may become crucial when a specific knowledge of financial sector is required from a judge. Moreover, litigation may take years as court decisions are capable of being challenged in an appellate court both on the grounds of law and fact.

IV. Movement towards Arbitration in International OTC Markets

IV.1. Arbitrating Disputes over OTC Derivatives and ISDA Arbitration Guides

Notwithstanding these downsides of litigation over derivatives, we have little evidence that prior to 2008 crisis disputes in OTC markets have been submitted to arbitration as financial industry traditionally preferred litigation over arbitration (Leonard and O'Donnell, 2022, p. 61). In 2004 P. Harding mentioned that some countries do not recognize or enforce judgements given in foreign courts, but are ready to accept international arbitration proceedings. To this end he offered an arbitration clause submitting disputes over ISDA Master Agreement to LCIA as an appointing authority and London as a place of arbitration. He suggested UNCITRAL Arbitration Rules as the rules applicable to dispute (Harding, 2004, p. 635). However, it appears that the users of ISDA documentation were reluctant to follow this advice.

One of the few reported cases is the dispute between *Bankers Trust International plc.*, a derivatives trader, and *PT Jakarta International Hotels & Development*, a company domiciled in Indonesia. Throughout 1997 these entities entered into a series of swap transactions under 1992 ISDA Master Agreement. The parties replaced the standard forum selection provision of 1992 ISDA Master Agreement with an arbitration clause. In accordance with it, all disputes were to be settled in the London International Court of Arbitration (LCIA).⁴¹ However, the In-

⁴¹ Thompson Reuters Practical Law Glossary. Available at: [https://uk.practicallaw.thomsonreuters.com/o-107-6094?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/o-107-6094?transitionType=Default&contextData=(sc.Default)&firstPage=true) [Accessed 20.07.2025].

donesian company refused to perform its obligations under swaps and launched a law suit in the local court in Indonesia thus ignoring the arbitration clause. English state court supported the arbitration clause and issued an anti-suit injunction staying procedures in Indonesia.⁴²

Another reported LCIA arbitration involving derivatives became known due to an international investment dispute between *Deutsche Bank AG and the Republic of Sri Lanka*.⁴³ The dispute considered a hedging agreement between a German derivatives trader and Ceylon Petroleum Corporation (CPC), a company controlled by the local government and accountable to the public (Ariyo, 2025, p. 5). It was resolved by the International Centre for Settlement of Investment Disputes (ICSID) in Washington, D.C. Notably, the ICSID award referred to another award concerning a dispute of the similar nature, this time between CPC and Citibank N.A., a U.S. derivatives trader.⁴⁴ The award was rendered on 1 August 2011 as the arbitral tribunal rejected the claims made by Citibank (Ariyo, 2025, p. 5). In general, CPC disputes concerned the issues of speculation, contractual capacity and mis-selling of financial products, a widely spread topic for litigation in derivative cases. Despite having a “star status” in international derivatives industry (Braithwaite, 2012, p. 784), ISDA has always been flexible in amending the terms of its standard agreements in line with existing market trends and legislative developments. On 19 January 2011 it shared a memo⁴⁵ with its members, which is of particular interest to us in connection with the topic of the present article as the memo addressed the use of arbitration under ISDA Master Agreement. In this document ISDA recognized

⁴² Queen’s Bench Division (Commercial Court). *Bankers Trust Co v. PT Jakarta International Hotels and Development* [1999] 1 Lloyd’s Rep 910.

⁴³ ICSID case No. ARB/09/02. Available at: https://icsid.worldbank.org/sites/default/files/parties_publications/C8394/Claimants%27%20documents/CL%20-%20Exhibits/CL-0474.pdf [Accessed 20.07.2025].

⁴⁴ LCIA. *Citibank N.A. v. Ceylon Petroleum Corporation*, First Partial Award, LCIA ab# 81215, 31 July 2011, Para. 5.71 to 5.78; 5.106 and 5.107.

⁴⁵ Memorandum for Members of the International Swaps and Derivatives Association, Inc. 19 January 2011. Available at: <http://www.efmlg.org/Docs/Meeting%2038/2011-03-22%20EFMLG%20-%20Item%208%20-%20ISDA%20memo%20on%20the%20use%20of%20arbitration%20under%20an%20ISDA%20Master%20Agreement.pdf> [Accessed 20.07.2025].

that model clauses on choice of jurisdiction present in its standard contracts are not always acceptable for the users of its documentation. In particular, Para. 4.3 of the memo stated the following:

“Historically, international financial transactions have tended to be documented under agreements governed by English or New York law and which contain jurisdiction clauses conferring jurisdiction on the English or New York courts. These are, of course, the options provided for in the 1992 and 2002 ISDA Master Agreements. The courts of both these jurisdictions have a reputation for probity and experience of resolving disputes arising out of derivative transactions, and they can generally be relied upon to do so with reasonable dispatch. Today, however, many parties to such transactions are based in emerging jurisdictions in which it is difficult to enforce a foreign judgment. Succeeding on the merits of a dispute may prove to be a pyrrhic victory if it is not possible to enforce the resulting judgment. Many counterparties in emerging jurisdictions are also increasingly reluctant to accept that any dispute will be resolved in the English or New York courts; arbitration is often a more acceptable alternative.”

Generally, the memo was intended to provide general guidance to facilitate further discussions of arbitration “as an alternative form of dispute resolution under an ISDA Master Agreement.” ISDA was seeking support of its initiative and requested the opinion of ISDA members. On 10 November 2011 ISDA published another memorandum evaluating the feedback received from its members and streamlining further policy options.⁴⁶ Finally, this preparatory work culminated in the release of 2013 ISDA Arbitration Guide 2013.⁴⁷ This guide outlines well-known advantages of arbitration including its speed, possibility to appoint arbitrators, finality and enforceability of arbitral awards. More importantly, this soft law instrument contains a model arbitral clause to be used with ISDA Master Agreements:

⁴⁶ The use of arbitration under an ISDA Master Agreement: feedback to members and policy options. 10 November 2011. Available at: <https://www.isda.org/a/DJDDE/arbitration-isda-memo-pt2-nov11-final.pdf> [Accessed 20.07.2025].

⁴⁷ Available at: <https://www.isda.org/a/6JDDE/isda-arbitration-guide-final-09-09-13.pdf> [Accessed 20.07.2025].

“Arbitration (i) Any dispute, claim, difference or controversy arising out of, relating to or having any connection with this Agreement, including any dispute as to its existence, validity, interpretation, performance, breach or termination or the consequences of its nullity and any dispute relating to any non-contractual obligations arising out of or in connection with it (a ‘Dispute’), shall be referred to and finally resolved by arbitration.”

The list of approved rules of arbitration presented in the 2013 ISDA Arbitration Guide appears to be well-balanced. Alongside LCIA and International Chamber of Commerce (ICC) ISDA recommended two arbitration institutions located in Asia (SIAC and HKIAC). Swiss Rules of International Arbitration and the International Arbitration Rules of the American Arbitration Association — International Centre for Dispute Resolution (AAA-ICDR Rules) are also on the list. Panel of Recognized International Market Experts in Finance Arbitration Rules (P.R.I.M.E. Finance Rules) are of particular interest as P.R.I.M.E. Finance is the only specialized arbitration institution recommended by ISDA. P.R.I.M.E. Finance was established in 2012 to deal with disputes arising out of complex financial transactions (Marsman, 2021, 3-030). Its list of arbitrators includes world recognized financial specialists as well as international lawyers experienced in the resolution of commercial disputes.⁴⁸

The publication of the 2013 ISDA Arbitration Guide attracted a lot of attention both within the arbitration community⁴⁹ and above.⁵⁰ Encouraged by the success of 2013 ISDA Arbitration Guide the asso-

⁴⁸ See the list of experts at P.R.I.M.E. Finance website. Available at: <https://primefinancedisputes.org/page/experts-overview> [Accessed 20.07.2025].

⁴⁹ Kluwer Arbitration Blog October 2013 Maria Karamperlia October 23 2013 Cross-border Disputes in the Financial Sector: A Trend towards Arbitration and the Release of the ISDA Arbitration Guide. Available at: <https://arbitrationblog.kluwerarbitration.com/2013/10/24/cross-border-disputes-in-the-financial-sector-a-trend-towards-arbitration-and-the-release-of-the-isdarbitration-guide/> [Accessed 20.07.2025].

⁵⁰ Business Times. Ruling of the arbitration panel dismissing the claim in the oil hedging case. Available at: <https://www.sundaytimes.lk/110814/BusinessTimes/bt44.html> [Accessed 20.07.2025].

ciation decided to renew the guide in 2018.⁵¹ To ensure the quality of this project it retained a well-known London City law firm as a legal adviser.⁵² The basic structure of the document largely European Master Agreement remained unchanged. As 2013 ISDA Arbitration Guide, the 2018 edition highlighted the benefits of international arbitration widely known within dispute resolution professional. ISDA recommended arbitration to its members and other users of ISDA documentation 2018 ISDA Arbitration Guide containing a larger list of recommended arbitration institutions as well as a variety of seats of arbitration including London, Dublin, New York, Hong Kong, Singapore, Zurich, Geneva, London, the Hague, Stockholm, Frankfurt am Main, Dubai and Vienna.

IV.2. European Master Agreement: a Balanced Approach

It is clear that ISDA has been promoting international commercial arbitration for more than a decade. Recent years have seen a surge in including arbitration clauses into ISDA agreements (Eidenmüller, 2013, p. 92). However, to ascertain whether arbitration has become a lasting trend in the market for OTC derivatives, we should consider other standard agreements to search for arbitration clauses. In fact, the universe of model contracts existing in financial markets is not limited to contractual instruments developed by ISDA and FXC. National banking associations in Germany,⁵³ France⁵⁴ and Spain⁵⁵ publish their own master agreements governed by local laws. Sometimes, they may refer their parties to arbitration in case of disputes. However, these instruments

⁵¹ 2018 ISDA Arbitration Guide. Available at: https://arbinfinanz.uni-koeln.de/uploads/Dokumente/2018_ISDA_Arbitration_Guide.pdf [Accessed 20.07.2025].

⁵² ISDA publishes a new edition of its Arbitration Guide. Available at: <https://www.jdsupra.com/legalnews/isda-publishes-a-new-edition-of-its-58015/> [Accessed 20.07.2025].

⁵³ Deutscher Rahmenvertrag für Finanztermingeschäfte. Available at: <https://www.germanbanks.org/recht/rahmenvertrag-fuer-finanztermingeschaefte> [Accessed 20.07.2025].

⁵⁴ Convention-cadre FBF relative aux opérations de marché à terme. Available at: <https://www.fbf.fr/fr/convention-cadre-fbf-relative-aux-operations-sur-instruments-financiers-a-terme> [Accessed 20.07.2025].

⁵⁵ Contrato Marco de Operaciones Financieras. Available at: <https://www.ceca.es/eng/cmof/> [Accessed 20.07.2025].

are predominantly aimed at domestic transactions rather than cross-border operations with derivatives. Hence, they do not make a lasting international impact, although in some cases local master agreements may be used to facilitate derivatives trading with overseas counterparties.⁵⁶ In contrast to local banking associations, European Banking Federation (EBF), a professional association of banking unions established in Europe, is focused on international issues involving financial institutions linked to different jurisdictions. Alongside other issues, EBF is focused on the unification of contractual practices existing in OTC financial markets on the basis of a single framework agreement covering all types of financial transactions concluded by commercial banks between themselves and with their corporate clients. The result of these efforts, European Master Agreement (EMA), is currently in use in Europe (Johansson, 2009, p. 71). European Central Bank acts as a strong promoter of European Master Agreement as it imposes this standard contract on its counterparties (Litten, 2024, p. 200).

European Master Agreement is a multi-product multi-language standard contract facilitating a variety of financial market transactions such as interbank deposits, derivatives, repos and securities loans. At first glance, the multi-product concept should be very attractive to derivative traders when doing interbank business with their overseas counterparties with the same legal status. Instead of entering a separate framework agreement for each type of financial product they may simply execute European Master Agreement and a Product Annex addressing transactions they envisage to make within their future commercial relationship. The latest version of European Master Agreement published in 2020 is divided into two parts — General Provisions and Special Provisions. The General Provisions of 2020 European Master Agreement⁵⁷ contain the following clause related to dispute resolution:

⁵⁶ Federal Court of Justice (Bundesgerichtshof — BGH) Decision IX ZR 314/14 dated 09.06.2016. Available at: <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&az=IX%20ZR%20314/14> [Accessed 20.07.2025].

⁵⁷ Master Agreement for Financial Transactions. General Provisions. Edition 2020. Available at: <https://www.ebf.eu/wp-content/uploads/2020/06/EMA-General-provisions-2020.pdf> [Accessed 20.07.2025].

“(2) Jurisdiction, Arbitration. *Each party irrevocably agrees that in respect of any dispute arising under or related to the Agreement (i) the courts specified in the Special Provisions shall have non-exclusive jurisdiction and each party irrevocably submits to such non-exclusive jurisdiction, or (ii) if so specified in the Special Provisions, any such dispute shall be finally settled by one or more arbitrators appointed and proceeding in accordance with the rules of arbitration specified in the Special Provisions, each party agreeing to comply with such rules.*”

Thus, 2020 European Master Agreement embraces litigation and arbitration in case of disputes (Braithwaite, 2021, p. 34). Such an approach gives the parties to this framework contract a high degree of flexibility. Special Provisions serve as a key point in choosing preferred dispute resolution techniques. To this end, EBF largely follows the pattern earlier chosen by ISDA. Generally, ISDA Master Agreement contains a choice of forum clause rather than an arbitration clause; however, the parties to the standard contract are free to replace it with an arbitration clause published by ISDA in 2013 and 2018 in its guides on arbitration. The key advantage of EBF approach is that the end-users of its standard documentation do not have to use alternative guidance to settle their disputes and differences via arbitration as the required wording is already in place. Under the 2020 European Master Agreement Special Provisions the recommended arbitration clause shall be as follows:

“The rules of arbitration referred to in Section 11(2) are the Rules of Arbitration of5 [Euro Arbitration – European Center for Financial Dispute Resolution] [the International Chamber of Commerce] § [other] § [with which each party agrees to comply]. The parties agree to submit those disputes to [a single] [three] arbitrator[s]. Such arbitration shall take place in [-]. The language[s] in which arbitration shall be conducted [is] [are].”⁵⁸

We find this alternative arbitration clause to be very narrow as EBF has recommended the rules of arbitration published by two arbitration institutions, namely by the European Center for Financial Dispute

⁵⁸ Master Agreement for Financial Transactions. Special Provisions. Edition 2020. Available at: https://www.ebf.eu/wp-content/uploads/2020/06/EMA-Special-Provisions_-2020.pdf [Accessed 20.07.2025].

Resolution and the International Chamber of Commerce (ICC). ICC arbitration clauses are present both in 2013 and 2018 ISDA Arbitration Guides, although ISDA chose not to recommend European Center for Financial Dispute Resolution to its members. However, in case of EBF the short list of arbitration institutions is easy to explain. EBF has published a set of standard contracts to be used in Europe, therefore, it had to put aside Asian arbitration centers in Hong Kong and Singapore. At the same time, the parties to 2020 European Master Agreement may always chose “other” rules of arbitration if they see it necessary.

While making the choice, the counterparties to European Master Agreement would most likely select a European arbitration institution. In our view, the seat of arbitration should be in Europe as well. In such a scenario European Master Agreement users may take advantage of ISDA recommendations pertaining to the choice of arbitration rules. Apart from the arbitration rules of ICC, 2018 ISDA Arbitration Guide features an impressive list of the arbitration rules adopted by the leading European arbitration institutions. The most obvious choice is LCIA as London plays the role of a recognized financial center. However, European Master Agreement counterparties may also opt for Arbitration Rules of the German Arbitration Institute, the Rules of Vienna International Arbitration Center or Swiss Arbitration Rules. In case the users of EBF standard documentation would like to have a special financial expertise, dispute resolution under the rules of PRIME Finance is a viable option.

V. Arbitrating Derivatives Disputes Involving Russian Counterparties in the Era of Unilateral Sanctions

V.1. Is There a Place for Arbitration for Russian Counterparties in OTC Derivatives Market?

International financial markets are global, therefore conflicts between states as well as restrictive measures and embargos introduced by economically significant powers against other nations may change the way derivatives are traded. Beyond any doubt, cross-border disputes in OTC markets are also affected by unilateral sanctions. The impact of

sanctions on derivatives trading and dispute resolution becomes evident when it comes to restrictive measures introduced against Russian financial sector. According to the widely shared opinion, European arbitration centers once popular among Russian businessmen no longer meet their needs. Such a view has already resulted in a decline of CIS-related cases administered by LCIA, a former dispute resolution venue of choice for Russian counterparties.

According to the report published by this arbitration institution on its website, only 2.6 per cent of disputes administered in 2024 involved a claimant or a respondent from Russia.⁵⁹ For instance, in 2020 such disputes accounted for 6.8 % of annual case load of this arbitration institution.⁶⁰ This outcome is even more surprising given that LCIA obtained a relevant license from the United Kingdom sanctions authority in 2022.⁶¹ The license was issued by the Office of Financial Sanctions Implementation (OFSI) in the form of a so-called general license under Regulation 32 of the Republic of Belarus (Sanctions) (EU Exit) Regulations 2019 and under Regulation 64 of the Russia (Sanctions) (EU Exit) Regulations 2019. Until its revocation in 2025, it covered arbitrations administered by LCIA pursuant to its arbitration rules and allowed the parties to LCIA arbitration to pay arbitration costs and representation fees.⁶²

Despite the general license being in force for three years, Russian parties to derivatives transactions preferred to ignore LCIA arbitration clauses existing in their international contracts with counterparties from the United Kingdom. Instead of initiating an arbitration in accor-

⁵⁹ LCIA Reports. Available at: <https://www.lcia.org/lcia/reports.aspx> [Accessed 20.07.2025].

⁶⁰ 2021 Annual Casework Report. Available at: <https://www.lcia.org/media/download.aspx?MediaId=890> [Accessed 20.07.2025].

⁶¹ LCIA procures a comprehensive, LCIA specific, general licence regarding the Belarus and Russia (Sanctions) (EU Exit) Regulations. Available at: <https://www.lcia.org/News/lcia-procures-a-comprehensive-lcia-specific-general-licence-re.aspx> [Accessed 20.07.2025].

⁶² General Licence — London Court of International Arbitration (LCIA) Arbitration Costs. INT/2022/1552576. Available at: https://assets.publishing.service.gov.uk/media/67e6b7a98ac59d1882eade07/LCIA_Costs_GL-INT-2022-1552576-_revoked_March_2025.pdf [Accessed 20.07.2025].

dance with LCIA rules, they opted for domestic courts. In doing so they rely on a set of Russian rules of civil procedure enacted in 2020. Widely known among Russian dispute resolution practitioners as the Lugovoy Law,⁶³ these provisions allow a Russian counterparty to an arbitration agreement to litigate at home in case the dispute is sanctions-related. In line with the Lugovoy law, existence of unilateral sanctions should create a genuine obstacle to justice so that Russian court has jurisdiction in the relevant case. However, these conditions have been interpreted by the Russian judiciary in a very broad and often frustrating manner.⁶⁴ On many occasions the courts adopted the view that Russian parties are deprived of access to justice *per se*. Moreover, Russian claimants may seek an anti-suit injunction to deter their former foreign business partners from submitting the case to arbitration in line with an arbitration clause.⁶⁵

With the Lugovoy Law being in force, the incentives to abide by the arbitration agreement sharply decrease. Recent Russian case law provides overwhelming evidence to this trend. Local financial institutions successfully sued their foreign counterparties over termination agreements relating to cross-border privately negotiated derivatives transactions.⁶⁶ Made with a view to wind up existing financial operations following the imposition of sanctions, those termination agreements included a standard LCIA arbitration clause. In case of VEB v. Barclays the dispute over such an agreement led to parallel proceedings in Rus-

⁶³ See Art. 248.1 of the Russian Arbitrazh (Commercial) Procedure Code.

⁶⁴ The Lugovoy Law Metamorphosis: The Russian Constitutional Court Declined the Request but Partly Aligned with the Amicus Curiae Briefs. Available at: <https://kiaplav.ru/press-centr/public/6783.html> [Accessed 20.07.2025].

⁶⁵ See Art. 248.2 of the Russian Arbitrazh (Commercial) Procedure Code.

⁶⁶ Ruling of the Moscow Commercial Court A40-194447/23-141-1534. Sovcombank v. J.P. Morgan Securities PLC. 8 February 2024. Available at: https://kad.arbitr.ru/Document/Pdf/d8542a52-4054-475f-99be-7f2cb9906b93/9f365bdb-fc23-48db-a5de-8905501a9bfo/A40-194447-2023_20240213_Reshenija_i_postanovlenija.pdf?isAddStamp=True [Accessed 20.07.2025]. Ruling of the Commercial Court of Saint-Petersburg and Leningrad Oblast A56-84760/2023. VTB v. OWH SE i.L. 1 December 2023. Available at: https://kad.arbitr.ru/Document/Pdf/efe9a23f-db51-41ff-a09a-of86b3229a04/b35786c6-3938-4903-8430-45ae11ac70b7/A56-84760-2023_20231207_Reshenie.pdf?isAddStamp=True [Accessed 20.07.2025].

sia⁶⁷ and the United Kingdom.⁶⁸ In addition to going on trial at home, on 21 June 2024 Barclays commenced arbitration under LCIA Arbitration Rules 2020 including Schedule of Costs 2023.⁶⁹

Despite this trend, a room for arbitration still remains as Russian businessmen and state corporations still conduct cross-border operations with East and West. Within that context, arbitration still remains the preferred method of dispute resolution.⁷⁰ However, submitting disputes to Western dispute resolution centers is not an option due to the risk of sanctions. Amidst sanctions pressure, Russian parties often choose Asian arbitration institutions such as SIAC and HKIAC.⁷¹ Both institutions were recognized by the Russian Ministry of Justice as a permanent arbitral institution in line with the Federal Law No. 382-FZ “On Arbitration (Arbitration Proceedings) in the Russian Federation.”⁷² Such a legal status allows SIAC and HKIAC to administer Russian-seated international arbitrations involving OTC derivatives, enabling parties to seek enforcement of SIAC and HKIAC arbitral awards in Russia.

2018 ISDA Arbitration Guide features standard arbitration clauses facilitating resolution of disputes arising under ISDA Master Agreements under the rules of SIAC and HKIAC. Should the parties to ISDA Master Agreement rely in those provisions drafted by ISDA in 2018 ISDA Arbitration Guide, the arbitration seat will be Singapore and Hong Kong, respectively. As for the law applicable to arbitration claus-

⁶⁷ Ruling of the Moscow Commercial Court. No. A40-111803/23-107-857. VEB v. Barclays. 30 July 2024. Available at: <https://kad.arbitr.ru/Card/2144a3ad-7c03-4b1e-bc4c-5f5848682aff> [Accessed 20.07.2025].

⁶⁸ Barclays Bank PLC v. VEB.RF [2024] EWHC 1074 (Comm) (10 May 2024). Available at: <https://www.bailii.org/ew/cases/EWHC/Comm/2024/1074.html> [Accessed 20.07.2025].

⁶⁹ Ruling of the Moscow Commercial Court A40-111803 — 9 July 2024. Available at: https://jusmundi.com/en/document/decision/ru-state-development-corporation-veb-rf-v-barclays-bank-plc-postanovlenie-arbitrazhnogo-suda-g-moskvy-a40-111803-tuesday-9th-july-2024#decision_67038 [Accessed 20.07.2025].

⁷⁰ Available at: <https://pravo.ru/story/257579/> [Accessed 20.07.2025].

⁷¹ International arbitration: why Russian business needs it today. Available at: <https://pravo.ru/story/257276/> [Accessed 20.07.2025].

⁷² Ministry of Justice of the Russian Federation. Activities/Areas of Activity. Arbitration Activities. Available at: <https://minjust.gov.ru/ru/activity/directions/961/> [Accessed 20.07.2025].

es, ISDA recommends the parties to choose the laws of Singapore and Hong Kong, as the case may be. Such a recommendation will lead to the split in the governing law of the contract and law applicable to the arbitration agreement, which is an integral part of the ISDA Master Agreement. However, this should not be viewed as a contradiction as arbitration clauses are legally separated from the underlying contract within the separability doctrine, which is widely accepted by the arbitration community worldwide.⁷³

V.2. NAFMII Master Agreement as a Comprehensive Solution

Executing ISDA Master Agreement featuring an arbitration clause may be a solution for a Russian counterparty, however, it does not address the issue in a comprehensive manner. Russian financial institutions, once active ISDA members, were deprived of their membership in 2022. Hence, commercial banks and other financial market players having Russian origin lost official access to ISDA contractual documentation. As a financial industry organization, ISDA vigorously embraced Western sanctions and pledged to follow them in the future. In particular, it published 2022 Russian Sanctions Additional Provisions booklet.⁷⁴ This document allows foreign parties to ISDA Master Agreement to exclude certain obligations that are restricted by sanctions imposed by Canada, the EU, Japan, Switzerland, the UK, and the US.

In light of this, a complex solution for dispute resolution and governing law issues is highly recommended for Russian counterparties transacting in the OTC derivatives market. Given the volume of cross-border trading with China, such a solution may be of Chinese origin. Luckily, Chinese authorities managed to set up a financial industry association many aspects analogous to ISDA. National Financial Associa-

⁷³ Revisiting the Doctrine of Separability. Available at: https://www.twobirds.com/en/insights/2024/singapore/revisiting-the-doctrine-of-separability?__cf_chl_rt_tk=6uo_DOYrnAC6Aavsr4cDyIVu74HuJORQez2WkRn07FY-1768720167-1.0.1.1-huoixClhzmZWibekJ9o.iUrjfEpbGM3jy.yELncIOhM [Accessed 20.07.2025].

⁷⁴ Thompson Reuters Practical Law Glossary. Available at: [https://uk.practi callaw.thomsonreuters.com/w-035-0417?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practi callaw.thomsonreuters.com/w-035-0417?transitionType=Default&contextData=(sc.Default)&firstPage=true) [Accessed 20.07.2025].

tion of Institutional Investors in the Financial Market (NAFMII) is a non-profit, self-regulatory organization responsible for promoting the development and standardization of the country's interbank financial market. In contrast to ISDA, which is a private entity not related to any governmental authority, NAFMII operates under the oversight of the People's Bank of China (PBOC). It is responsible for rule formulation, market development, financial supervision and providing member services.

As for the contract drafting domain, NAFMII took the responsibility to publish standard OTC derivatives market agreements. They are based on the same legal principles as ISDA Master Agreement and European Master Agreement. The latest major event in the market standardization process was the publication of NAFMII Master Agreement (Cross-border — 2022 Version) (the 2022 NAFMII Master Agreement),⁷⁵ the first cross-border standard contract for OTC derivatives fully governed by Chinese law. This standard agreement was drafted with a view to open the derivatives market of mainland China for the foreigners.⁷⁶ It may be applied in transactions between Chinese and foreign counterparties as well the entities non-resident in China⁷⁷ arguably making 2022 NAFMII Master Agreement the best choice for Russian financial institutions.

2022 NAFMII Master Agreement features the following clause addressing governing law and dispute resolution issues:

“Section 20

Dispute Resolution

(I) Governing Law

The Parties may specify in the Supplement the governing law of this Agreement which governs the relevant Transaction. If not specified, this Agreement shall be governed by PRC Laws.

⁷⁵ NAFMII Master Agreement (Cross Border — 2022 Version). Available at: <https://www.nafmii.org.cn/ggtz/gg/202208/P020220831632138066172.pdf> [Accessed 20.07.2025].

⁷⁶ Mastering cross-border derivatives in China — the new 2022 NAFMII Master Agreement (Cross-border Version). Available at: <https://www.lexology.com/library/detail.aspx?g=24d0a4d0-eaf2-433f-820b-a2e14401b109> [Accessed 20.07.2025].

⁷⁷ See Section 2 2022 NAFMII Master Agreement.

(II) Dispute Resolutions

The Parties may resolve, by consultation, any disputes, claims or disagreements under or in connection with this Agreement. If the Parties do not carry out such consultation or no agreement is reached from such consultation, unless otherwise specified in the Supplement, the Parties may agree to submit such disputes, disagreements or claims to China International Economic and Trade Arbitration Commission for arbitration to be conducted in Beijing in accordance with the Arbitration Rules of China International Economic and Trade Arbitration Commission then in effect; the arbitral tribunal shall consist of three arbitrators, and the arbitration award shall be final and binding on the Parties.”

China International Economic and Trade Arbitration Commission (CIETAC) is the primary and oldest permanent arbitration institution in Mainland China. Its international reputation is comparable to ICAC, an oldest Russian arbitration institution (Berzin et al., 2022, p. 13). As China is a party to the New York Convention, arbitral awards produced by CIETAC shall enjoy the highest degree of recognition and enforceability worldwide. Choosing Beijing as a place of arbitration in line with 2022 NAFMI Master Agreement will mean that the laws of the People’s Republic of China will govern the arbitration proceedings. Generally, Russian parties to 2022 NAFMII Master Agreement should familiarize themselves with the Arbitration Law of the People’s Republic of China adopted in 1994 and significantly revised in 2025.⁷⁸

VI. Conclusion

In this article, we focused on the many advantages of international commercial arbitration. The most vital of them is the ability to recognize and enforce arbitral awards in many countries around the globe. Although financial industry has historically been reluctant to embrace arbitration as a method of resolving international commercial disputes, it has changed in recent decades. ISDA, the professional association re-

⁷⁸ Arbitration Law of the People’s Republic of China. Machine Translation. Available at: <https://www.acerislaw.com/wp-content/uploads/2025/10/Chinas-Arbitration-Law-2025-Eng.pdf> [Accessed 30.04.2026].

sponsible for the publication of the most widely spread standard contracts within OTC derivative industry, has demonstrated its commitment to international commercial arbitration. Its arbitration guides outline the opportunities that arbitration provides and suggest arbitration clauses should be incorporated into ISDA Master Agreement. On top of that, EBF is promoting arbitration through its own standard contract, the European Master Agreement.

Despite the introduction of unilateral sanctions against Russia and the wide use of Lugovoy Law to undermine contractual arbitration clauses in OTC derivatives transactions, arbitration will remain in demand by Russian counterparties in the future. However, Western arbitration hubs once popular in the past will be replaced by Asian financial institutions such as HKIAC and SIAC. In our view, this process will be facilitated by the presence of standard arbitration clauses in 2018 ISDA Arbitration Guide. In case Russian counterparties wish to avoid using ISDA documentation in light of the existing sanctions commitments of this industry organization, they may opt for 2002 NAFMII Master Agreement containing CIETAC arbitration clause and featuring Beijing as a seat of arbitration.

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