

WORLD LEGAL FORUM

'Where the Power of the Law meets the Law of Power'

Panel of **Recognized International Market Experts in Finance**

PRIME Finance

Presentation to the EFMLG, Dublin 22 March 2011



World Legal Forum foundation (WLF)

1. WLF has the objective of structuring the interaction between international law and public and private stakeholders worldwide. Our aim is to develop market-oriented products and services for global organizations, substantiated by leading international academic institutions, preferably in cooperation with Hague based institutions.
2. WLF started in 2007 with its first annual conference on “Effective International Dispute Settlement for Public and Private Actors”, followed by “Public and Private Actors in International Lawmaking; new perspectives for international supervision, regulation and dispute resolution” with keynote speaker Prof. Francis Fukuyama in 2008, “Private International Regulation and Public Supervision” in 2009, “Business and Community in Dialogue; connecting corporate responsibility and global governance” with keynote speaker Prof. John Ruggie in 2010. These conferences hosted recognized experts in international law and international business.
3. In 2009 WLF submitted a proposal for an international three-year innovation programme with the Ministry of Economic Affairs, Agriculture and Innovation, called „Hague Utilities for Global Organisations (HUGO)“. HUGO started in the summer of 2010. In 2010 WLF has organised three international events.

Conclusion I: There is a Need

Prevent uncertainty and support financial stability:

- Participants acknowledged the danger of and damages from legal uncertainty in the financial markets. The initiative should identify areas of legal uncertainty and uncalculated financial market legal risk.
- A panel of experts could: Where possible, make recommendations to remedy these. Where appropriate, resolve disputes arising from them.

National courts and ad hoc arbitration do not always set the desired international standards:

National Courts:

- Unpredictable
- The decisions are too decentralized
- The decisions are taken too slowly
- The judges do not always have the necessary expertise to deal with the complex cases; size and complexity of sophisticated financial products and markets have increased rapidly
- Decisions are not always enforceable in home jurisdictions

Ad Hoc Arbitration:

- Too expensive
- It does not produce a settled and authoritative body of law which the markets crave for, financial stability that markets can depend on
- Attracting relevant expertise on an ad hoc basis has proved difficult

Conclusion I: There is a Need (cont.)

Due to the large number of transactions governed by master agreements, derivatives contracts and terms are standardized; standard master agreements also now govern other key financial markets (repo, stock lending, etc).

- Diminishes the legal risk of transactions
- Increases consistency
- Improves legal certainty
- Supports financial stability

But:

- Amplifies mistakes from court decisions
- Market interest may be greater than party interest

Conclusion I: There is a Need (cont.)

Training of judges and market practitioners

○A flaw in the present system is that there is a lack of relevant guidance for judges and arbitrators. Training by industry bodies viewed as too biased. The proposed facility would also offer training for judges and market practitioners

Other needs also discussed:

- Exchanges and clearing houses
- Developing countries
- Expert witnesses and opinions
- Language and multi-jurisdictional concerns

Conclusion II: What is Needed

- Competence
- Predictability
- Transparency
- Permanent Body
- Centralized Dispute Resolution System
- Multi-Jurisdictional
- Multi-Cultural and Multi-Linguistic
- Secretariat

A Panel of Recognized International Market Experts in Finance could answer this need.

Conclusion III: Key Features of PRIME F

1. High level expertise and reputation (individuals)
2. Multi-cultural
3. World wide reach
4. Speedy decisions, especially in the pre bankruptcy phase or crisis resolution
5. Mediation and Arbitration
6. Centre of Expertise, including valuation experts, legal experts, regulatory experts, tax experts and accounting experts, including experts from the end users on the “buy side”
7. Decisions should be enforceable
8. Decisions should meet justified market expectations
9. Decisions should be publicly available (subject to protections for proprietary information)
10. Neutrality
11. A preemptive role in identifying legal uncertainties
12. Confidentiality
13. Education and training of judges, regulators and other participants
14. Persuasive advisory opinions
15. Competitive pricing
16. Access to justice for developing economies

Conclusion IV: Arbitration Inspired

- All disputes can be resolved through arbitration, with perhaps the exception of insolvency and tax cases due to the strong connection to local law
- The decisions are binding
- Decisions to arbitrate can be made after a dispute has arisen, or inserted as a future means of dispute resolution in contracts
- The arbitration institute would have a unique list of experts (competitive advantage) who can act as arbitrator, mediator or expert
- Rationale for award can be transparent and published. While the hearings will be behind closed doors, the conclusion reached on matters of market interest may be public (and could also be anonymous)
- With the proceedings on the basis of special UNCITRAL Rules, and the full independent support of the Secretary General of the Permanent Court of Arbitration for the appointment of the arbitrators on the basis of a special financial expert list (created for this purpose), arbitration will be an appropriate method for the final resolution of the kind of disputes at hand (if no mediation settlement can be reached)
- Mediation and advisory services also key

Conclusion V: Type of Cases

The Roundtable participants spent considerable time discussing what type of cases would be best served by PRIME Finance:

1. Cases dealing with contract interpretation, especially standard terms, market practice
2. Cases dealing with more general contract law (ultra vires, misrepresentation)
3. Cases where crisis resolution bodies are involved (pre bankruptcy)
4. Expert opinions
5. Structured transactions: what are the structures, what are the cash flows of transactions
6. Cases dealing with the economics of the transaction
7. Cases dealing with valuation issues
8. Developing market cases
9. "Foreign" language (non-English) cases

Parties involved, including but not limited to:

1. Financial Institutions (commercial and investment)
2. Funds and other "buy side" market participants
3. Development Banks
4. Multinationals
5. Exchanges
6. Clearing Houses
7. Microfinance (MFIs)
8. Central Banks and Regulatory Bodies (advisory only)
9. Referrals from National Courts (advisory only)

Conclusion VI: Points of Attention

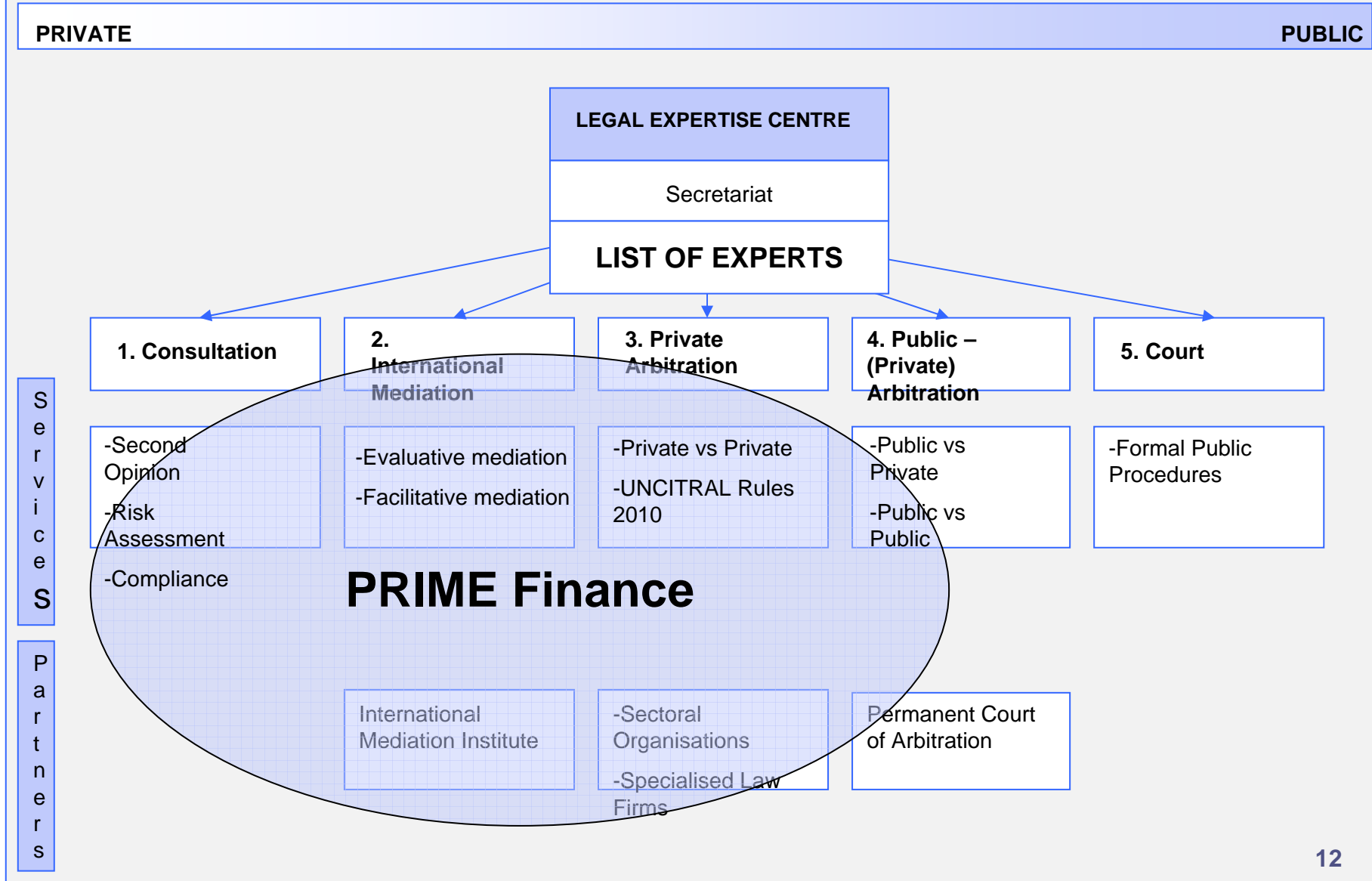
- Authority: possibility of “hardwiring” referrals to PRIME Finance in standard form contracts *before* the dispute has arisen
- It is important to obtain buy in (commitment) from market participants in non western jurisdictions
- How best to harmonize nuances in approach to standard terms in competing master agreements
- To keep up with innovation it is preferred to have meetings with a small expert group several times a year. It is also important to have market practitioners involved in a preparatory market expert group
- Lots of smaller steps that will distinguish PRIME Finance and give competitive advantage, including working groups (e.g. bankruptcy, tax, ISDAs, emerging markets, Islamic finance)

Conclusion VII

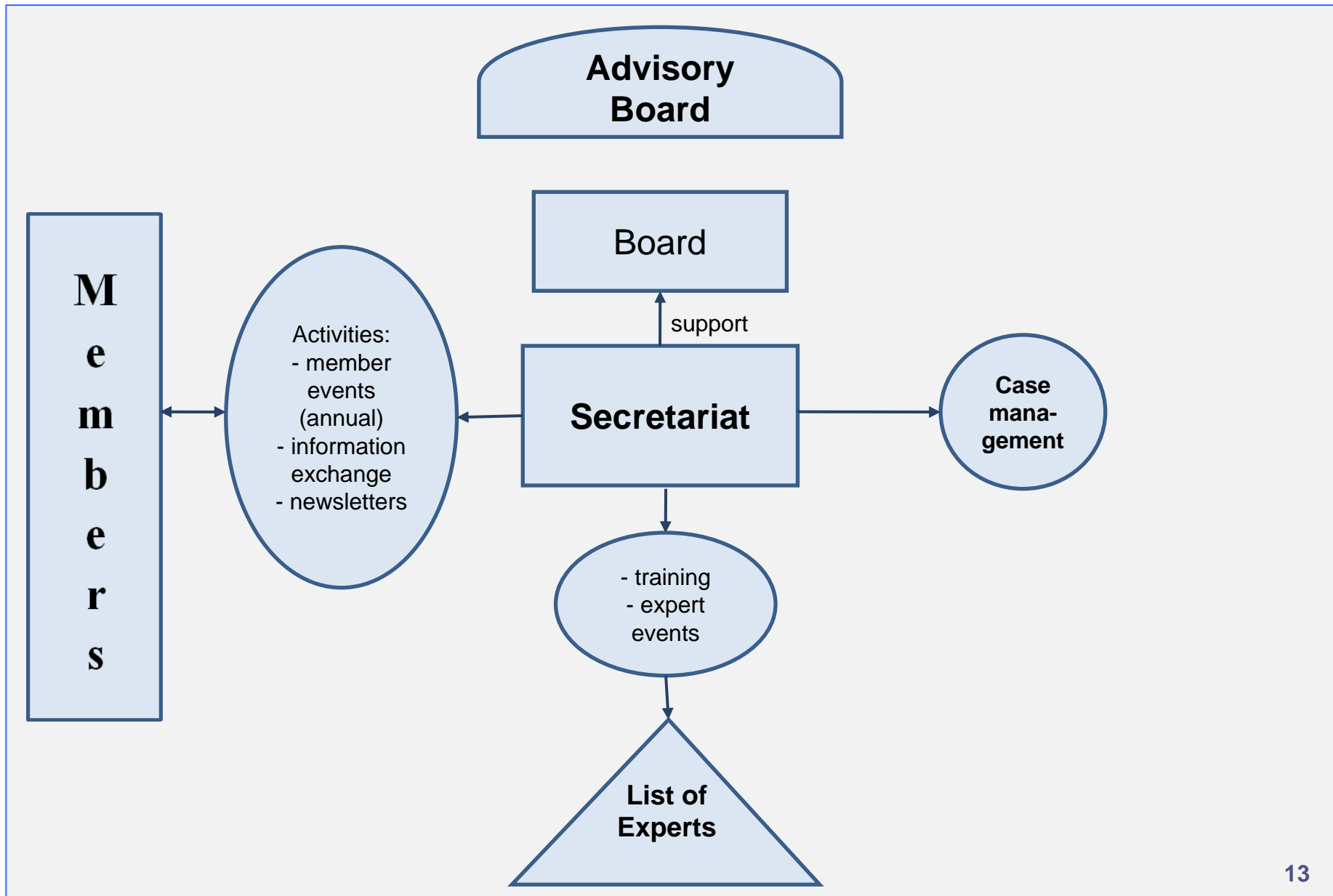


Next Steps I: Positioning PRIME Finance

Organising International Dispute Resolution in The



Next Steps II: Proposed Governing Structure of PRIME Finance



Next Steps III: Creating the first List of 50 (and then 100) Experts January – May 2011

The expert list, to be used for PRIME Finance, is work in progress. Approximately 80% of the first list is identified. An appropriate mechanic for selection needs to be confirmed. The expert list will include the following expertise:

○Market Experts	30%
○Legal Experts	30%
○Academics and Specialty Consultants	10%
○Former Judges	15%
○Specialized Arbitrators and Mediators	15%

Next steps III: Experts - relevant qualifications to be taken into consideration (cont.)

- Proven authority related to international commercial arbitration, mediation and/or the field of expertise, i.e. financial markets/financial instruments.
- Training and substantial experience in arbitration, mediation and/or other forms of out-of- court dispute resolution (if appropriate).
- Honors, awards and citations indicating authority in your field.
- Other relevant experience or accomplishments (e.g. published articles).

Next Steps IV: Membership to PRIME Finance

Membership of PRIME Finance may include:

- Special tariffs for periodical courses and training
- Invitation to annual state of art conference: a conference where the panel of experts will discuss the current issues and report out to the members
- Informational bulletins – e.g. library function

Next Steps V: Support from Market Parties and End Users

- **Financial Market Meetings:**

London, 27 January 2011

New York, 14 – 17 February 2011

Paris, 11 April 2011

Frankfurt, 2 May 2011

Regional workshops and presentations with Middle East and Asian parties

Next Steps VI: Forming a Market Expert Group(s) January - May 2011

- 15 -25 Experts
- The MEG will finetune the proposed activities and services of PRIME Finance:
 - Mediation
 - Arbitration
 - Advisory opinions
 - Risk assessment
 - Judicial Training
 - Library
 - The MEG will finetune the proposed list of cases in international financial markets law that PRIME Finance could deal with

Next Steps VII: Advisory Board of PRIME Finance

- Maximum of eight prominent personalities
- From different relevant backgrounds (banks, law firms, regulators, judiciary)
- To give comments and advice to the WLF foundation on the overall development of the project
- To lend their name to the initiative in public

The preliminary Advisory Board of PRIME Finance consists of:

- **Lord Woolf of Barnes**, former Lord Chief Justice of England and Wales, Barrister at Blackstone Chambers
- **Mr. Nout Wellink**, President, Dutch Central Bank; Chairman, Basel Committee on Banking Supervision
- **Mr. Antonio Sáinz de Vicuña**, General Counsel, European Central Bank
- **Mr. Thomas Jasper**, Founder Chairman ISDA
- **Mr. Thierry Porté**, Operating Partner, J.C. Flowers & Co.; Former President, Shinsei Bank, Japan

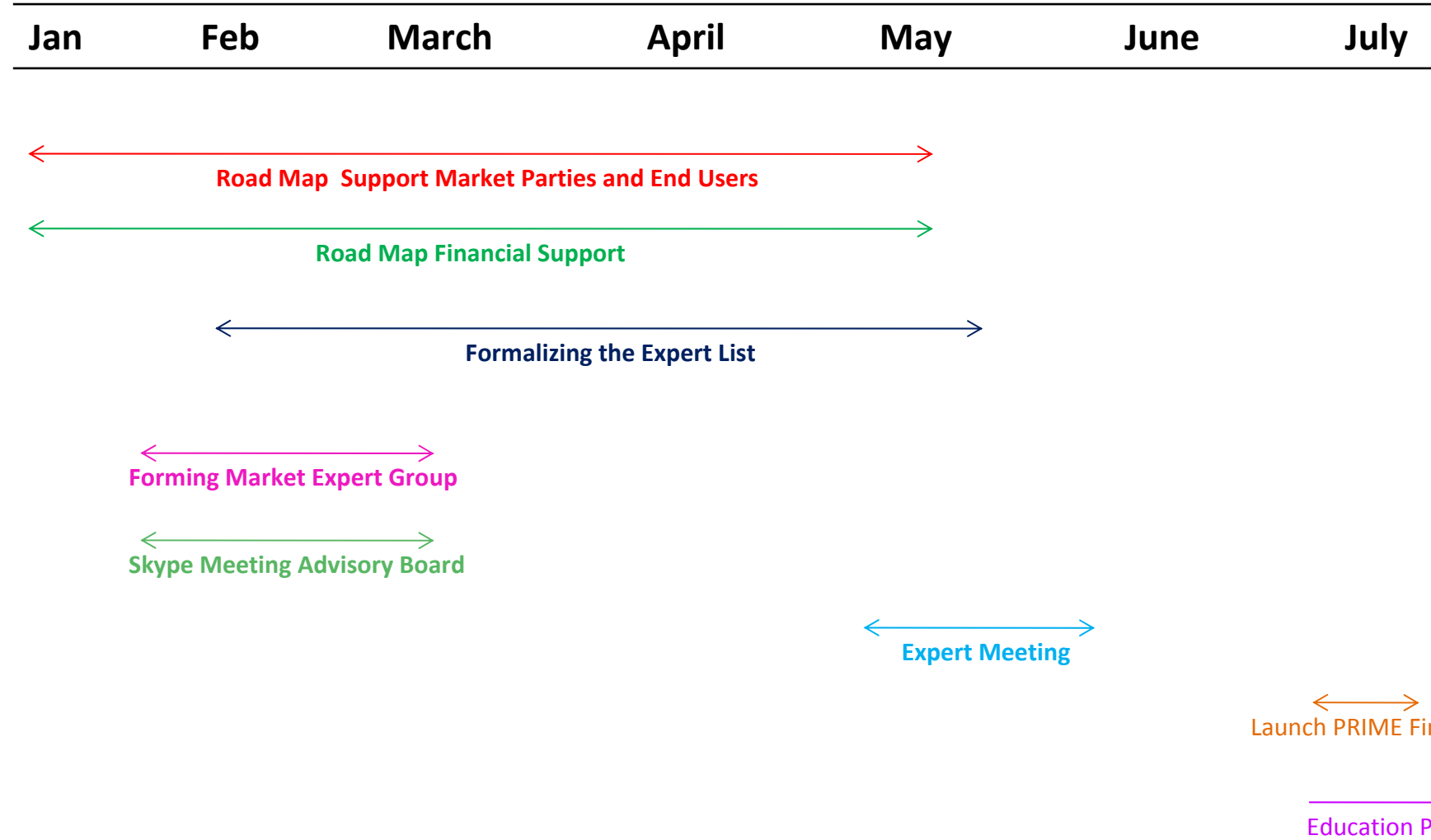
Conclusions of the London Expert meeting

- PRIME Finance must ensure access to the **most authoritative market experts** able to follow the market and evolution of new financial instruments
- Having the most experienced experts will ensure that the **non-binding and non-enforceable recommendations** by mediators will be **authoritative**
- **Confidentiality** is a concern for the parties. PRIME Finance aims at creating settled body of law concerning sophisticated financial products. Arbitral awards need to be made more **transparent**. Taken the above into account, PRIME Finance shall not publish the award without the consent of the parties. PRIME Finance may, however, include in its publications **excerpts of the legal reasoning** applied by the Tribunal.
- The **administrative fee** of PRIME Finance must be **significantly lower** than fees charged by other leading arbitral institutions

Conclusions of the NY Expert meetings

- In addition to ADR services, PRIME Finance should provide specialized judicial and educational **training**, as well as a **library function**. It was indicated that the combination of arbitration/mediation and complex financial instruments is currently not readily available.
- Participants pointed out importance of **hardwiring** for PRIME Finance. It was indicated by both ISDA (ISDA Master Agreement) as well as the FED (Foreign Exchange and Option Master Agreements , FEOMAs), that once PRIME Finance has been established they would be able to inform the international financial community on the existence of PRIME Finance and facilitate hardwiring through publishing a standard clause / reference to PRIME Finance in external documentation (**memo and website**).
- It was indicated that in order to ensure **neutrality**, the **composition of the board** (diversity) as well as the **origin of the funding** is important: governmental funding, private (e.g. IBA), development banks (e.g. Asian Development Bank), supranational organizations (e.g. IMF, World Bank). PRIME Finance needs to be perceived as fair.

TIMELINE



Next Steps 2011

1 March – 1 July 2011, next steps include:

- Finalizing draft Expert List (March)
- Finalize Rules PRIME Finance, Arbitration and Mediation (March, April)
- Marketing (March – July)
- Arranging Funding PRIME Finance 2011 – 2013 (March – May)
- Expert Meeting Frankfurt - ECB Offices (2 May)
- Expert Meeting Paris - De Pardieu Brocas Maffei A.A.R.P.I. (11 April)
- Finalizing and publishing final Expert List (April, May)
- Finalize composition Management Board (April, May)
- Launch Prime Finance (29 June)

- Provisional Expert Meeting Dubai (October 2011)