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Financial industry slowly accepting arbitration, says lawyer

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Banks and financial institutions are becoming more willing to resolve disputes through arbitration and other forms of dispute resolution than courts of law, a lawyer said. He said a long-held reluctance in the financial sector to entering into arbitration was beginning to reverse itself, particularly in transnational disputes.

B. Ted Howes, a partner with law firm Mayer Brown in New York, said one reason for the reversing trend may be that arbitration in international disputes offers a higher degree of neutrality.

"Banking and finance are an increasing part of the [arbitration] pie as a whole," Howes said. "The increase in [arbitration in] international financial transactions, particularly in emerging jurisdictions, shows not all parties want to be in the courts of New York or London or the courts of another country."

Howes was speaking in an online seminar organised by Mayer Brown earlier this week. He said that while the times were changing, there still remained holdouts in the business that would rather fight things out in court.

"There has been a historical antipathy of banks to dispute resolution. Banks have, as financial institutions, liked to rely on the courts of New York and London, which have experience in resolving derivative transaction disputes," he said. "Another reason [for their reluctance to arbitrate] may be that there are larger amounts in dispute when it comes to financial institution disputes and parties are afraid of going into arbitration with a decision maker [arbitrator] that they do not know without any right of review."

There is evidence, however, that the financial services is increasingly embracing arbitration— particularly in the transnational context. In a 2013 survey by the Queen Mary University Law School and PwC, 69 percent of general counsel in the banking and finance field supported arbitration. Additionally, 25 percent said it was their most preferred option to resolve disputes. Over at the London Court of International Arbitration (LCIA), there has been a 448 percent increase in international arbitration before the LCIA between 1995 and 2011. An increasing percentage of the LCIA arbitration cases were in the financial sector.

Additionally, as financial products become more complicated, arbitration affords the parties to choose decision makers with

the specialised, complex financial expertise they seek. Parties cannot control the quality of a judge they might face in a litigated court case, but they have some say in their choice of decision-maker in arbitration.

"In arbitration, you can say what kind of decision maker you want. You can ask for an arbitrator with experience in derivatives transactions and better knowledge of the issues put before them," Howes said.

A perceived advantage of arbitration is also its speed and cost. Yet, that may not necessarily be true.

"It [arbitration] is generally perceived of as quicker and less expensive than litigation. Generally that is true because there is no appeal, but arbitration can be as long as litigation and sometimes longer and equally costly," Howes said.

Another point is that arbitration affords less discovery than would be permitted in a typical common law courtroom.

"As a defendant, it is always nice for the claimant [plaintiff] to have less discovery [options]. There is less discovery in international arbitration than in litigation; there are no depositions and document discovery is limited, so U.S. style 'fishing expeditions' are not permitted," Howes said.

Some also believe that arbitral proceedings are private and confidential, but this is not always the case because it hinges on the choice of rules, Howes said. "Everything depends on the arbitration rules you choose. You cannot assume an arbitration is confidential just because you want confidentiality."

For example, the International Chamber of Commerce (ICC) in Paris — one of the pioneers in the field of international arbitration and among the biggest creators of the field rules, norms and protocols — does not provide for confidentiality. However, a degree of privacy is assured in such proceedings to the extent that the general public cannot watch proceedings as they often might with courtroom cases.

There is also the issue of neutrality. With litigation, one party ends up in another's home court, which may put them at a disadvantage in terms of either procedural or substantive law.

"Understandably, people do not like that," Howes said. "Arbitration is neutral in that the proceedings are generally conducted in a jurisdiction other than the two parties' home countries or locales. You also often have three-person tribunals and the chairperson cannot be of the nationality of either party," he said.

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