The changing face of International Arbitration for Financial Institutions

Introduction

Whilst the general use of international arbitration as a dispute resolution mechanism has risen globally in recent years, financial institutions have traditionally been more hesitant to take their disputes out of national courts and place them in the hands of arbitral tribunals. In an attempt to counter this and attract more arbitrations from financial institutions, the International Chamber of Commerce (**"ICC"**) Commission on Arbitration and ADR put together a Task Force on Financial Institutions and International Arbitration (the **"Task Force"**), which interviewed around 50 financial institutions and banking counsel from around the world, as well as 13 arbitral institutions. The Task Force published a report on 9 November 2016 (the **"Report"**) on its findings regarding current perceptions and attitudes within the international financial services sector towards arbitration, along with its recommendations for improving the experience of users in the industry.

This legal update will highlight some of the key messages of the Report that may be of interest to financial institutions considering whether recent innovations have made international arbitration a more attractive means of resolving disputes for financial institutions. It is fair to say that Mayer Brown has already noticed increased interest in international arbitration by financial institutions.

The current perceived issues with arbitration as a means of resolving finance disputes

The Report revealed that, of the Task Force's interviewees (drawn from various financial sectors including derivatives, sovereign lending, regulatory, trade finance and Islamic finance), 70% were not aware of whether their institution had participated in any international arbitration proceedings in the preceding five years and 24% of institutions had only participated in a small number of arbitrations (representing 5% or less of their institution's disputes). Those interviewees who had used arbitration stated their reasons for doing so included the need to avoid problems enforcing court judgments abroad, the confidential nature of arbitration and its suitability for complex transactions.

Possible reasons as to why international arbitration is not being used more in the banking and finance sector were identified in the Report, which included:

- a general lack of awareness of potential benefits of international arbitration in banking circles;
- a traditional view that arbitration is unsuitable for certain segments of the banking sector;
- concerns over the perceived inability to obtain summary judgment, the lack of interim measures and the lack of precedent creation in arbitration; and
- the perceived lack of transparency in arbitration.

Adapting international arbitration to the needs of financial institutions

Whilst the potential challenges are acknowledged, the Report highlights what it describes as certain advantages of arbitrating financial disputes, such as the ability to choose neutral arbitrators with sector-specific expertise, confidentiality, the finality of arbitral awards and the ease of cross-border enforcement of arbitral awards under the New York Convention (to which 156 countries are signatory). In particular, procedural flexibility is emphasized as a key strength of arbitration. Arbitration clauses can be tailored to the specific needs of participants in the industry, for example to grant tribunals the power to consider claims or defences on a summary basis or

consolidate parties' claims, to amend procedural timescales or to provide for the publication of a redacted award (to contribute to the development of a body of precedent).

The Report also outlines ways in which arbitral institutions have adapted to better suit the needs of the banking and financial sector and address factors that have historically held financial institutions back from engaging in arbitration, including, for example:

- The ICC's decision to publish the names of all arbitrators appointed to cases filed after 1 January 2016 and allow parties to request reasons for ICC Court decisions from 1 March 2017, to address concerns regarding transparency;
- Provisions in most arbitral rules for an emergency arbitrator to be appointed before a tribunal is constituted in order to consider applications for interim relief, potentially eliminating the need to go to court;
- The insertion of summary judgment provisions into the Singapore International Arbitration Centre (SIAC) rules in 2016, allowing claims or defences that are manifestly without merit to be dismissed at an early stage (with similar provisions in the Stockholm Chamber of Commerce (SCC) draft arbitration rules which came into force on 1 January 2017); and
- The bespoke Financial Disputes Arbitration Rules of the China International Economic and Trade Arbitration Commission (CIETAC), which allow proceedings to be condensed into shorter time periods.

In addition, the ICC revised rules which will apply from 1 March 2017 provide for a new expedited procedure. Furthermore, industry-specific initiatives have been developed in response to the growth of complex transactions and the resulting need for sector-specific expert arbitrators, such as the introduction of optional arbitration clauses in the ISDA Master Agreement in 2013 and the establishment of the Panel of Recognised International Market Experts in Finance (P.R.I.M.E. Finance) at The Hague, which publishes model arbitration clauses and maintains a list of over 100 financial and legal specialists for financial institutions.

Also underlined in the Report is the growing significance of protections offered by an increasing number of bilateral and multilateral investment treaties, which are only enforceable by arbitration. The availability and extent of such protections is highly dependent upon the nature and circumstances of each transaction, and these protections should therefore be considered at the outset when deciding how a deal is structured.

Conclusions

Banking and finance disputes cover a plethora of sectors and industries, and the Report notes that a "one size fits all" model simply cannot work for financial disputes. Whilst arbitral institutions have been implementing changes to adapt to users' needs in the banking and financial sector, there is further potential for financial institutions and industry associations to work alongside arbitral bodies to develop standard arbitration clauses which meet the requirements of specific sectors, and we expect to see more industry-led attempts to introduce arbitration clauses into standardised agreements.

Key drivers in the extent to which there is growth of arbitration as a means of resolving complex international financial disputes in the medium to long term are likely to include confidentiality considerations, the worldwide recognition and enforcement of arbitral awards available under the New York Convention (particularly in developing markets where national courts may be perceived to be less predictable) and the flexibility to tailor arbitral proceedings to the specific circumstances of a transaction. Institutions' arbitration rules can be used simply as a starting point for regulating the dispute resolution process, as parties are afforded a wide discretion to make bespoke arrangements. A robust set of internal guidelines in respect of each type of industry activity undertaken will allow financial institutions to better tailor arbitration clauses to suit their needs and consequently benefit from the wide range of options available.

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