Kluwer Arbitration Blog

The Need for Confidentiality in Arbitration Proceedings Relating to Advisory Matters

Arnaud de La Cotardière (Linklaters) and Claudia Cavicchioli (Linklaters LLP) · Monday, December 26th, 2016 · Linklaters

Advisory works generally include advisory services rendered by investment banks to their clients in two main areas: M&A (mergers and acquisitions) and equity capital markets. In this context, a financial institution will enter into a various number of agreements, either with its clients (mandate, etc.) or with its counterparty to a transaction where the deal is conducted for its own account (share purchase agreement, etc.).

From a theoretical perspective, international arbitration appears particularly suited as a dispute resolution method for M&A and advisory works, notably given the generally complex issues they raise and the frequent need for confidentiality, due to the generally sensitive nature in terms of reputation.

The interviews conducted when drafting the ICC Commission Report on Financial Institutions and International Arbitration (the "Report") have shown that this theoretical approach is largely adopted by financial institutions, which, nevertheless, still have concerns in submitting disputes to international arbitration. While showing a strong interest in arbitration, many representatives of financial institutions indicated that they rarely have recourse to this kind of dispute resolution mechanism, because of the cost involved (at least in some jurisdictions), the general unfamiliarity with the process and, in particular, a lack of trust in the process, as they perceive arbitration to be a "small club" with only few players.

On the other hand, the interviews supported the idea that one of the key perceived benefits of international arbitration in advisory matters relates to the existence of private hearings and the possibility of confidentiality. The possibility of opting confidentiality is therefore frequently a determining factor in a financial institution's choice to submit a dispute to arbitration, insofar as it is upheld in the *lex arbitri*, or imposed under the rules of the arbitration institution, or provided for in the parties' dispute resolution clause.

A large majority of the interviewees have notably underlined the risk of reputational damage for an advisor, should a negligence or a similar claim be heard publicly. One financial institution also responded that it will be more inclined to submit a dispute to arbitration when the parties believe that the possibility of confidential proceedings may encourage a settlement of the dispute between the parties before the award is rendered. A dispute arising out of the acquisition by a hedge fund of a stake in a company subject to a squeeze-out was cited as an example.

In this respect, the interviewees were well aware that, unless otherwise provided for under the applicable law, arbitration under ICC Rules is private but not expressly confidential. Therefore, when confidentiality is sought, the parties have to agree that the arbitration proceedings must remain confidential, either in their dispute resolution clause, or during the arbitration proceedings themselves, in the terms of reference.

In light of the possibility of opting for confidential proceedings, international arbitration is increasingly a part of the strategic options considered for cross-border banking and financial disputes in advisory matters and an important alternative to domestic litigation.

It is legitimate to ask whether international arbitration will eventually be seen as a viable alternative dispute resolution mechanism for resolving advisory disputes. The elements of response to this question are to be found in the complexity of the issues at stake, which relates to two main factors. First of all, advisory disputes often arise between commercial partners (notably, between financial institutions and their major clients), who will set as one of their main goals the need for maintaining the business relationship. Secondly, the disputes in this field are of a particular nature, as they seldom arise out of a matter of bad faith or wilful misconduct. Most commonly, the dispute will relate to a problem of interpretation of a complex contractual arrangement, whose issue is genuinely uncertain.

In light of these factors of complexity, disputes in advisory matters require a dispute resolution mechanism which helps, as much as possible, to create a smooth procedure. One could claim that arbitration could serve as the perfect alternative forum. Arbitration is indeed flexible by nature. Will it be flexible enough to convince Financial institutions? That will depend on many things, but mainly on the arbitrators and lawyers attitudes!

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